



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-08814
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: *Pro se*

June 23, 2010

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on September 18, 2007. (Government Exhibit 1.) On June 23, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline E (Personal Conduct) and Guideline H (Drug Involvement). 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 July 15, 2009, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on August 28, 2009. I received the case assignment on September 2, 2009. DOHA issued a notice of hearing on September 14, 2009, and I convened the hearing as scheduled on October 21, 2009. The Government offered Government Exhibits 1

through 5, which were received without objection. Applicant testified on his own behalf and submitted Applicant Exhibits A through E, also without objection. DOHA received the transcript of the hearing on October 30, 2009. The record closed on October 21, 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 58, and is a high school graduate. He is employed by a defense contractor and seeks to obtain a security clearance in connection with his employment.

Paragraph 1 (Guideline E - Personal Conduct)

Paragraph 2 (Guideline H - Drug Involvement)

The Government alleges under Guideline E that the Applicant is ineligible for a clearance because he has made false statements to the Government during the clearance screening process, as well as engaging in conduct showing questionable judgment.

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

Applicant admitted the factual allegations under both guideline, but denied that his conduct showed questionable judgment or a lack of candor. His admissions are hereby deemed findings of fact.

2.a. Applicant used marijuana from 1969 to 2001, and from 2004 to September 2006. Applicant estimates that he used marijuana in total about 30 to 40 times.

2.b. Applicant tested positive for marijuana in 2001 during a random drug test.

2.c. As a result of that positive drug test in 2001, he was required to attend drug counseling.

1.h. and 2.d. Applicant used marijuana while holding a security clearance during various periods from 1980 until 2006.

1.i. and 2.e. Applicant terminated his employment in about October 2004. One of the reasons for leaving was his refusal to participate in his company's drug testing program. This allegation will be further discussed under 1.c., below.

Beginning in 1991, and continuing to 2008, Applicant has repeatedly misstated the extent of his illegal drug use in questionnaires provided to the Government, and in interviews with authorized investigators. For ease of discussion, the remaining allegations under this paragraph will be examined in chronological order, and not in the order alleged in the SOR.

1.g. Applicant filled out a Government questionnaire in October 1991. He answered “No” to Question 20, which asked if he had ever tried or used any illegal drugs, including marijuana. (Government Exhibit 4.) This was a false answer concerning a relevant question about the Applicant’s drug use. (Transcript at 21-23.)

1.f. Applicant filled out a second Government questionnaire in May 1993. He answered “No” to Question 22, which asked if he had ever tried or used any illegal drugs, including marijuana. (Government Exhibit 3.) This was also a false answer concerning a relevant question about the Applicant’s drug use. (Transcript at 23.)

1.e. Applicant filled out a third Government questionnaire in July 2000. He answered “No” to Question 27, which asked if he had used any illegal drugs, including marijuana since the age of 16 or in the last seven years, whichever was shorter. (Government Exhibit 2.) This was also a false answer concerning a relevant question about the Applicant’s drug use. (Transcript at 23-24.)¹

1.d. Applicant filled out a fourth Government questionnaire in September 2007. He answered “Yes,” to Question 24, which asked if he had used any illegal drugs, including marijuana since the age of 16 or in the last seven years, whichever was shorter. (Government Exhibit 1.) He went on to say that he had used marijuana between July and August 2001. This was also a false answer concerning a relevant question in that it severely understated the true extent of Applicant’s drug use.

1.c. Government Exhibit 1 at Question 22 asks Applicant if, in the last seven years, he had been fired from a job, quit after being told he would be fired, left a job by mutual agreement after allegations of misconduct, left a job by mutual agreement after allegations of unsatisfactory performance, or left a job for other reasons under unfavorable circumstances. Applicant answered “No.” In fact, Applicant had left employment in October 2004 because he had refused to participate in his company’s drug testing program, as set forth in 1.i. and 2.e.

Applicant admits that he quit his job, in part, because he refused to participate in the drug testing program, knowing he would be terminated if he did not so participate. Applicant also argues that what he did, and why he did it, did not come under the purview of Question 22. (Applicant’s Answer at 3; Government Exhibit 5 at 11-13; Transcript at 30-31, 41-42.) However, at the hearing, Applicant eventually admitted, “The bottom line is this should have been put down on my Application, and it wasn’t.” (Transcript at 30.)

