



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



In the matter of:)
)
) ISCR Case No. 08-00574
)
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro Se*

April 23, 2009

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated Drug Involvement and Alcohol Consumption security concerns, but has not mitigated the concerns raised under the Criminal Conduct and Personal Conduct guidelines. Eligibility for access to classified information is denied.

On September 15, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, Criminal Conduct; Guideline H, Drug Involvement; Guideline G, Alcohol Consumption; and Guideline E, Personal Conduct. 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 November 4, 2008, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel

submitted the government's written case on December 30, 2008. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on January 23, 2009. As of April 8, 2009, he had not responded. The case was assigned to me on April 16, 2009.

Findings of Fact

Applicant is a 27-year-old employee of a defense contractor. He has worked for his current employer since 2006. He has lived and worked overseas since 2005. He served on active duty with the U.S. Navy from August 2000 through September 2002. He received an Honorable Discharge. He has an associate's degree awarded in 2001, and is attending classes on-line toward a bachelor's degree. He is single with no children.¹

Applicant smoked marijuana on one occasion in 1997, when he was about 16 years old. He told an Office of Personnel Management (OPM) investigator in July 2007, that this was the only time he used illegal drugs. He stated that he did not like the experience and would never use illegal drugs again. Applicant submitted a Security Clearance Application (SF 86) in 2000, in conjunction with his enlistment in the Navy. His did not list his 1997 marijuana use under the question that asked about drug use.²

Applicant was drinking at a bar in May 2003. He told the OPM investigator in 2007, that he had about ten alcoholic beverages. He went to his car and fell asleep. A police officer woke him and temporarily detained him under suspicion of driving while intoxicated (DWI). The police searched the car and found a pipe with trace amounts of marijuana. Applicant was arrested and charged with possession of a controlled substance and possession of controlled substance paraphernalia. He was not charged with DWI. Applicant entered a plea bargain in which there was a deferred adjudication with payment of a fine or costs and community service. The charges were placed on an inactive docket with no findings of guilt. Applicant told the OPM investigator in 2007, that a friend must have left the pipe in his car without his knowledge or consent.³

Applicant was issued a citation in about August 2004 for having an open container in public. He told the OPM investigator in 2007, that he was drinking an alcoholic beverage outside a residence when a police officer saw him and issued the citation. Applicant went to court and paid a \$100 fine.⁴

¹ Items 2-5.

² Items 2-5. Falsification of the 2000 SF 86 was not alleged as a basis for the denial of Applicant's security clearance in the SOR and will not be used for disqualification purposes. The 2000 SF 86 will be considered in analyzing Applicant's 2006 SF 86; in the application of mitigating conditions; and in evaluating the "whole person."

³ Items 2, 5-8.

⁴ Items 2, 5.

In about the fall of 2004, Applicant was drinking at a bar. He became intoxicated, went outside, and fell asleep on the sidewalk or street. The local police called his mother who came and got him and drove him home. He was not charged for the incident. He told the OPM investigator in 2007, that he did not have a drinking problem. He stated that from 2003 to 2004, he drank on the weekends, and to the point of intoxication about once a month. He described drinking to intoxication as consuming about ten to twelve beers. He stated that since 2004, he only drank about one to two beers, twice a month, and he stopped drinking to the point of intoxication. In his response to the SOR, he wrote that he no longer uses alcohol in any way.⁵

Applicant submitted a Questionnaire for National Security Positions, certified as true on February 26, 2006. The introduction to Section 23 stated:

For this item, report information regardless of whether the record in your case has been “sealed” or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

Question 23d of the SF 86 asked, “Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?” Question 23f asked, “In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)” Applicant answered “No” to both questions.⁶

Applicant was interviewed for his background investigation in July 2007. A signed statement was not provided but the interview was memorialized in a report of investigation (ROI). DOHA sent Applicant a copy of the ROI in an interrogatory and asked him if the ROI reflected accurately the information he provided to the investigator on the day he was interviewed. He was provided the opportunity to explain why the ROI was inaccurate and to add additional information regarding the matters discussed during the interview. He answered that the ROI was accurate. He did not submit additional information. The ROI indicates that he did not list the open container in public citation because he forgot about the citation when he completed the SF 86. Regarding the drug-related offenses, the ROI stated:

After pleading guilty, subject’s attorney told him that he did not have to disclose this arrest on employment paperwork since it was a suspended sentence. While completing his paperwork for his security clearance application, subject debated if he should answer the question pertaining to drug related arrest[s] and decided to willfully withhold the fact that he had

⁵ Items 2, 5.

⁶ Item 3.

been arrested. Subject stated that he did deliberately falsif[y] his security clearance paperwork relating to his drug related arrest.⁷

Applicant denied the two falsification allegations in his response to the SOR. He wrote that he “did not fully understand the question and was mistaken in [his] omission of information.” After considering all the evidence, I find that Applicant intentionally falsified his Questionnaire for National Security Positions by not listing his open container in public citation and his drug-related arrest under Questions 23d and 23f.

