



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



In the matter of:

ISCR Case No. 08-11336

Applicant for Security Clearance

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: *Pro Se*

September 24, 2009

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the case file, pleadings, and exhibits, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under Guideline H, Drug Involvement, and Guideline F, Financial Considerations. I also conclude that there is insufficient record evidence to conclude that Applicant is disqualified, pursuant to the Bond Amendment, from holding a security clearance. His eligibility for a security clearance is denied.

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on July 28, 2008. On April 23, 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 F, Financial Considerations. 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.

In his Answer to the SOR, dated May 12, 2009, Applicant requested a decision on the record in lieu of a hearing. The Government did not request a hearing within 20 days of receipt of Applicant's Answer. (See Directive, Enclosure 3, Additional Procedural Guidance (E3.1.7)). The Government then compiled its File of Relevant Material (FORM) on June 23, 2009. The FORM contained documents identified as Items 1 through 8. By letter dated June 24, 2009, DOHA forwarded a copy of the FORM to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the file on June 29, 2009. His response was due on July 29, 2009. Applicant did not file additional information within the required time period. On September 3, 2009, the case was assigned to me for a decision.

Findings of Fact

The SOR contains five allegations of disqualifying conduct under Guideline H, Drug Involvement (SOR ¶¶ 1.a. through 1.e.), and ten allegations of financial delinquency under Guideline F, Financial Considerations (SOR ¶¶ 2.a. through 2.j.). In his Answer to the SOR, Applicant admitted the five Guideline H allegations. He admitted four of the Guideline F allegations of financial delinquency (SOR ¶¶ 2.b., 2.d., 2.f., 2.j.) He denied one Guideline F allegation (SOR ¶ 1.c.) as a duplicate of the allegation at SOR ¶ 1.d. There was insufficient evidence in the record to substantiate the allegation and to rebut his denial. Additionally, he denied the following five Guideline F allegations: SOR ¶¶ 2.a., 2.e., 2.g., 2.h., and 2.i. Applicant's admissions are entered herein as findings of fact. (Item 1; Item 4.)

After a thorough review of the documentary record before me, I make the following additional findings of fact:

Applicant is 42 years old, never married, and employed in information technology by a government contractor. From 2001 to 2008, he was self-employed in information technology. (Item 5.)

On September 17, 2008, Applicant was interviewed by an authorized investigator from the U.S. Office of Personnel Management (OPM). On January 30, 2009, in response to DOHA interrogatories, Applicant provided a signed notarized statement that acknowledged and adopted the authorized investigator's summary of his interview as accurate. He also affirmed his understanding that his responses to the interrogatories and the content of the investigator's report might be used as evidence to determine his suitability for a security clearance. (Item 6 at 8.)

Applicant has used marijuana, with varying frequency, for approximately 27 years, from 1981 to September 2008.¹ He suffers from obsessive compulsive disorder,

¹ The investigator reported that Applicant had abstained from marijuana use between 1995 and 2003. However, in his responses to interrogatories, Applicant stated: "I do not have enough confidence in my memory to say, 'He did not use marijuana from 1995 until 2003.'" (Item 6 at 3, 6.)

depression, and anxiety. His problems with depression and anxiety began in adolescence. He has been under the care of a psychiatrist since 1995. Applicant described his medical treatment as follows:

I've been prescribed at least 20 different medications with limited success and various side-effects. The only thing that I have found that can effectively stabilize my mood and reduce the anxiety is marijuana. When it's out of my system, I'm less than useless. I become depressed, impatient, unmotivated, hopeless, and withdrawn. I have recently begun taking St. John's Wort in addition to my prescribed medications in hopes that it will be something that can help me reduce (or perhaps eliminate) the marijuana.

(Item 5 at 17.)

