



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



In the matter of:)
)
-----) ISCR Case No. 08-08142
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel

For Applicant: *Pro se*

September 17, 2010

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on March 5, 2007. (Government Exhibit 1.) On June 10, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline H (Drug Involvement) 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on June 25, 2009, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on October 25, 2009. I received the case assignment on November 5, 2009. DOHA issued notices of hearing on November 6 and November 24, 2009. I convened the hearing as scheduled on December 3, 2009. The Government offered Government

Exhibits 1 through 4, which were received without objection. Applicant testified on his own behalf, called two additional witnesses, and submitted Applicant Exhibits A through E, which were also admitted without objection. DOHA received the transcript of the hearing on December 10, 2009. The record closed on December 3, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

Applicant is 46 and married. He is employed by a defense contractor and seeks to retain a security clearance in connection with his employment. Applicant admitted all of the allegations in the SOR. Those admissions are hereby deemed findings of fact.

Paragraph 1 (Guideline H - Drug Involvement)

The Government alleges under Guideline H that the Applicant is ineligible for clearance because he has used illegal drugs.

Applicant has been employed in the defense industry since 1981. (Government Exhibit 3, Section 11.) He first began using marijuana in 1979. He used it until approximately 1990. While marijuana was his drug of choice, he also used hashish, mushrooms, cocaine and crystal methamphetamine during the period 1979 through 1988. He used marijuana, cocaine and crystal methamphetamine after being granted a security clearance by the Department of Defense in 1981.

In August 1989 the Directorate for Industrial Security Clearance Review (predecessor agency to the Defense Office of Hearings and Appeals) issued an SOR to the Applicant proposing to revoke his security clearance. The SOR stated that the Applicant's drug abuse was one of the reasons he was not eligible for a security clearance. After a hearing, the Applicant was found ineligible for a security clearance in a decision dated April 23, 1990. (Government Exhibit 1.)

Applicant applied to have his security clearance renewed in 1994. In a letter dated May 28, 1994, Applicant gave various reasons about how his life has changed. In this letter he said, "I will not argue against any conclusions made in the determination, but I will only state that I no longer consume alcohol or drugs, or participate in the trafficking of any drug related products." (Government Exhibit 2 at 3.) Based on this statement, and other evidence, the Applicant's security clearance was reinstated in 1995. (Government Exhibit 2 at 1.)

Beginning in approximately February 2001 and continuing to approximately September 2008, the Applicant used marijuana again. According to the Applicant, his use of marijuana was very infrequent. The last time the Applicant used drugs was September 2008, with his brothers. (Transcript at 33-34.) (See Government Exhibit 4.) The decision to begin using marijuana again, despite his prior history and knowledge that it was inappropriate for security clearance holders, was his alone. (Transcript at

69.) He maintains that, on at least one occasion since then, he has turned down an opportunity to use marijuana. (Transcript at 41-44.) Applicant's last use of marijuana occurred after he filled out his last security clearance questionnaire, in March 2007.

Applicant submitted a written statement, which states that he has not used any marijuana since September 2008, he intends not to use illegal substances in the future, and he agrees that any future use of illegal substances will result in the automatic revocation of his security clearance. (Applicant Exhibit A.)

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in conduct which displays questionable judgment, dishonesty, or unwillingness to comply with rules and regulations.

As part of this allegation, the Government states that the Applicant's conduct in using illegal drugs after initially being granted a clearance in 1981, and subsequent to his security clearance being reinstated in 1995 (SOR 1.f. and 1.h.), is cognizable under this paragraph as well. Accordingly, the findings entered under Paragraph 1 concerning these allegations will be considered in determining the issues under this paragraph as well.

Applicant further admits that he was arrested for Indecent Exposure in December 1999. He was convicted in April 2001 and sentenced to pay a fine, 30 days public service, complete sex offender counseling and register as a sex offender. Applicant successfully completed the sex offender counseling. He remains registered as a sex offender. (Transcript at 76-77.)