Applicant submitted a number of letters from his supervisors and military members at commands that he supports. He is regarded as an outstanding employee and a valuable asset to the U.S. military. He is described as trustworthy, hard working, dependable, professional, and honest. He is recommended for a security clearance.⁸

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 to be used 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, administrative judges apply the guidelines 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 the applicant or proven by Department Counsel.” The

⁷ Item 5.

⁸ Item 2.

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 adverse 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 J, Criminal Conduct

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

Criminal activity creates doubt about an Applicant’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 conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and

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

It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States.⁹ A violation of 18 U.S.C. § 1001 is a serious offense as it may be punished by imprisonment for up to five years. Applicant knowingly and willfully made a materially false statement on his SF 86, as discussed above. He also smoked marijuana; was cited for having an open container in public; and was arrested for possession of a

⁹ See *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

controlled substance and possession of controlled substance paraphernalia. The evidence is sufficient to raise the above disqualifying conditions.

Applicant was never criminally charged with DWI or when he was drunk and fell asleep in public. There is insufficient evidence to support the application of a disqualifying condition for SOR ¶¶ 1.b and 1 d. Those allegations are concluded for Applicant.

Four Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and
- (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 smoked marijuana in 1997, when he was 16 years old. AG ¶ 32(a) is applicable to that one-time drug use. A pipe with trace amounts of marijuana was discovered in his car in 2003. He stated that the pipe must have been left by a friend without his knowledge. He was never convicted of the offense. AG ¶ 32(c) is applicable to the possession of drugs and drug paraphernalia offenses. He was cited for having an open container in public in 2004. There have been no other alcohol-related offenses in the last five years. AG ¶ 32(a) is applicable to that citation.

Applicant intentionally provided false information on his SF 86 in 2006, which constituted a federal crime. He was not honest in his response to the SOR when he stated that he did not intentionally falsify the SF 86 because he did not fully understand the questions. No mitigating conditions are applicable to his violation of 18 U.S.C. § 1001.

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.

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

The guideline notes several conditions that could raise security concerns under AG ¶ 25. Two are potentially applicable in this case:

- (a) any drug abuse; and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant admitted to smoking marijuana in 1997. The police discovered a pipe that contained marijuana residue in his car in 2003. AG ¶¶ 25(a) and 25(c) are applicable as disqualifying conditions.

Two Drug Involvement Mitigating Conditions under AG ¶ 26 are potentially applicable:

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

Applicant admitted to smoking marijuana on one occasion in 1997, when he was about 16 years old. He stated the pipe was left in his car by a friend without his knowledge. There is no evidence of any drug involvement since 2003. AG ¶¶ 26(a) and (b) are applicable.

Guideline G, Alcohol Consumption

The security concern relating to the guideline for Alcohol Consumption is set out in AG ¶ 21:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

The guideline notes several conditions that could raise security concerns under AG ¶ 22. The following are potentially applicable in this case:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent; and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.

Applicant has four alcohol-related incidents, including two that did not result in an alcohol-related arrest. He admitted to excessive drinking on two occasions resulting in him passing out or falling asleep in his car and on the street. AG ¶¶ 22(a) and (c) are applicable.

Two Alcohol Consumption Mitigating Conditions under AG ¶¶ 23 are potentially applicable:

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

(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser).

Applicant has not had an alcohol-related incident in almost five years. He stated that he no longer drinks alcohol. AG ¶¶ 23(a) and 23(b) are applicable.

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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;

(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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant intentionally falsified his SF 86 in 2006. AG ¶ 16(a) is applicable. His criminal conduct, drug use, and alcohol-related incidents establish AG ¶¶ 16(c) and 16(e) as disqualifying conditions.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant stated at one point that his attorney told him that he did not have to disclose his drug arrest on employment paperwork since it was a suspended sentence. He also admitted to the OPM investigator that he debated whether to answer the question pertaining to drug arrest and decided to willfully withhold the fact that he had been arrested. He was provided the ROI in an interrogatory and stated that the ROI was accurate and that he had nothing further to add. He provided a contradictory answer in response to the SOR. I find no mitigating conditions are applicable to the intentional falsification of his SF 86. I further find that the other criminal conduct, drug use, and alcohol-related incidents are mitigated under AG ¶¶ 17(c) and 16(f) under the same rationale addressed under their specific guidelines.

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) 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 be an overall common sense 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 27 years old. I considered his honorable service in the U.S. Navy and his very favorable character letters and job performance. However, he was dishonest on his SF 86 and in his response to the SOR. His drug use, arrests, and alcohol-related incidents have been

mitigated by the passage of time. His inability to provide truthful answers has not been mitigated and raises serious concerns about his judgment, reliability, and trustworthiness.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated Drug Involvement and Alcohol Consumption security concerns, but has not mitigated the concerns arising under the Criminal Conduct and Personal Conduct guidelines.

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 J:	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant
Paragraph 3, Guideline G:	FOR APPLICANT
Subparagraphs 3.a-3.c:	For Applicant
Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraphs 4.a-4.b:	Against Applicant
Subparagraph 4.c:	For Applicant

Conclusion

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

Edward W. Loughran
Administrative Judge