



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)	
)	
-----)	ISCR Case No. 08-05721
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: Patrick Domholdt, Esquire

December 13, 2010

Decision

MOGUL, Martin H., Administrative Judge:

On January 27, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and E 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 responded to the SOR (RSOR) in writing on February 3, 2010, and requested a hearing before an Administrative Judge. I received the case assignment on March 8, 2010. DOHA issued a Notice of Hearing on March 9, 2010, and I convened the hearing on April 6, 2010. The Government offered Exhibits 1 through 4, which were received and entered into evidence without objection. Applicant testified on his own behalf, and he submitted Exhibits A through D. Three additional witnesses testified on behalf of Applicant. DOHA received the transcript of the hearing (Tr) on April 19, 2010.

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

Findings of Fact

In his RSOR Applicant admitted SOR allegations 1.a., 1.d., and 1.e., under Guideline H; and 2.a. and 2.c, under Guideline E. He denied 1.b.,1.c., and 2.b. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant and the additional witnesses, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 51 years old. He works as a heavy equipment operator for a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline H - Drug Involvement)

The SOR lists five allegations regarding illegal drug involvement under Adjudicative Guideline H. They will be discussed in the same order as they were listed in the SOR:

1.a. The SOR alleges that Applicant used marijuana from approximately 1978 to about 2005. At the hearing, Applicant testified that he was a marijuana user for a long time. He stated that because he had four daughters, and one bathroom, "I don't know what I would have done. It just kept me balanced. I don't know." (Tr at 97.) He conceded that he used marijuana more than 200 times. (Tr at 116 - 117.)

Applicant testified that he started working for his present employer in 2004, and because of his previous marijuana usage, he was drug tested every Monday. Yet despite knowing he would be tested, he used marijuana again in 2005, when he tested positive. When asked, Applicant could give no reasonable answer for this conduct. Applicant indicated that intends to never use marijuana again. (Exhibits 2 and 3.)

1.b. The SOR alleges that Applicant was arrested in June 2002 and charged with 1) Transporting Controlled Substance, a Felony, and 2) Possession of a Controlled Substance. The charges were dismissed after Applicant completed an alcohol and drug offenders program for the third time. In his RSOR, Applicant denied this allegation. He testified that he denied this allegation because this was his first time offense, not his third, but he did concede that he was arrested and charged with possession of a controlled substance. (Tr at 115.) He estimated that he used cocaine, which he purchased from friends, a total of 20 times.

1.c. The SOR alleges that Applicant used methamphetamine from approximately the late 1990s until at least 2004. In his RSOR, Applicant denied this allegation. He

testified that he denied this allegation because he believed that he began using methamphetamine in the early 2000s. He testified that he used methamphetamine approximately two or three times a week, and he estimated that his usage was less than 50 times total. (Tr at 116 - 117.)

1.d. The SOR alleges that Applicant received treatment in May 2004 in a Chemical Dependency Unity, for a condition diagnosed as Cannabis Dependence.

1.e. The SOR alleges that Applicant tested positive for marijuana on a random drug test by his employer in about May 2005 . After he tested positive, he was required to attend Narcotic Anonymous meetings for approximately two or three months

1.f. At the hearing, based on the testimony of Applicant, Department Counsel moved to amend the SOR, and add the following allegation: [Applicant] "used cocaine less than five times in the 1980s." The amendment was granted without objection and Applicant admitted this allegation. (Tr at 119 - 120.)

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he exhibited conduct involving questionable judgement, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

2.a. Applicant executed a Security Clearance Application (SCA), which was certified on November 28, 2007. (Exhibit 1). Question #24 of the SCA asked since the age of 16 or in the previous seven years, whichever is shorter, had Applicant illegally used any controlled substance? Applicant answered "No" to this question, and he listed no illegal substances. The Government alleges, and the evidence is clear that Applicant should have included his illegal drug usage as included in subparagraphs 1.a. and 1.c., above. In his RSOR, Applicant admitted this allegation.

At the hearing Applicant gave different explanations for his answer. At one point Applicant testified, "All I could think of was maybe I thought it was because my charge was expulsed (*sic*) that I didn't have to talk about that. But I know it's not - it wasn't about conviction, it was about usage. I really don't have an answer for that. I just marked the box wrong." (Tr at 129.) Since the questionnaire was completed and signed by Applicant in 2007, only two years after he tested positive for marijuana at his work place and three years after his regular and long term use of marijuana and methamphetamine. I do not find Applicant's explanation to be reasonable or believable.

2.b. During a February 8, 2008 interview with an authorized investigator for the Department of Defense, Applicant stated that he last used marijuana in June 2002, and he had no intention of using it in the future. (Exhibit 3.) The SOR alleges that Applicant deliberately failed to disclose that he had used marijuana until 2005, as alleged in subparagraph 1. c., above.

In an attempt to explain this incorrect information that Applicant provided to the Government, he testified, "It's kind of hard to recollect when you're doing drugs. You're mind doesn't remember a lot of things. . . You don't sit down and write a diary about every time you smoke. I don't sit down and write every day that I smoked, who I smoked with."

While Applicant may not have remembered the specific dates that he used marijuana, the date he stated he last used marijuana was a date that was documented, June 2002, because of his felony arrest, as alleged in 1.b., above. He certainly had to be aware that he used marijuana after this arrest, regularly through 2004, and again in 2005, when he tested positive for drug use at his current employer, see 1.e., above. The only explanation for his furnishing this inaccurate information, about the recency and frequency of his drug usage, was that he was attempting to mislead the Government in an attempt to minimize his drug use so that he could receive his security clearance.