Beginning in 2003, Applicant used marijuana three times a day: in the morning, after work, and before going to bed at night in order to relax. He found that the marijuana had a calming effect on him. He used marijuana on the morning of the day he was interviewed by the authorized investigator from OPM. As of September 17, 2008, he purchased marijuana every two weeks. He spent about \$240 a month on marijuana. (Item 6 at 3.)

Applicant told the investigator that he self-medicated with marijuana in order to be a productive person. He stated that he believed himself to be addicted to marijuana, and he believed he could not function without it. (Item 6 at 3.)

Applicant was never arrested for illegal drug use, and his illegal drug use was limited to marijuana. Nothing in the record establishes that Applicant received a diagnosis of drug abuse or drug dependence from a medical professional, nor does the record establish that he sought medical treatment specifically for his drug use. His family and coworkers did not know that he used marijuana. In a notarized statement, dated January 30, 2009, Applicant stated: "My point of contact (manager) is aware that I use marijuana." His friends knew he used the drug, and he used marijuana with friends about twice a month. (Item 6 at 3, 6.)

Applicant reported a gross monthly income of \$3,100. He was responsible for filing a Form 1099 to pay his income taxes at the end of the tax year. He identified the following monthly fixed living expenses: house payment, \$489; car payment, \$289; automobile insurance, \$65; utilities, \$120; association fees, \$200; medications, \$35; debt for advertising his former business, \$320; and purchase of marijuana, \$240. He stated that, in the past, he had paid the Internal Revenue Service (IRS) \$320 each month, but had not done so recently. His monthly disposable income did not include

setting money aside to pay his income taxes.² Applicant acknowledged that he had not paid his federal income taxes for several years. He also acknowledged he had not paid his state income taxes since 2000. (Item 6 at 4, 7.)

In response to the SOR, Applicant admitted four delinquent debts of approximately \$31,219. Two of the debts were substantial: a \$17,945 federal tax lien (SOR ¶ 2.b.) and a delinquent business debt of \$12,018 (SOR ¶ 2.f.) Neither debt has been satisfied. Additionally, Applicant admitted that a notice of lien had been filed against him for \$1,016 (SOR ¶ 2.d.), and the debt remained unsatisfied. While these delinquent debts remained unsatisfied, Applicant spent about \$240 a month on marijuana (SOR ¶ 2.j.). (Answer to SOR; Item 6 at 3, 4, 7.)

In his September 17, 2008, interview with an authorized investigator, Applicant admitted a state tax lien of \$2,328 to his state taxing authority and acknowledged that he had made no payments on the lien. In his response to the SOR, he denied the lien and stated that the lien had been satisfied. However, he failed to provide documentation to corroborate satisfaction of the lien. I find his denial is not credible in light of his other statements in the record. (SOR ¶ 2.a.; Answer to SOR; Item 6 at 7.)

In his September 17, 2008, interview with the OPM authorized investigator, Applicant admitted the \$621 debt alleged at SOR ¶ 2.i., and he acknowledged that it was unpaid. He also admitted that the \$537 debt alleged at SOR ¶ 2.g. and the \$581 debt alleged at SOR ¶ 1.h were his debts and remained unpaid. Applicant also told the investigator that he had paid the \$974 debt alleged at SOR ¶ 2.e. However, he did not recall the amount of the debt or when it was paid. (Item 6 at 4.)

Applicant told the investigator that his financial problems arose when he had his own business and acquired a great number of debts he could not pay. He could not recall the specifics of any of the debts, but he stated he intended to contact his creditors and satisfy those debts that were in collection or charged-off status. (Item 6 at 4.)

In response to the SOR, Applicant denied the debts alleged at SOR ¶¶ 2.e., 2.g., 2.h., and 2.i., claiming that the debts were not his because they were in charged-off status. (Item 4 at 2, 3.)

Nothing in the record establishes that Applicant received consumer credit counseling.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and

² Later, in response to DOHA interrogatories, Applicant reported that his medication cost \$758 per month. He also reported that he had failed to submit monthly payments of \$320 on the business debt he owed, and the account was subsequently in collection status. (Item 6 at 7.)

it has emphasized that “no 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 Applicant’s 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.

