



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-05890
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn E. Hoffman, Esquire, Department Counsel
For Applicant: *Pro se*

August 26, 2009

Decision

CURRY, Marc E., Administrative Judge:

In 2006, Applicant agreed to accept an administrative discharge from the U.S. Navy under other than honorable conditions rather than face a court-martial, after an investigator confiscated several marijuana plants from his home on base housing. Applicant mitigated the criminal conduct security concern generated by this incident, but failed to mitigated the personal conduct security concern. Clearance is denied.

On December 10, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines J and E. 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.

On February 5, 2009, Applicant answered the SOR, admitting all of the allegations and requesting a hearing. The case was assigned to me on May 15, 2009. On June 3, 2009, a notice of hearing was issued scheduling the case for June 22, 2009. The hearing was held as scheduled. At the hearing, I received four government exhibits, two Applicant exhibits, and Applicant's testimony. The transcript was received on June 29, 2009.

Findings of Fact

Applicant is a 31-year-old married man with one infant child and two stepchildren. A previous marriage ended in divorce. For the past three years, he has worked for a defense contractor as a marine electrician, providing installation and maintenance for the U.S. Navy fleet's phone and cable (Exhibit B). According to his supervisor, his performance is consistently exceptional (*Id.*).

Shortly after graduating from high school in 1995, Applicant joined the U.S. Navy. He received training as an interior communications technician, and spent most of his tenure in this field. (Exhibit A). He was a highly effective sailor. In February 2001, a supervisor characterized him as his "best interior communications technician [who was] highly motivated toward advancing his career" (Exhibit A at 13). According to a supervisor in 2005, Applicant was a superior manager and administrator whose performance was "absolute[ly] stellar," and who excelled in subordinate development (Exhibit A at 4).

Applicant met his current spouse in November 2002, and married her three years later, in February 2005 (Exhibit 4 at 3). Approximately four months later, after discovering drug paraphernalia in their car, Applicant confronted her, and discovered she was a marijuana user (*Id.*). They frequently argued about her marijuana usage over the next several months. Ultimately, he "turned a blind eye to it" (*Id.*).

Applicant and his wife were avid gardeners. They purchased materials during the winter of 2006 to cultivate vegetable plants indoors, including heat lamps and reflective shields (Tr. 34). They then began growing the plants in a closet in the basement. Applicant's wife planted five or six marijuana plants along with the vegetables (Tr. 35). At the hearing, Applicant testified that he did not discover she was growing marijuana until the early spring when he "checked up on everything" in preparation for planting the vegetables outdoors (Tr. 35). Conversely, in his statement to a U.S. Naval Criminal Investigative Service (NCIS) agent, he stated as follows:

When we moved . . . this past January [she] got the idea to start growing her own marijuana It was her project, for her own personal use . . . I had seen the setup in the downstairs closet but ignored it, because it was for her own personal use (Exhibit 4 at 3).

I find Applicant knew his wife was growing marijuana in their basement by January 2006.

In June 2006, Applicant and his wife hosted a party (Tr. 62). One of their friends went downstairs, opened the closet door, discovered the marijuana, and reported it to the police (*Id.*). A few weeks later, several Naval Criminal Investigative Service (NCIS) investigators came to Applicant's home with a search warrant, and confiscated the marijuana (Exhibit 2 at 3). Neither Applicant nor his wife was arrested or charged. They were informed, however, that an investigation would be pending.

As part of the investigation, an NCIS agent interviewed Applicant's wife. She stated that Applicant was aware of her marijuana-growing scheme, but did not participate (Exhibit 4 at 6).

Later, civil law enforcement authorities arrested and charged Applicant's wife with wrongful use and possession of a controlled substance, a misdemeanor (Tr. 55). She pleaded guilty, and was sentenced to 150 hours of community service, and fined \$775 (Tr. 41). Also, she was ordered to attend counseling for three months (Tr. 40).

Applicant's command gave him the option of either accepting a discharge under other than honorable conditions, or facing a court-martial under UCMJ Article 112(a) for wrongful use, possession, or manufacture of marijuana (Exhibit 2 at 3). Applicant chose the former option, and was discharged in August 2006 (Exhibit 4).

Applicant never used marijuana either before or after the incident (Tr. 47). His wife no longer uses marijuana (Tr. 41). Applicant is active in his church, providing daycare for children during services, and helping to organize carolling sessions during the holiday season (Tr. 65).

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 overarching 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."

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.

Analysis

Guideline J, Criminal Conduct

Under this guideline, “criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness [and] by its very nature, . . . it calls into question a person’s ability or willingness to comply with laws, rules, and regulations” (AG ¶ 30).

The SOR alleges Applicant, while in the Navy, committed a crime by permitting his wife to grow marijuana in their home located on base. Applicant asserts that he neither used nor approved of his wife’s marijuana cultivation. He chose to ignore it only after unsuccessfully admonishing her to stop. Under UCMJ Article 112(a), it is a crime to use, possess, or manufacture controlled substances. Possession includes “the power or authority to preclude control by others” (UCMJ Article 112(c)). I conclude Applicant’s conduct constituted a crime. AG ¶¶ 31(a), “ a single serious crime or multiple lesser offenses,” and 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted,” apply.

Applicant’s criminal conduct was isolated and has not recurred. He has a good employment record, and is active in his community. The vulnerability to coercion through his wife is minimized because she no longer abuses marijuana. AG ¶ 32(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,” applies. Applicant has mitigated the criminal conduct security concern.

Guideline E, Personal Conduct

Under this guideline, “conduct involving questionable judgment, lack of candor, dishonest, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information” (AG ¶ 15). Applicant, by allowing his wife to grow marijuana in the basement of their home on base housing, subordinated his commitment to the U.S. Navy’s core values. Consequently, although he mitigated the security concern regarding the criminal nature of his conduct, the questionable judgment that he demonstrated remains in question. AG ¶ 16(e), “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress . . .” applies.

Applicant's testimony regarding when he was aware that his wife was cultivating marijuana in their basement contradicted his earlier signed, sworn statement to an NCIS investigator. This contradiction undermines his credibility, and renders any of the mitigating conditions inapplicable. Applicant has not mitigated the personal conduct security concerns.

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 relevant 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.

Applicant's exceptional work performance both during and after his stint in the Navy, the isolated nature of his crime, and his history of volunteerism mitigates the criminal conduct security concern. However, the personal conduct ramifications of Applicant's decision to ignore his wife's marijuana cultivation were compounded by his failure to testify about it truthfully at the hearing. I conclude Applicant mitigated the criminal conduct security concern, but failed to mitigate the personal conduct security concern.

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
Subparagraph 1.a - -1.c:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	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.

MARC E. CURRY
Administrative Judge