



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)	
)	
-----)	ISCR Case No. 08-06605
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: Erick M. Ferran, Esquire

September 18, 2009

Decision

MOGUL, Martin H., Administrative Judge:

On October 14, 2008, 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 November 12, 2008, and requested a hearing before an Administrative Judge. I received the case assignment on March 16, 2009. DOHA initially issued a Notice of Hearing on March 30, 2009, and the hearing was scheduled on April 28, 2009. As a result of the attorneys' request, the hearing was continued. A second Notice of Hearing was issued on April 22, 2009, and the hearing convened, as scheduled on June 2, 2009, in Las Vegas Nevada.

The Government offered Exhibits 1 through 4, which were received without objection. Two witnesses testified on behalf of the Government. Applicant testified on

his own behalf, and he submitted Exhibits A through P, which were admitted without objection. DOHA received the transcript of the hearing (Tr) on June 10, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

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

Applicant is 34 years old. He is not married, and he has one child. He has received two years of college education. He served in the United States Marines Corps (USMC) from 1998 to 2006. Applicant works for a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

The testimony of two witnesses and the Applicant will be reviewed, before it is applied to the SOR allegations. Two witnesses from the Marine Corps testified, at the request of Department Counsel, to explain and give insights to the methods used by the Marine Corps to administer drug testing, in general, and to provide any specific information available, regarding the specific results of drug tests taken by Applicant, when he was in the Marines.

Witness 1

The first witness identified himself as a 25 year old, active duty sergeant, who has been in the Marine Corps for almost six years. Part of the duties of Witness 1 for almost the last 3 years included being the substance abuse control officer (SACO), for which he indicated that had been thoroughly trained. His duties included conducting urinalysis tests every month, and he estimated that he has conducted "a couple hundred tests" (Tr at 28). Witness 1 testified, not as to the specifics of the tests received by Applicant while in the Marines, but rather to explain the techniques used consistently by all Marines, and to interpret the results of tests taken by Applicant, which were entered into evidence.

Witness 1 testified as to the procedures used to test each Marine throughout the Marine Corps, for potential drug usage, which are always the same and are extremely thorough and careful, to make certain that no errors are made in the process (Tr at 36-38). He thereafter explained the results of several of the documents that were identified and entered into evidence as Exhibit 4. The first document reviewed by Witness 1 was from the Naval Drug Screening Lab, which identified all drugs that are tested and the amount necessary to be found in the blood stream to be tested positive or the Cutoff Value (Tr at 33-34). A second document was the "Results Report for USMC." This report identified that Applicant tested positive for THC (Marijuana) in the amount of 28 nanograms per millileter (npl) in February 2006. Since 15 npl is the minimum amount required to test positive (Cutoff Value), the amount identified in Applicant was almost two times that amount. In a second "Results Report for USMC" Applicant tested positive

for MDMA (Ecstasy) in the amount of 1542 nanograms in September 2005. Since 500 nanograms is the Cutoff Value, the amount identified in Applicant was more than three times that amount.

Finally, Witness 1 testified that, as the SACO officer, it is his duty to notify the Officer in Charge if there are positive results on drug tests, but since he was not the SACO when the tests were performed on Applicant, he could not testify whether or not that procedure was carried out (Tr at 67).

Witness 2

Witness 2 identified himself as a staff sergeant, who has been in the Marine Corps for eight years, and whose occupational specialty is as an administrative personnel chief, where he performs human resources functions. He testified that a review of Applicant's military records showed he received a urinalysis on his last drill weekend, prior to his medical discharge from the Marines (Tr at 91-93). He further stated that when Marines tested positive on drug tests, the rest of the troop was sometimes made aware of the results of the test, although he was not certain if that was the proper Marine policy (Tr at 112).

Witness 2 also testified that he was the observer who was present during Applicant's urinalyses, making sure that Applicant properly provided the urine for each test and returned it to the SACO without any contamination or error (Tr at 113-114).

