



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



In the matter of:)
)
) ISCR Case No. 07-17879
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro Se*

March 23, 2009

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

On August 10, 2007, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On June 9, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E (Personal Conduct), Guideline J (Criminal Conduct) and Guideline H (Drug Involvement). 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's answer to the SOR was undated. In it he waived his right to a hearing. In accordance with Paragraph E3.1.7 of the Additional Procedural Guidance at Enclosure 3 of DoD Directive 5220.6, Department Counsel requested a hearing. (Hearing Exhibit 1). DOHA assigned the case to me on December 8, 2008, and issued a Notice of Hearing on January 7, 2009. The case was heard on January 28, 2009, as scheduled. Department Counsel offered Exhibits (GE) 1 through 4 into evidence without objection. Applicant testified and offered exhibit (AE) A and B into evidence without objection. At the conclusion of the hearing, I left the record open until February 13, 2009, to give Applicant an opportunity to submit additional information. On February 11, 2009, Department Counsel forwarded to me three additional exhibits from Applicant marked as AE C through E. These were admitted into the record without objection from the Government. DOHA received the hearing transcript (Tr.) on February 6, 2009.

Procedural Issues

At the commencement of the hearing, Department Counsel moved to amend the SOR. (Tr. 13-14) Applicant did not object to the amendments. The Motion was granted and the SOR was amended as follows:

1. ¶ 1.b: Delete the words "and 2(g) (regarding the charge of "FOID ID Cards");
2. ¶ 1.d: Delete the entire paragraph;
3. ¶ 1.e: Delete the entire paragraph;
4. ¶ 1.k: Delete the entire paragraph;
5. ¶ 2.a: Delete the entire paragraph;
6. ¶ 2.j: Delete the entire paragraph;
7. ¶ 2.k: Delete the entire paragraph; and
8. ¶ 2.l: Delete the entire paragraph.

Findings of Fact

Applicant admitted the following allegations contained in the SOR: ¶ 1.h; ¶ 1.i; ¶ 1.j; ¶ 2.d; ¶ 2.e; ¶ 2.g; ¶ 2.h; ¶ 2.i; and ¶¶ 3.a through 3.d.

Applicant is 41 years old and single. He attended technical college for about a year and a half after high school. He has a plumbing license and has worked in the field for more than twenty-five years. In July 2007, he began working on the maintenance

plumbing crew for his current employer, a defense contractor. He needs a security clearance in order to have access to areas that contain classified information.

After high school, Applicant enlisted in the Navy reserves in September 1985 and received a general discharge in April 1987 after testing positive for marijuana.¹ In August or September 1999, he was arrested and charged with (1) Possession of Cannabis; (2) Firearm Owner's Identification Cards; and (3) Carrying a Firearm/Unlawful Use of Weapon. He pleaded guilty and was fined \$1,000 plus court costs. He disclosed the Cannabis and Carrying a Firearm charge under Question 23(f) of the August 2007 SF 86, and later addressed the marijuana charges during an October 2007 interview. (GE 2 at 68)

In April 2003, Applicant and his girlfriend became embroiled in a domestic argument at his home after a concert. His girlfriend left the house, called the police, and filed a complaint against him. The police did not arrest him that night, but issued an arrest warrant. In October 2003, Applicant was stopped and arrested by the police on a charge of Third Degree Domestic Assault, Third/Subsequent Offense (a felony). Upon searching Applicant's car, the police found an unregistered gun that Applicant had purchased for protection because he lived in a dangerous neighborhood. He was taken to the police station and charged with Unlawful Use of Weapon, and Receiving Stolen Property. His gun was confiscated and he stayed in jail for 24 hours before being released. After leaving the police station he never received any information about the incidents. Later, all of charges were later dismissed. (GE 3) He did not disclose the October 2003 charges under Question 23(a) because he did not know they existed until he met with a Government investigator in October 2007. (Tr. 34) Applicant stated that he "was not trying to mislead . . . but overlooked the question or I didn't read it properly." (Tr. 28) He told the investigator about the situation during his October 2007 interview. (*Id.*; GE 2)