2.c. The SOR alleges that Applicant submitted a signed, sworn statement, dated October 20, 2008, to an authorized investigator for the Department of Defense (Exhibit 2), in which he falsified material facts by stating that he had used methamphetamine from 2002 to 2004, whereas he had used methamphetamine from at least the late 1990s to at least 2004, as referred to in 1.c., above. The general date of the late 1990s that Applicant first started using methamphetamine was provided by Applicant in Exhibit 3. While he contradicted this in Exhibit 2, as to when he began using methamphetamine, I find that this information, which was several years previous to the other information provided by Applicant, could have been because of Applicant's incorrect memory, and it has not been established that this misstatement was made to mislead the Government.

Mitigation

Applicant had three additional witnesses testify on his behalf. The first was Applicant's older sister, who also is the President and Chief Executive Officer of the company that employs Applicant, a company with 500 to 600 employees, and a position that she has held since 2001. His sister testified that Applicant informed her that he and his wife were separating, and he was looking for some kind of rehabilitation program for his marijuana usage. Once he completed the program, her company hired him, subject to his being drug tested weekly at his own expense. In May 2005, approximately one year after he began employment, he tested positive for marijuana. Applicant then was given the opportunity to become involved with the Employee Assistance Program (EAP). She testified that he went through the program, and she now believes that he is trustworthy. (Tr at 18 - 55.)

The second witness was the Human Resources Manger of Applicant's employer. She testified that she was involved in Applicant's weekly drug testing, and that after he tested positive for marijuana in 2005, they considered termination, but instead gave him the option of entering the EAP program, which he did. She stated that Applicant completed the program satisfactorily, and he continues to be subject to random drug tests. She also testified that she believed Applicant is trustworthy. (Tr at 58 - 76.)

The third witness was Applicant's former brother-in-law, who is a retired Captain in the United States Navy. He indicated that he considers Applicant to be a brother to him, and he believes that he is truthful and patriotic. He could offer no substantial explanation for Applicant's failure to list his illegal drug use on his SCA. (Tr at 77 – 92.)

Applicant submitted four documentary exhibits into evidence. Exhibit A consists of two awards that Applicant has received from his present employer, which Applicant's sister indicated he received for work above and beyond normal. (Tr at 30 -31.) Exhibit B includes the results of two Controlled Substance tests taken by Applicant, one on December 11, 2008, and the other on July 15, 2009. Both of the tests indicated a negative result for any illegal substance present in Applicant's urine. These tests were ordered to be taken subsequent to an accident in which Applicant was involved.

The third exhibit consists of four character letters, one from Applicant's sister, the second and third from the Human Resources Manager and the Vice President of Operations of Applicant's employer, and the fourth from Applicant's former brother-in-law. (Exhibit C.) All of the letters were extremely positive in describing Applicant. The final document was a signed, sworn statement of Applicant, dated April 6, 2010, in which he stated that he is not currently using illegal drugs and he promises to abstain from any illegal use in the future. (Exhibit D.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the 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 judgement and because it raises questions about a person’s ability or willingness to comply with laws, rules and regulations.

With respect to Guideline H, the Government has established its case. Applicant’s improper and illegal drug abuse, the use for many years of marijuana and methamphetamine is of great concern, especially in light of his desire to have access to the nation’s secrets. Applicant’s overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement ¶ 25 (a) “any drug abuse,” and (c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.” It also is disturbing that Applicant has used marijuana, during the period that he has been working for his current employer.

In reviewing the mitigating conditions, I conclude that ¶ 26 (a) “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur again” has been established in this case, because while the evidence has established that Applicant used methamphetamine in 2004, and marijuana in 2005, after he became employed at his current employer, there is no evidence that he has used any illegal substance since that time. I also find that (b) “a demonstrated

intent not to abuse any drugs in the future” is applicable, as there has been independent evidence introduced to establish Applicant’s veracity or credibility regarding his intent not to abuse drugs in the future.

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant has used illegal drugs for many years under Guideline H. Applicant, on the other hand, has introduced persuasive evidence in rebuttal, explanation or mitigation, which is sufficient to overcome the Government’s case against him. Accordingly, Paragraph 1, Guideline H, of the SOR is concluded for Applicant.

Guideline E - Personal Conduct

With respect to Guideline E, the evidence establishes that Applicant furnished to the Government incomplete, untruthful answers regarding the extent of his drug involvement on an SCA that he executed on November 28, 2007, and during an interview with a Government investigator on February 8, 2008.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation’s secrets. When such an individual intentionally falsifies material facts or fails to furnish relevant information to a Government investigator, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, I conclude that Applicant knowingly and willingly failed to give complete, honest answers regarding his drug usage to the Government.

In reviewing the Disqualifying Conditions (DC) under Guideline E, I conclude that AG ¶ 16 (a) applies because of Applicant’s “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, used to . . . determine security clearance eligibility.” AG ¶ 16 (b) also applies since Applicant “deliberately provid[ed] false relevant information to the Government investigator.” His use of marijuana after he began working for his current employer when he knew that he was subjected to weekly drug testing, also shows extremely questionable judgement. I can not find that any Mitigating Condition (MC) applies in this paragraph.

Applicant’s conduct, considered as a whole, exhibits questionable judgement, unreliability, and a lack of candor. I resolve Paragraph 2, Guideline E, against Applicant.

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 commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I have considered the potentially disqualifying and mitigating conditions under Guidelines H and E in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited above, including Applicant's long history of using marijuana and other illegal drugs, and his lack of honesty and candor with the information he furnished to the Government, I find that the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the security concerns.

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: Subparagraph 1.a. -1.f.:	FOR APPLICANT For Applicant
Paragraph 2, Guideline E: Subparagraph 2.a.-2.b.: Subparagraph 2.c.:	AGAINST APPLICANT Against Applicant For Applicant

Conclusion

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

Martin H. Mogul
Administrative Judge