Applicant

As stated above, Applicant served for 6 years in the Marines. He was deployed in Iraq and ultimately received a medical honorable discharge, because of an injury he sustained to his L5-S1 disk from driving a LVS vehicle for long periods of time while in Iraq (Tr at 161-162). Despite his medical discharge, Applicant did testify that for his current employment, he has certain physical requirements. He has to be able to run three miles in 22 minutes, but he stated that he runs it in 16 minutes. He also has had to perform 20 or 30 push-ups and 60 sit-ups in two minutes (Tr at 149). For an individual, who had to leave the Marines because of a disability, to perform in this clearly superior physical manner, seems rather unlikely, particularly since Applicant contends that he experiences constant pain from his injury and received a subsequent surgery.

At the hearing, Applicant testified that his disability was rated as 50% (Tr at 194). However, a letter, dated January 26, 2006, from the Inspector/Officer in Charge regarding Applicant's "Discharge From the United States Marine Corps Reserve With Severance Pay" clearly contradicts Applicant's assertion (Exhibit A) . It indicates that Applicant's "disability is rated at ten percent."

Applicant testified that he has been employed by his current employer for five years, and during that time he has undergone two saliva drug tests, and he has never been informed of any positive drug results (Tr at 148-149). No evidence was introduced regarding the results of drug tests from his current employer.

Applicant testified that he used marijuana when he was 17, but he did not use it again after that time (Tr at 171). When he completed the Security Clearance Application (SCA), he answered "No" to question 24, indicating that he had not used any illegal substance in the last seven years, and at the hearing, he testified that he was being honest when he furnished this answer. He also averred that he was not aware when he completed the SCA, that he had received two positive drug tests (Tr at 174-175).

Applicant did concede that he had heard from a few former fellow Marines that he had tested positive for drugs, and while he claimed that he thought it must be a joke, he stated that he called his former first sergeant, who informed him that he was not aware of Applicant testing positive (Tr at 181-184). Finally, Applicant claimed that he had been present where marijuana was being used, on the day before the test, and he posited a theory indicating that may have been why he tested positive for marijuana.

Paragraph 1 (Guideline H - Drug Involvement)

The SOR originally listed one allegation regarding illegal drug involvement under Adjudicative Guideline H (1.a.). As a result of the Government's Motion to Amend the SOR, an additional allegation (1.b.) was added under Guideline H:

1.a. The SOR alleges that in February 2006, Applicant tested positive for marijuana on a mandatory United State Marine Corps (USMC) drug test. Exhibit 4 and the testimony of Witnesses 1 and 2 clearly establish that Applicant tested positive on February 12, 2006, for THC (marijuana) in the amount of 28 npm, which is almost twice the cutoff value of 15 npm. Although Applicant denied ever using marijuana while he was in the Marines, I find the methods and techniques of the drug tests administered by the Marines, including the chain of custody, as explained by Witnesses 1 and 2, to be extremely reliable and accurate, and far more credible and persuasive than Applicant's testimony and his ultimate denial of drug usage. Therefore, I conclude that Applicant did use the marijuana for which he tested positive.

1.b. The SOR alleges that "In or around September of 2005, Applicant used MDMA (Ecstasy)." Exhibit 4 and the testimony of Witnesses 1 and 2 also clearly establish that Applicant tested positive on September 11, 2005, for MDMA (Ecstasy) in the amount of 1542 npm, which is more than three times the cutoff value of 500 npm. Applicant also denied ever using MDMA while he was in the Marines. However, again, I find the methods and techniques of the drug tests administered by the Marines, to be extremely reliable and accurate, and far more credible and persuasive than Applicant's denial. I also conclude that Applicant used the MDMA for which he tested positive.

Paragraph 2 (Guideline) E - Personal Conduct)

The SOR originally listed 1 allegation (2.a.) under Adjudicative Guideline E. As a result of the Government's Motion to Amend the SOR, two additional allegations were added under Guideline H (2.b. and 2.c.):

2.a. The SOR alleges that Applicant falsified material facts on a SCA, which he executed on April 11, 2006 (Exhibit 1). Question #24 a. 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? The Government alleges that Applicant should have disclosed that he tested positive for marijuana in February 2006. I do not find that the question, as it is worded, calls for an answer that would disclose that Applicant tested positive for any drug. However, since I have found that the drug test that Applicant underwent was accurate, and he did use marijuana in 2006, then Applicant had the duty to inform the Government of his marijuana usage on the SCA, which he failed to do.