On May 24, 2005, Applicant forcibly entered his girlfriend's house and began a physical altercation with her. A neighbor telephoned the police and he left the residence before they arrived. On June 3, 2005, while the police were responding to a call to tow a wanted vehicle in his neighborhood, Applicant inquired about the vehicle and was arrested on a Domestic Assault 3rd Degree and Burglary charges arising out of the May 24, 2005 incident. He does not know why he was charged with burglary because he did not steal anything. The charges were later dismissed. He disclosed the arrest for assault under Question 23(f) of the SF 86. (GE 1 at 127) He has not been arrested since June 2005 or owned a gun since 2003. (Tr. 41)

In follow-up to an October 2007 interview with the Government about his answers in the SF 86, Applicant completed Interrogatories in January 2008, specifically addressing previous drug use. In it, he disclosed that he purchased and used illegal drugs, including marijuana, at least five or six times per year, from the late 1980's to

¹Applicant discussed his discharge for marijuana use in an October 2007 interview with a Government investigator. (GE 2 at 68)

approximately December 2004. In response to Question 8 on the Interrogatories regarding his initial failure to list his drug use on the SF 86, he wrote, "I did. When I read the question in Section 24 I miss interped (sic) the question. But I did include a charge from 1999 of cannabis." (GE 2 at 24) While testifying, he elaborated on the issue stating that he did not have a specific reason for not disclosing it, as he had no intention of falsifying the SF 86. He thinks he was too overwhelmed at the time and in a hurry to finish it because he was told to submit it within 20 days. It was the first time he filled out the application and he had no help from his employer. He went to the library to complete it. (Tr. 29-30; 85) In discussing his past drug use, he admitted that he made poor decisions. (Answer) He no longer associates with friends who smoke marijuana. (Tr. 36)

During the October 2007 interview, Applicant told the investigator about a verbal altercation that occurred in September 2007 with his girlfriend. He wanted to be open with the Government in the event any charges were filed later. (GE 2 at 69) At the hearing, he testified that he no longer is involved with that girlfriend. (Tr. 68)

From 1999 until 2004, Applicant helped support his girlfriend's two children, who lived nearby.² When he filed his income tax returns for those years, he claimed them as dependent foster-children based on a conversation he had with someone at the Internal Revenue Service (IRS). (Tr. 31; 47-48) Applicant stated that he had a letter authorizing the deduction for 1999, but did not produce it. During his October 2007 interview, he told the investigator that the IRS notified him in 2004 that he owed \$4,000 for the disallowed deductions he took for the two children for several years, and subsequently the IRS garnished his tax refunds for 2000 through 2004. (GE 2 at 70)

Applicant filed his 2004 federal tax return in January 2005. He filed his 2005 and 2006 federal returns in or about January 2008, well past the deadline. He attributed his late filing to a philosophical difference and irritation with the IRS. (Tr. 52) As of the hearing, he owes about \$2,770 in tax liability for the tax years of 1999, 2004 and 2005, and for "Liabilities not shown," as noted on AE B. In January 2008, his tax liability was \$4,000. Since then, he has been making monthly payments of \$237 on that outstanding bill. The record does not contain any evidence explaining the basis of the outstanding liability for any of those years. He asserted that he filed his 2007 federal returns and paid his taxes, but did not provide documentation to support his claim. (Tr. 64)

Applicant admitted that over the years he has done plumbing work for companies, family and friends and did not report to the IRS the income he earned. (Tr. 56-57) He understood he was required to report all of his income and will do so in the future. (Tr. 71)

Applicant submitted his Employee Performance Review for July 2007 to July 2008. His supervisor gave him an overall rating of "3" out of a possible "5." (AE C)

² On Form 8867, which is included in the 2004 federal tax return, Applicant answered "yes" to Question 8 that asked whether the child for whom a deduction is being taken, resided with Applicant for over half of the year. (GE 2)

Applicant was candid about his previous arrests, drug use, and tax issues, albeit at times confusing about the details. He repeatedly stated that he was not trying to mislead the Government when he completed the SF 86, knowing that it had access to his history. (Tr. 85) He stated:

I would just like to say I just feel like because of the things I went through, I feel like I'm a better person. I just made some bad decisions and I'm looking forward to redeeming myself the next twenty-five or thirty years of my life. Just being a better citizen and a better person." (Tr. 83-84)

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 commonsense decision. According to AG ¶ 2(a), 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.