Mitigation

Applicant's supervisor testified on his behalf. The witness testified that he has worked with the Applicant for almost two years, trusts the Applicant, and would like to promote him to positions of higher authority. The witness was particularly impressed with the Applicant's forthrightness after receiving the SOR. The witness made the decision that Applicant was still employable and could be trusted with classified information. (Transcript at 56-58.)

The alternate COSEC (Communication Security) manager for Applicant's employer submitted a letter. He discussed the Applicant's job performance, stating "[Applicant] is a valuable member to our division," and "I have no reason to question his integrity or job ethics in any way." (Applicant Exhibit A.)

Applicant's mother testified on his behalf. She stated that the Applicant is honest and a man of integrity. He has been forthcoming with her about his problems and she believes that he has overcome them at this point in time. (Transcript at 60-66.) Applicant's wife also submitted a letter on the Applicant's behalf. (Applicant Exhibit C.)

Applicant submitted documentary evidence showing that he is a highly respected employee. He was "Employee of the Quarter" for the third quarter of 2009. (Applicant Exhibits D and E; Transcript at 78-80.)

Policies

Security clearance decisions are not made in a vacuum. 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 to be used as appropriate 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(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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized by the President in Section 7 of Executive Order 10865, "Any determination under this order . . . shall be a determination 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

Paragraph 1 (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. 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; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under AG ¶ 25 and especially find that the following apply to this case:

- (a) any drug abuse;

- (g) any illegal drug use after being granted a security clearance; and

- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

The Applicant used marijuana on an infrequent basis, from 1979 until 1990, and again from 2001 until approximately September 2008. During both periods he held a security clearance, and knew his use of marijuana was inappropriate. Indeed, he used marijuana *after* losing his security clearance in 1990, and having it restored in 1995.

I have considered all of the mitigating conditions under AG ¶ 26 and especially considered the following:

(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 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 are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

The evidence is clear that the Applicant's use of marijuana were the actions of a mature person. Applicant stated several times that he would not use marijuana in the future, and submitted a signed statement to that affect. However, based on the facts of this case, his statements do not carry much weight. Enough time has not passed for me to say with any degree of confidence that he will not use marijuana in the future. None of the mitigating conditions apply to this case.

Paragraph 2 (Guideline E - Personal Conduct)

The security concern relating to Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules or regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.

The entirety of the Applicant's conduct set forth under Paragraph 2, brings into play disqualifying condition ¶ 16(c) under Guideline E:

credible adverse information in several adjudicative 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 following mitigating conditions under Guideline E ¶ 17 arguably apply to his conduct:

(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, and

(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.

Applicant's drug use, as described under Paragraph 1, above, is clearly inappropriate and cognizable under this Guideline. While it has been ten years since his sexual misconduct, Applicant still must register as a sex offender. He did discuss his coping strategies, but the record is simply too thin on this point for me to find that his conduct was unique and in the past. It is the Applicant's burden to show that the mitigating conditions apply. He failed to do so. This guideline is found against the 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 relevant circumstances. 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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. My findings under Paragraphs 1 and 2, above, are also relevant to this discussion. The Applicant is a hard-working, respected, professional who has engaged in occasional marijuana use for many years, and has a single arrest for indecent exposure in 1999. His drug use ended in the recent past, after he lost and regained his security clearance over that very issue. In viewing all the facts of this case, I find that the Applicant has not mitigated the security significance of his prior conduct. I further find that there have not been permanent behavioral changes under AG ¶ 2(a)(6). In addition, I find that there is still potential for pressure, coercion, exploitation, or duress (AG ¶2(a)(8)), and that there is likelihood of recurrence (AG ¶2(a)(9)).

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 the Applicant has not mitigated the security concerns arising from his drug

involvement and personal conduct as expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

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 THE APPLICANT

Subparagraphs 1.a through 1.h: Against the Applicant

Paragraph 2, Guideline E: AGAINST THE APPLICANT

Subparagraphs 2.a. through 2.c: Against the 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.

WILFORD H. ROSS
Administrative Judge