



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-09310
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: John B. Glendon, Esq., Department Counsel
For Applicant: *Pro se*

December 17, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement) and J (Criminal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on April 29, 2008. On April 28, 2009, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines H and J. 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) promulgated by the President on December 29, 2005.

Applicant received the SOR on May 5, 2009; answered it on May 27, 2009; and requested a hearing before an administrative judge. DOHA received the request on June 1, 2009. Department Counsel was ready to proceed on August 3, 2009, and the case was assigned to me on August 31, 2009. DOHA issued a notice of hearing on September 2, 2009, scheduling the hearing for September 23, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection, and Applicant testified. DOHA received the transcript (Tr.) on October 1, 2009.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.b-1.d and 2.a-2.d. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 37-year-old employee of a federal contractor. He has worked for his current employer since November 2007. He has never held a security clearance.

Applicant has a high school education. He was raised by his mother, a single parent, and grew up in an economically disadvantaged environment (Tr. 38-39). He is unmarried, but he has a 12-year-old son for whom he pays child support (Tr. 34). He spends considerable time with his son. In addition to having his son on weekends, he helps him with homework, calls him every night, visits his school, and talks to his teachers (Tr. 70-71).

In April 1991, Applicant was arrested and charged with possession of cocaine with intent to distribute, a felony. He was a senior in high school at the time, and he was selling drugs to make money (Tr. 37). He pleaded guilty, was sentenced to five years in jail (suspended), and was placed on probation for one year. The charges were dismissed after he completed his probation (Tr. 39; GX 2 at 6; GX 4 at 1; GX 5 at 3).

In November 1996, Applicant was arrested for a hit and run in which injuries were inflicted, a felony. He was 24 years old at the time and did not have a driver's license. He was found guilty of reckless driving, a misdemeanor, and he was fined (Tr. 40-42; GX 1 at 34).

In August 1997, Applicant was arrested for domestic assault, after he punched the mother of his son in the eye during an argument (GX 5 at 3; Tr. 66). He pleaded guilty (Tr. 43-44). The sentence is not reflected in the record.

Applicant used marijuana about three times a week between January and August 1999. In August 1999, he was charged with possession of cocaine and marijuana (GX 5 at 3). He was placed on probation for five years and ordered to complete a "drug court" program (GX 2 at 5). He described the program as a very intense and effective drug treatment program. He was required to attend frequent support group meetings, get a job, pay his court costs, and demonstrate personal responsibility (Tr. 47-48). He testified

he “had a problem with marijuana” but has never used cocaine (Tr. 46). He completed the drug treatment program and was on probation until October 13, 2006 (GX 4 at 3-5; Tr. 52-53).

In June 2001, Applicant was stopped for a traffic offense. He did not have a driver’s license at the time, and he was delinquent on his child support payments. He spent four months in a detention center and four months on a work-release program at a diversion center (Tr. 48-50).

In November 2001, Applicant was charged with being a habitual offender as a result of the June 2001 traffic offenses (Tr. 50-51). He was sent to a detention center for 90 days, of which 60 days were suspended (GX 4 at 8).

In June 2007, Applicant side-swiped another vehicle while merging onto a highway, but he did not stop. His driver’s license was suspended at the time (Tr. 56). He was charged with reckless driving resulting in an accident, leaving the scene of an accident, and operating an uninsured vehicle (GX 2 at 4; GX 4 at 11-13). He was convicted and sentenced to 30 days in jail (suspended).

Applicant used marijuana eight to ten times between December 2006 and February 2007 (GX 1 at 35). During this time, he was unemployed and living with his mother. He testified he used the marijuana to relax (Tr. 61).

Applicant was interviewed by a security investigator in June 2008. The written summary of his interview indicates that he purchased and smoked a marijuana cigarette in December 2007, and that he told the investigator that he stopped using marijuana after that date (GX 2 at 5). At the hearing, he testified that he last used marijuana in March 2007, before he began his current employment. He testified that the date of his last use of marijuana was incorrectly reflected in the written summary of his interview (Tr. 64). He no longer associates with persons involved with drugs (Tr. 70). He was required to undergo a urinalysis before he began his current job, and it was negative (Tr. 63).

About a week before the hearing, Applicant was involved in another car accident. He rear-ended another vehicle, resulting in substantial damage to his car but none to the car he hit. When this accident occurred, he had insurance and a valid driver’s license (Tr. 57-59). Unlike his previous car accidents, he stopped and identified himself. He testified that he acted responsibly after this accident because he had decided to change his lifestyle. He denied that his responsible behavior was motivated by his pending hearing (Tr. 68).

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an

individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement

The SOR alleges Applicant used marijuana with varying frequency from December 1999 to March 2007 (SOR ¶ 1.a); he completed a court-ordered drug program in October 2006 and used marijuana after completing this program (SOR ¶ 1.b); he was arrested, charged, and convicted of possession of cocaine and marijuana in August 1999 (SOR ¶ 1.c); and he was arrested and charged with possession of cocaine with intent to distribute in April 1991 (SOR ¶ 1.d).