Directive ¶ E3.1.14 requires the Government to 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 the applicant or proven by Department Counsel and has the ultimate burden of persuasion as to obtaining a favorable security decision." 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."

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.

Analysis

Guideline J, Criminal Conduct

The security concern pertaining to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes one condition that could raise a security concern and may be disqualifying in this case:

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant admitted that he has a history of criminal conduct allegations and arrests: in 1987 he tested positive for marijuana; in 1999 he was arrested and convicted of carrying a firearm and possession of marijuana; in 2003 he was arrested for domestic assault, unlawful use of a weapon and receiving stolen property; in 2005 he was arrested for domestic assault and burglary; and from 1987 to 2004, he used marijuana illegally. The evidence is sufficient to raise this disqualification.

After the Government raised these security concerns, the burden shifted to Applicant to rebut or produce evidence to prove mitigation. AG ¶ 32 provides one condition that could potentially mitigate security concerns under this guideline:

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's last arrest occurred in June 2005, almost four years ago. He has not used marijuana since December 2004. There is no evidence of criminal charges for the illegal use of drugs since 1999. Throughout this proceeding, he expressed remorse about his criminal past and poor judgment. He submitted his most recent job performance evaluation that indicates he is performing well and meeting his supervisor's expectations. Hence, there is evidence of rehabilitation,

such that this mitigating condition is applicable to the allegations involving criminal conduct, including the illegal use and purchase of marijuana.

Guideline H, Drug Involvement

The security concern pertaining to the guideline for Drug Involvement is set out in AG ¶ 4:

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; and

(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.

AG ¶ 25 describes three conditions that could raise a security concern and may be disqualifying in this case:

(a) any drug abuse (see above definition);

(b) testing positive for illegal drug use; and

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant admitted that he was discharged from the Navy in 1987 after testing positive for marijuana and that he used and purchased marijuana for approximately 17 years, from the late 1980's until December 2004. He was also convicted of purchasing and possessing marijuana in 1999. The evidence is sufficient to raise said disqualifications.

AG ¶ 26 provides one condition that could mitigate security concerns arising under this guideline:

(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.

Applicant stopped using marijuana in December 2004, over four years ago. He repeatedly acknowledged that he exercised poor judgment while using it. He appears committed to remaining abstinent. Hence, the evidence is sufficient to trigger a partial application of AG ¶ 26(b)(3), but not its full application, because there is no independent evidence, such as random drug screenings or an evaluation from an appropriately credentialed health care professional, to corroborate his assertion that he has not used marijuana since December 2004. Such evidence is necessary, given his 17-year history of marijuana use. He no longer associates with the people with whom he previously used marijuana, which merits a limited application of AG ¶ 26(b)(1), due to a lack of verification of his statements.

Guideline E, Personal Conduct

The security concern pertaining 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.

AG ¶ 16 describes two conditions that could raise a security concern and maybe disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness,

unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

The Government alleged in SOR ¶ 1.a that Applicant falsified his answer to Question 23b: *Your Police Record*, in that he failed to disclose his October 2003 arrest involving a weapons charge. It alleged in SOR ¶ 1.b that in response to Question 23f: *Your Police Record*, he deliberately failed to disclose the 2005 burglary charge and the 2003 assault and weapons charges. It further alleged in SOR ¶ 1.c that in response to Question 24a: *Your Use of Illegal Drugs*, he deliberately failed to disclose his illegal drug use from the 1980's to 2004. The Government contended that those omissions may raise a security concern and be disqualifying under AG ¶ 16(a). Applicant denied these allegations.

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant did not disclose the October 2003 charges because he was unaware of the weapons charge. At the time of his arrest, the police stopped him based on an April 2003 arrest warrant for a domestic incident. Because he had a gun in his car when arrested, they also charged him with a weapons offense, unbeknownst to him. Because he never went to court on any of the charges or received any additional information about them, he did not realize that he was required to disclose them. Nor was he aware of the May 2005 burglary charge that had been filed against him when he was arrested in June 2005 on an assault offense. All of the 2003 and 2005 charges were later dismissed. Given his disclosure of the 1999 weapons and marijuana charges, and the 2005 assault charge, his explanation is plausible and believable.

