



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
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SSN: -----) ISCR Case No. 07-14414
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Applicant for Security Clearance)

Appearances

For Government: Richard A. Stevens, Esquire, Department Counsel
For Applicant: Pro se

June 24, 2008

Decision

ABLARD, Charles D., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline H (Drug Involvement), and Guideline E (Personal Conduct). Clearance is denied.

Statement of the Case

Applicant submitted his Security Clearance Application (SF 86), on January 9, 2006. On February 11, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H (Drug Involvement), and Guideline E (Personal Conduct), for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on February 22, 2008, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on March 17, 2008. I received the case assignment on March 20, 2008. DOHA issued a

Notice of Hearing on April 22, 2008, for a hearing on May 30, 2008, and I convened the hearing as scheduled.

At the hearing, the government offered two exhibits (Exh.) which were admitted in evidence without objection. Applicant submitted four exhibits which were admitted without objection. He testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on June 11, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural Rulings

Amendment to SOR

The government moved to amend the SOR in accordance with evidence submitted by Applicant in the following ways:

SOR ¶ 1.d. was amended to delete “without a prescription” and substitute “in a manner inconsistent with approved medical direction.”

SOR ¶¶ 1.e. and f. were amended to substitute the date February 2007 for December 2006 in both sections.

Applicant had no objection to the amendments (Tr. 9).

Findings of Fact

Applicant is a twenty seven-year-old employee of a government contractor. He has worked since August 2004 in information systems, specializing in networking.

The allegations in the SOR under Guideline H (Drug Involvement) relate to Applicant’s use of illegal drugs and use of prescription drugs in a manner inconsistent with approved medical direction between 2000 and 2007. The illegal drugs were marijuana and cocaine, which he used while in college. He used the drugs as frequently as two to three times a week (SOR ¶¶ 1. a. and b.). During his college years, a friend died of a drug overdose and, while this had an effect on him, he continued to use drugs but less often than before the death of his friend. He graduated from college in 2003 and has not used those drugs since then. He no longer sees any of his college friends with whom he used drugs.

Applicant is alleged to have used at various occasions, both legally and illegally, the prescription drug oxycodone under the names Tramadol and Percocet (SOR ¶¶ 1. c. d. and e.). While he had a prescription for Tramadol, he used it in a manner inconsistent with approved medical direction. The prescription was as a result of pain arising from an auto accident in 2002 (Tr. 46). However, he continued to use it past the time he needed it for pain between 2003 and 2006 and discovered he could not cease using it (Tr. 45). He obtained it on several occasions from internet orders.

Applicant also obtained Percocet from his grandmother who was using it for rheumatoid arthritis (Tr. 59). It is a stronger drug than Tramadol and not available over the internet. He did not have a prescription for Percocet.

Applicant tested positive for oxycodone in February 2007, the most recent evidence of drug use in the allegations (SOR ¶ 1. e.). He received medical treatment at that time because he overdosed on one of the drugs causing seizures. He had planned on applying for Officer's Candidate School but the seizures made him ineligible for the program. As a result of the drug treatment he received, he was prescribed methadone by the doctor. He used it for two weeks until he had no withdrawal symptoms.

Allegations in the SOR relating to Guideline E (Personal Conduct) also alleged that Applicant was charged with setting off a fire alarm in a dormitory while in college in 2003 and fined \$550 (Tr. 34). He turned himself in to the police the following day after the incident. He was also charged with underage drinking in 2001 and his driver's license was suspended for 90 days. The incident did not occur while driving (Tr. 33). He admitted both allegations.

Also alleged under Guideline E are the first five allegations regarding illegal drug use and illegal use of a prescription drug.

Applicant does not now and has never held a security clearance. He seeks one because the other members of the staff with whom he interrelates have clearances or have applied for them and having one would be helpful in his work. However, his work is management, so he does not interface with classified information (Tr. 26).

Applicant has a bachelor's degree in business administration and computer information systems. He is married with a two-year-old daughter. His wife's parents own and operate the company for which he works. He is active in his church with the youth group where he serves as a minister. Letters from his minister and two others indicate that he is held in high regard by them (Exh. A – C).

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture. Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by department counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) inhalants and other similar substances.

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Three drug involvement disqualifying conditions could raise a security concern and may be disqualifying in this case: “any drug abuse”, “testing positive for illegal drug use”, and “illegal drug possession, including . . . purchase, sale or distribution . . .” AG ¶¶ 25 (a), (b), and (c). The other five disqualifying conditions listed in AG ¶ 25 are not applicable. These three disqualifying conditions apply because Applicant used drugs, tested positive for a drug he illegally obtained and used, and possessed drugs.

AG ¶ 26 provides several conditions that could mitigate security concerns:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) a demonstrated intent not to abuse any drugs in the future, such as:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence; and

(4) a signed statement of intent with automatic revocation of clearance for any violation.

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended;

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Drug involvement with illegal drugs is mitigated by the passage of a period of five years, since his most recent use of illegal drugs was in 2003. He has removed himself from contact with drug users. However, the misuse of prescription drugs last occurred only a little over one year ago. While he initially used the drug because of pain, there is no evidence that it grew from a severe or prolonged illness. His treatment from a medical professional grew out of seizures as a result of overdose on the prescription drug. Thus, I conclude that he has not mitigated the allegations relating to the misuse of prescription drugs.

Guideline E Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Since the first allegation under this guideline (SOR ¶ 2.a.) relates to the first five allegations under Guideline H, and raises the same issues of trustworthiness to hold a security clearance, there is no need to discuss it further under Guideline E.

The other two allegations (SOR ¶¶ 2.b. and 2.c.) relate to the two criminal offenses that occurred in 2001 and 2003 while Applicant was in college.

AG ¶ 17 provides one condition that could mitigate security concerns for those allegations:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

The mitigating condition in AG ¶ 17 (c) is applicable to those two allegations.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2 (a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

While Applicant has shown evidence of rehabilitation by changes in his life style, and actions to remove himself from contact with drugs and users of drugs, the period of time elapsed since his last wrongful and illegal use of prescription drugs has not been sufficient to warrant a whole person finding in his favor. He failed to take advantage of the lessons he should have learned at the time of the death of his friend in college. He also should have known from his past experience with drug use that becoming dependent on a prescription drug might lead to the type of problems he encountered.

After considering all the evidence in its totality, I conclude that Applicant has not mitigated the security concerns arising from his drug use. While he is a young man who likely has learned from his past conduct, it is premature to grant him a security clearance at this time.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H: AGAINST APPLICANT

- Subparagraph 1.a.: For Applicant
- Subparagraph 1.b.: For Applicant
- Subparagraph 1.c.: Against Applicant
- Subparagraph 1.d.: Against Applicant
- Subparagraph 1.e.: Against Applicant
- Subparagraph 1.f.: Against Applicant
- Subparagraph 1.g.: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

- Subparagraph 2.a.: Against Applicant
- Subparagraph 2.b.: For Applicant
- Subparagraph 2.c.: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance at this time. Eligibility for access to classified information is denied.

CHARLES D. ABLARD
Administrative Judge