The concern under this guideline is as follows: “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.” AG ¶ 24. This guideline encompasses “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).” AG ¶ 24(a)(1).

Two disqualifying conditions under this guideline are relevant: AG ¶ 25(a) (“any drug abuse,” defined in AG ¶ 24(b) as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction”); and AG ¶ 25(c) (“illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia”). The evidence in this case establishes these two disqualifying conditions, shifting the burden to Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated if “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 current reliability, trustworthiness, or good judgment.” AG ¶ 26(a). The first prong of AG ¶ 26(a) (“happened so long ago”) focuses on whether the drug involvement was recent. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

According to Applicant's testimony at the hearing, his last use of marijuana or any other illegal drug was in March 2007. On its face, the time period between March 2007 and the hearing was a “substantial period of time.” His last misconduct before the hearing was the hit-and-run incident in June 2007. On the other hand, he used

marijuana, sometimes frequently, from December 1999 to at least March 2007. His drug abuse was not the result of circumstances that make it unlikely to recur. Between April 1991 and June 2007, he was convicted of two drug-related offenses, involved in two hit-and-run driving incidents, and convicted of domestic assault. He started his new job in November 2007 and applied for a clearance in April 2008, about a year after his last marijuana use and ten months after his last misconduct. Since April 2008, he has lived under the pressure of qualifying for a clearance. Under all these circumstances, I am not satisfied that he has established a track record of drug-free and responsible behavior sufficient to demonstrate reform or rehabilitation. I conclude AG ¶ 26(a) is not established.

Security concerns also may be mitigated by “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 were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.” AG ¶ 26(b). The evidence establishes AG ¶ 26(b)(1), but not AG ¶ 26(b)(2), (3), or (4).

Security concerns also may be mitigated by “satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.” AG ¶ 26(d). Applicant completed an intensive drug treatment program, but he has not met the two remaining prongs of this mitigating condition, because he used marijuana eight to ten times between December 2006 and February 2007, and there is no evidence of a favorable prognosis.

Guideline J, Criminal Conduct

The SOR alleges that in June 2007, Applicant was charged with and convicted of leaving the scene of an accident, reckless driving resulting in an accident, and operating an uninsured motor vehicle (SOR ¶ 2.a); that in November 2001, he was charged with and found guilty of being a habitual offender (SOR ¶ 2.b); that in August 1997, he was arrested for and convicted of domestic assault (SOR ¶ 2.c); and that in November 1996, he was arrested for hit-and-run and convicted of reckless driving (SOR ¶ 2.d). The SOR also cross-alleges the drug-related offenses in SOR ¶¶ 1.a, 1.c, and 1.d as criminal conduct under this guideline (SOR ¶ 1.e).

The concern raised by criminal conduct is that it “creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.” AG ¶ 30. The relevant disqualifying conditions are AG ¶ 31(a) (“a single serious crime or multiple lesser offenses”) and AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”). Applicant's multiple arrests and convictions raise both of these disqualifying conditions.

A disqualifying condition under this guideline also may be raised by “violation of parole or probation.” AG ¶ 31(e). Applicant’s arrest in June 2001 may have been a violation of the probation imposed in 1999, but the record does not reflect the terms of probation, and the evidence regarding the habitual offender charge is scant. Accordingly, I am not satisfied that this disqualifying condition is raised by substantial evidence.

Security concerns under this guideline may be mitigated by evidence that “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” AG ¶ 32(a). Security concerns also may be mitigated if “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.” AG ¶ 32(d). For the reasons set out above in my discussion of Guideline H, I conclude these two mitigating conditions are not established.

Whole Person Concept

Under the whole person concept, an 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. An 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 incorporated my comments under Guidelines H and J in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature adult. He presented himself as sincere and candid at the hearing. I am satisfied that he wants to put his old lifestyle behind him, but I am not satisfied that he will not fall back into old behavior when he is no longer under the pressure of qualifying for a clearance. His irresponsible behavior and drug abuse extended beyond his youth and into his mid-thirties. He was thirty-five years old when the last hit-and-run accident occurred. He successfully completed a drug treatment

program, but there is no evidence of a favorable prognosis. He behaved responsibly when he had another accident about a week before the hearing, but this situation differed from the earlier hit-and-run cases, where he fled because he did not have a valid driver's license. When he had his latest accident, he had a valid driver's license and insurance, and he knew his hearing was imminent. He has not yet established a track record of drug-free and responsible behavior. See Directive ¶¶ E3.1.37 through E3.1.41 (reconsideration authorized after one year).

After weighing the disqualifying and mitigating conditions under Guidelines H and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on drug involvement and criminal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a-2.e:	Against Applicant

Conclusion

In light of all of the circumstances, 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.

LeRoy F. Foreman
Administrative Judge