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge applies these guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching 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.

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).

In SOR ¶ 1.e., the Government alleged that Applicant was disqualified under the provisions of 50 U.S.C. § 435c (the Bond Amendment) from holding a security clearance. By memorandum dated June 20, 2008 (hereafter cited as Memorandum), the Deputy Under Secretary of Defense (HUMINT, Counterintelligence & Security) issued interim guidance for the implementation of the Bond Amendment. The interim guidance prohibited all Federal agencies from granting or renewing a security clearance to any person who is an unlawful user of a controlled substance or who is an addict. (Memorandum at 2.)

The Memorandum defines “unlawful user of a controlled substance” as “a person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance” and “any person who is a current user of the controlled substance in a manner other than as prescribed by a licensed physician.” (Memorandum at 2.)

The Memorandum further specifies that “such [current] use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct.” Additionally, the Memorandum defines “addict” of a controlled substance as “any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare; or [who] is so far addicted to the use of narcotic drugs as to have lost the power of self control with reference to his addiction.” (Memorandum at 2.)

Analysis

Guideline H, Drug Involvement

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness 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(a) defines drugs as “mood and behavior altering substances.” The definition of drugs includes “(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.” AG ¶ 24(b) defines drug abuse as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

The record shows that Applicant admitted the illegal use and possession of marijuana, with varying frequency, for approximately 27 years, from 1981 to at least September 17, 2008. He was using marijuana when he completed his e-QIP on July 28, 2008, and he used marijuana on the morning of September 17, 2008, the same day he

was interviewed by an authorized OPM investigator. Applicant's use of marijuana is an habitual, long-standing, lifestyle choice.

When he completed his e-QIP, Applicant described marijuana as "the only thing that I have found that can effectively stabilize my mood and reduce [my] anxiety." When he had no marijuana in his system, applicant felt "less than useless, . . . depressed, impatient, unmotivated, hopeless, and withdrawn." He told the authorized investigator that he believed himself to be addicted to marijuana.

Applicant's involvement with an illegal drug, marijuana, casts doubt on his reliability, trustworthiness, and good judgment. It also raises security concerns about his ability or willingness to protect classified information and to comply with laws, rules, and regulations. I conclude that Applicant's illegal drug use raises security concerns under AG ¶¶ 25(a), 25(c), and 25(h).³

Two Guideline H mitigating conditions might apply to the facts of Applicant's case. If Applicant's drug use happened "so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt" on his "current reliability, trustworthiness, or good judgment," then AG ¶ 26(a) might be applicable in mitigation. If Applicant "demonstrated [an] intent not to abuse any drugs in the future" by "(1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used;" (3) abstaining from drug use for an appropriate period; and (4) signing a "statement of intent with the automatic revocation" of his security clearance "for any violation," then AG ¶ 26(b) might be applicable.

The documentary record shows that Applicant's drug use as of September 2008 was on-going and frequent. As of January 30, 2009, the documentary record again reflects that he acknowledged marijuana use. He also maintained contacts with drug-using associates, and he used drugs regularly with them. Nothing in the record suggests that he abstained from drugs for an appropriate period in order to demonstrate an intent not to abuse drugs in the future. Because he believed that only marijuana could reduce his frequent depression and anxiety, Applicant's use of the illegal drug occurred under circumstances that are likely to recur. The record reflects a strong likelihood that he may not be able to abstain from drug use in the future.

The Memorandum defines "current use" as unlawful use [that] has occurred recently enough to indicate that the individual is actively engaged in such conduct." The record in this case is silent regarding the degree and frequency of Applicant's use of marijuana since September 2008. Absent testimony from Applicant on the record about his current marijuana use and intent to use marijuana in the future, I conclude that there is insufficient evidence in the record to establish that Applicant is an addict who

³ AG ¶ 25(a) reads: "any drug abuse [as defined at AG ¶ 24(b)]." AG ¶ 25(c) reads: "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia." AG ¶ 25(h) reads: "expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinuing drug use."