1.a. and 1.b. Applicant was interviewed by an authorized investigator of the Defense Department on July 29, 2008. In that first interview, and for the first time, Applicant set forth what he has stated was his entire drug abuse history. (Government Exhibit 5 at 4-7.)

¹Applicant also responded “No,” to question 28 of Government Exhibit 2, which asked whether he had “EVER illegally used a controlled substance . . . while possessing a security clearance.” (Emphasis in original.)

Applicant recontacted the investigator on August 12, 2008, and asked for a reinterview. During this interview, he recanted much his July 29, 2008, interview. In particular, he stated that he had lied about the extent of his drug use from 1970 to 2001, and 2004 to 2006. (Government Exhibit 5 at 7-8.)

Finally, on August 13, 2008, Applicant contacted the interviewer yet again. At this last interview he recanted his second statement and basically reaffirmed his first statement. Applicant gave conflicting reasons for deciding to come forward. At this interview, his drug use was described as follows:

[Applicant] had smoked marijuana while in college in 1969-70, he had smoked marijuana about 12 times between 1970 and the start of his 2001 vacation, smoked marijuana daily while on his 1 week - 10 days vacation in 2001 just before his urinalysis, and he had smoked marijuana a couple of times a year while out camping in 2005 and [2006], but none in 2007 to present. (Government Exhibit 5 at 9.) (See Transcript at 31-35, 39, 42-43.)

Mitigation

Applicant submitted documentary evidence showing that he is a highly respected employee. His current supervisor recommends Applicant for a security clearance, stating he is “dedicated” and “dependable.” (Applicant Exhibit A.) (See Applicant Exhibits B and C.)

Applicant’s last two “Employee Performance Evaluations” were also submitted. He received the highest ranking, “Exceeded Job Requirements.” (Applicant Exhibits D and E.)

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 own common sense,

as well as his 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 E - Personal Conduct)

Applicant repeatedly lied to the Government about the extent of his drug use over a period of 16 years, on four questionnaires and in three interviews. Applicant argues that he is telling the truth now, that his drug use was not that serious, and that he has been otherwise trustworthy. It is obvious that the Applicant is not a reliable or believable reporter of the facts concerning his own life, making his arguments specious at best.

Disqualifying Condition AG ¶ 16(a) applies to this case, concerning:

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.

In addition, AG ¶ 16(b) also applies, since he was “deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.”

Applicant’s conduct in using marijuana while having a security clearance, and terminating employment rather than take a drug test, is also cognizable under this paragraph. Specifically, AG ¶ 16(c):

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.

None of the Mitigating Conditions apply to this case. Paragraph 1 is found against the Applicant.

Paragraph 2 (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 considered the following: AG ¶ 25(a) “any drug abuse”; ¶ 25(b) “testing positive for

illegal drug use”; and ¶ 25(g) “any illegal drug use after being granted a security clearance.”

The Applicant used marijuana on an infrequent basis, from 1969 until approximately 2006. While he stated an intent not to use drugs in the future because he needed a security clearance, his statement was not clear and convincing.

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. As of the date of the hearing, the Applicant was 58 and had been using marijuana, albeit infrequently, for almost 30 years. If his job did not require him to have a security clearance, it is likely that he would continue such use into the future. He is commended for finally being honest with the Defense Department about his drug use. However, insufficient time has passed to show that he truly intends to stop marijuana use. The Applicant did not provide a signed statement that he would not use marijuana in the future with automatic revocation of clearance for any violation.

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. The Applicant is a hard-working, respected, professional who has engaged in occasional marijuana use for many years. In addition, he has a years long history of lying to the Government on essential security forms and in interviews. In viewing all the facts of this case, I find that the Applicant has not mitigated the security significance of his prior conduct. As set forth above, I 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 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:

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| Paragraph 1, Guideline E: | AGAINST THE APPLICANT |
| Subparagraphs 1.a through 1.i.: | Against the Applicant |
| Paragraph 2, Guideline H: | AGAINST THE APPLICANT |
| Subparagraphs 2.a. through 2.e. | 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