Applicant admitted that he did not disclose his history of marijuana use in the SF 86, which he subsequently detailed in a January 2008 interrogatory after an October 2007 interview. He had no clear explanation for the specific omission, but knew he listed the 1999 drug charges. During a follow-up interview, he explained the basis for his general discharge from the Navy, relating to marijuana use, and the 1999 marijuana charge. He also disclosed a recent September 2007 incident with his girlfriend in an effort to be forthcoming.

Applicant asserted that he did not intentionally withhold any information, but felt rushed to complete the SF 86 (for the first time) and left out facts as a result. He did not receive any assistance or guidance from his employer about the process. He knew the Government had access to his past and he would have no reason to hide information. During the October 2007 interview, he candidly discussed those issue raised by the

investigator. After reviewing the record and listening to him testify, Applicant's explanations for leaving information out of SF 86 regarding his police record and drug history are sufficiently credible, such that I find that the omissions were not intentional. Hence, the evidence does not establish deliberate falsification as to SOR ¶¶ 1.a, 1.b and 1.c. These allegations are found in his favor.

In addition to the above falsification allegations, the SOR alleged under this guideline issues pertaining to income taxes and a general discharge from the military. Based on the record, there is sufficient evidence to raise a potential disqualification under AG ¶ 16(c). Applicant asserted that he had authorization to take two children, who did not live with him, as deductions on his income taxes for the years 1999 to 2004. In 2004, he verified that they lived with him more than half of the year, despite testifying that they lived nearby. Although he claimed he had a letter authorizing the deduction, at least for 1999, he did not produce it. It appears that some of his current outstanding tax liabilities are related to the wrongfully claimed deductions, as he previously stated during an interview. As a consequence of his interactions with the IRS subsequent to filing his returns for 1999 through 2004, he deliberately failed to file his 2005 and 2006 tax returns and report other earned income. These tax issues, which were ongoing into January 2008, when he decided to resolve them, coupled with his general discharge from the Navy for misconduct in 1987, constitute sufficient credible information in the area of finances and drugs, which when considered as a whole, demonstrate a lack of good judgment and unwillingness to comply with rules and regulations, and indicate that he may not properly safeguard protected information if he comes into contact with it.

AG ¶ 17 describes a condition that could mitigate the disqualification raised in this case:

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Although Applicant remorsefully acknowledged his wrongful behavior as it pertains to his taxes and marijuana use, he did not produce any evidence to verify that he is no longer involved with drugs, had authorization to take the child deductions or filed his 2007 tax return on time and paid his taxes, as he testified. Hence, the above condition is not applicable.

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). They include the following:

(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) the 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 include an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a 42-year-old man, whose past is blemished by a 17-year history of using marijuana, several arrests and tax issues, beginning in 1987 with a drug incident and spanning into January 2008 when he filed tax returns that were several years late. In July 2007, he began his current position as a plumber and recently earned a good job performance evaluation for his first year. While discussing his history, he candidly acknowledged his past problems and expressed a desire to move forward and live a more productive life. His change of attitude is commendable. However, to-date he has not established a sufficient track record to assure the Government that similar problems will not recur in the future, in particular maintaining abstinence from drugs and complying with income tax codes.

Overall, the record evidence leaves me with questions as to Applicant's eligibility and suitability for a security clearance at this time. For all these reasons, I conclude Applicant mitigated the security concerns arising under criminal conduct and drug involvement, but not those concerns raised under personal conduct.

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 E:	AGAINST APPLICANT
Subparagraphs 1.a –1.c:	For Applicant
Subparagraphs 1.d – 1.e:	Withdrawn
Subparagraph 1.f	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	Withdrawn

Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	Withdrawn
Subparagraph 2.b -2.i:	For Applicant
Subparagraphs 2.j – 2.l:	Withdrawn
Paragraph 3, Guideline H:	AGAINST APPLICANT
Subparagraphs 3.a – 3.d:	Against Applicant

Conclusion

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

SHARI DAM
Administrative Judge