“habitually uses any narcotic drug so as to endanger the public morals, health, safety or welfare.” Additionally, while Applicant’s own statements establish that, as of September 2008 and January 2009, he was “an unlawful user of a controlled substance,” there is insufficient evidence in this record to establish that he is a current user of marijuana and that he “has lost the power of self-control with reference to the use of the controlled substance.”

I conclude that AG ¶¶ 26(a) and 26(b) do not apply in mitigation to the security concerns raised by the facts in Applicant’s case. I also conclude that there is insufficient record evidence to establish that the Bond Amendment applies to this Applicant’s case.

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Under AG ¶ 19(f), a disqualifying condition can arise when an individual’s “financial problems are linked to drug abuse, alcoholism, gambling problems, or other issues of security concern.” Moreover, “failure to file annual [f]ederal, state, or local income tax returns as required . . .” can raise security concerns under AG ¶ 19(g).

Applicant accumulated substantial delinquent debt and did not pay his creditors. Instead of paying his creditors, he devoted \$240 a month to purchasing and using an illegal drug. He failed to file his state and federal taxes, which resulted in tax liens for which he failed to provide evidence of satisfaction. This evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Several Guideline F mitigating conditions could apply to the security concerns raised by Applicant’s financial delinquencies. If the financially delinquent behavior “happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment,” then AG ¶ 20(a) might apply. If “the conditions that resulted in the financial problem were largely beyond the

person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce, or separation), and the individual acted responsibly under the circumstances," then AG ¶ 20(b) might apply. If "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control," then AG ¶ 20(c) might apply. If "the individual initiated a good faith effort to repay overdue creditors or otherwise resolve debts," then AG ¶ 20(d) might apply. Finally, if "the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue," then AG ¶ 20(e) might apply.

Applicant has a history of financial delinquencies. Moreover, the delinquencies remain unpaid and have occurred under circumstances that are likely to recur. He has not received financial counseling, and he had not made good faith efforts to pay or settle his delinquent debts.

Applicant reported that some of his delinquent debt resulted from business losses. However, he did not specify how the losses occurred and what he did to remedy or contain them. It is unclear that the business losses were beyond his control. Additionally, the record does not reflect that Applicant's actions in the face of his financial difficulties were reasonable and responsible. In his interview with an authorized investigator, Applicant expressed his intent to satisfy and settle his delinquent debts in the future. However, in determining an individual's security worthiness, the Government cannot rely on an Applicant's unsupported promise to resolve his outstanding debts at some future date. ISCR Case No. 98-0614 at 5 (App. Bd. Jul. 12, 1999). I conclude that none of the guideline F mitigating conditions applies to the facts of Applicant's case.

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 an applicant's conduct and all 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.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant was candid in discussing his long use of marijuana and how, in September 2008, he used the drug in an attempt to alleviate his depression and anxiety. However, he failed to recognize how this conduct could compromise his ability to protect classified information.

Applicant has failed to satisfy his delinquent debts, and he fails to understand that he is responsible for debts that have been charged off and may no longer appear on his credit reports. He lacks a detailed, credible plan to resolve his current delinquencies and to avoid financial problems in the future. His reported use of his limited resources to purchase illegal drugs instead of paying his legitimate creditors raises concerns about his judgment and reliability.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising from his drug involvement and financial delinquencies.

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

 Subparagraphs 1.a. through 1.d.: Against Applicant

 Subparagraph 1.e.: For Applicant

Paragraph 2, Guideline F: AGAINST APPLICANT

 Subparagraphs 2.a. and 2.b.: Against Applicant

 Subparagraph 2.c.: For Applicant

 Subparagraphs 2.d. through 2.j.: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance.

Joan Caton Anthony
Administrative Judge