2.b. The SOR alleges that Applicant falsified material facts on the SCA (Exhibit 1), in that Applicant should have disclosed, in response to Question 24 a., that he used MDMA (Ecstasy) in September 2005. Since I have also found that Applicant used MDMA in 2005, then Applicant had the duty to inform the Government of this drug usage on the SCA, which he also failed to do.

2.c. The SOR alleges that while Applicant was a “member of the USMC reserves, [n he] wrongfully used a controlled substance on at least two separate occasions.” As reviewed above, I find that Applicant did use a controlled substance on at least two separate occasions as a USMC Reserve, which exhibited questionable judgement.

Paragraph 3 (Guideline J- Criminal Conduct)

The SOR originally did not list any allegation under Adjudicative Guideline J. As a result of the Government’s Motion to Amend the SOR, two allegations were added under Guideline J (3.a. and 3.b.). The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal conduct:

3.a. The SOR alleges that “In or around February of 2006 [Applicant] used Marijuana.” I find that Applicant’s marijuana usage constitutes criminal conduct.

3.b. The SOR alleges that “In or around September of 2005 [Applicant] used MDMA (Ecstasy).” I also find that Applicant’s MDMA usage constitutes criminal conduct.

Mitigation

Applicant submitted a number of documents in an attempt to mitigate the allegations in the SOR. Exhibits A through D detail the record of Applicant’s Marine service and confirm that he did receive an Honorable Discharge. Exhibit A specifically showed that Applicant received a discharge by reason of physical disability. His total active service was 1 year 7 months, and his reserve time was 5 years 7 months, and as reviewed above, his disability was rated as ten percent. Applicant also offered into evidence eight character letters from individuals, who know or have known him in his professional or private life, and many who consider him a friend (Exhibits F through M). These letters were extremely laudatory in describing Applicant’s high integrity, reliability, and good judgement.

Applicant also introduced three different articles about drug tests and their accuracy. The first was by a criminal defense lawyer to the National Association of Criminal Defense Lawyers (Exhibit N), the second was titled "Investigation of Interference by Nonsteroidal Anti-Inflammatory Drugs in Urine Tests for Abused Drugs" (Exhibit O), and the third was "Urine Drug Screening: Practical Guide for Clinicians" (Exhibit P). All of these articles analyzed different aspects of drug tests, including their flaws and whether they should be allowed into evidence. I reviewed them in great detail. However none of the objections to drug testing, discussed in these articles, convince me that the drug tests used in this case were not applicable, relevant or accurate.

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

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the possession and use of marijuana and MDMA, is of 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 falls within Drug Involvement Disqualifying Condition (DC) 25. (a) (any drug abuse) and (b) (testing positive for illegal drug use).

Based on the Applicant's lack of candor in the information about his drug involvement that he furnished to the Government, I cannot conclude at this time that Applicant's conduct comes within any Mitigating Condition (MC). Accordingly, Paragraph 1, Guideline H, of the SOR is concluded against Applicant.

Guideline E - Personal Conduct

With respect to Guideline E, the evidence establishes that Applicant executed a SCA on April 11, 2006, in which he failed to identify that he had used marijuana or MDMA.

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 DC 16. (a) applies because of Applicant's deliberate omission, concealment, and falsification of relevant facts from a personnel security questionnaire, which was used to determine security clearance eligibility. I cannot 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.

Guideline J, Criminal Conduct

The Government also established that Applicant engaged in criminal conduct, by using illegal substances while in the USMC. Additionally, while it is not alleged in the SOR, Applicant's knowingly providing false and misleading information to the Government on a SCA is also a criminal act, although it will not be considered adversely to the Applicant under this guideline.

DC 31. (a), a single serious crime or multiple lesser offenses, applies in this case. DC 31. (c), allegations or admissions of criminal conduct, regardless of whether the person was formally charged, is also applicable to this case. While MC 32. (a) could be argued to apply under Criminal Conduct, because so much time has allegedly elapsed since the criminal conduct. However, since Applicant has not acknowledged his conduct, I do not find that this condition mitigates this concern. Paragraph 3, Guideline J is found 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, E, and J, in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited above, as to why the Disqualifying Conditions apply and the Mitigating Conditions do not, I find that the record evidence leaves me with significant 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 set forth in this SOR.

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: Against Applicant

Subparagraph 1.b: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Paragraph 3, Guideline J: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against 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