



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



| | | |
|----------------------------------|---|------------------------|
| In the matter of: |) | |
| |) | |
| XXXXXXXXXX, XXXXX |) | ISCR Case No. 09-02611 |
| SSN: XXX-XX-XXXX |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Jennifer I. Goldstein, Esq., Department Counsel
For Applicant: *Pro se*

August 5, 2010

Decision

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns pertaining to Guidelines H (drug involvement), J (criminal conduct), and E (personal conduct). Clearance is granted.

Statement of the Case

On January 7, 2009, Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP). On September 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H (drug involvement), J (criminal conduct), and 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 on September 1, 2006.

Applicant acknowledged receipt of the SOR on September 23, 2009. He answered the SOR on October 6, 2009, and DOHA received his answer on October 8,

2009. Department Counsel was prepared to proceed on October 27, 2009. The case was assigned to me on October 28, 2009. DOHA issued a notice of hearing on January 7, 2010, scheduling the case for January 26, 2010. The hearing was convened as scheduled.

The Government offered Government Exhibits (GE) 1 through 4, which were received without objection. Applicant offered Applicant Exhibit (AE) A, which was received without objection, and he testified on his own behalf. DOHA received the hearing transcript (Tr.) on February 3, 2010.

Findings of Fact

Applicant admitted all of the SOR allegations except for SOR ¶¶ 2.a. and 3.a., which he denied. His admissions are accepted as findings of fact. (Response to SOR, Tr. 8-15.)

Applicant is a 38-year-old maintenance trade helper, who has been employed by a defense contractor since January 2008. He testified that he has held a security clearance since being employed for his company, and that maintaining a security clearance is a condition of his continued employment. His previous employment consisted of several masonry-related positions in the construction field. (GE 1, Tr. 17-24.)

Applicant was born and raised in a rural agricultural community in the Southwestern United States. He did not complete high school; however he did earn his General Educational Development (GED) certificate while he was in prison from 1992 to 1994, discussed *infra*. He has no formal education beyond his GED. (Tr. 24-25, 28-29.) Applicant married in approximately July 1997, but has been in a relationship with his wife since 1991. He has four children with his wife, a 19-year-old daughter, who is attending university, a 13-year-old daughter, a 7-year-old son, and a 4-year-old daughter. The three youngest children live at home. (Tr. 24-28.)

Drug Involvement

Applicant has a history of drug involvement that spanned an approximate 16-year period beginning in 1986, when Applicant was 15 years old, and continued to 2003, when Applicant was 32 years old.¹ (GE 3.)

Applicant's introduction to marijuana began at an early age, perhaps as early as eighth grade. (Tr. 30.) He explained, "[e]verybody did it, with the guys I (was) hanging around with." (Tr. 29.) He acquired marijuana from "[t]he streets" and eventually began selling marijuana, but does not remember exactly when he made the transition from use to sales. (SOR ¶¶ 1.a. – 1.c.; Tr. 29-30.)

¹ These dates and ages are approximations. Applicant was unable to recall with any degree of certainty exact dates, ages, and amounts of marijuana involved. (Tr. 28-33.)

Applicant's drug involvement took a significant turn for the worse in November 1991 at age 20. Out of work and in need of money, he agreed to accompany a friend to pick up a load of marijuana near the Mexican border. Applicant explained his decision, "(I was) [d]umb I guess." (Tr. 35.) Unbeknown to Applicant and his friend, the Border Patrol observed them while they were picking up the drugs and arrested them. Applicant was charged with felony smuggling of marijuana, felony possession of marijuana (60 – 62 pounds), and felony possession of drug paraphernalia. In April 1992, he pled guilty to an amended charge of felony conspiracy to transport marijuana. The remaining charges were dismissed. He was sentenced to five and one-quarter years in prison and an \$800 fine. He was released from prison after serving two and one-half years. (SOR ¶ 1.d.) Applicant successfully completed one and one-half years probation. After he was released from prison, he attended alcohol and drug awareness classes in the 1994-1995 timeframe. (GE 2, GE 3, GE 4, Tr. 33-38.)

While on parole, Applicant refrained from marijuana use because he was subject to random drug testing. He resumed marijuana use when he completed probation in approximately 1997 and continued to use marijuana until approximately 2003. When queried why he resumed using marijuana, Applicant stated, "I don't know. . . . I think I was hanging around with the wrong crowd And that's not to blame the crowd, this is – I'm really the one guilty for it, I mean." (Tr. 40.)

In approximately 2003, Applicant stopped using marijuana when he began attending church. His introduction to the alternate lifestyle offered through his church was a significant turning point in his life. He stated that he stopped using illegal substances because he did not want his family "to grow up the way I did. I want a better life for them. I want to be the father and husband they and my country needs," and cited his "love for my family." He also stopped drinking alcohol around this time. Applicant credibly expressed his intent to remain drug free. Lastly, he has long since disassociated himself from individuals involved with drugs, and he associates with friends he met through church. (GE 3, Tr. 40-41.)

Criminal Conduct

The allegation, which references Applicant's 1991 drug-related arrest, is cross-alleged under this concern. (SOR ¶ 2.a.). Applicable facts and discussion under Drug Involvement are incorporated under this concern, discussed *supra*.

Personal Conduct

SOR ¶ 3.a. alleges that Applicant failed to disclose his past drug activity to include use, purchase, and sale of marijuana ending in 2003 when completing his January 2009 e-QIP. When queried why he failed to list his past drug use, Applicant stated, "I don't know why I did it. I should have put, yes, I know that." He acknowledged being embarrassed about his past drug involvement, but added despite his embarrassment, he informed his supervisors about his past drug involvement and prison record. (Tr. 44-46.) Applicant stated that he filled out his e-QIP "quick," adding "And I don't know exactly the date I stopped using marijuana. I don't (know) the exact

date, if it was July, June of 2000 let's – I know it's anywhere from seven years. Maybe a little bit over, maybe a little bit less.” (Tr. 14.)

I note that Applicant listed the details of his November 1991 drug arrest and prison sentence on his January 2009 e-QIP, putting the Government on notice about his past drug involvement. Additionally, Applicant readily acknowledged his past drug involvement and discussed it in detail during his February 2009 Office of Personnel Management (OPM) interview. (GE 2.)

Character Evidence

Applicant submitted a January 2010 letter from his pastor stating:

I have known [Applicant] since 2007. [Applicant] has become an excellent server for God, with different characteristics, just to name a few, very responsible, caring, always exploring ways to serve in our Center. His positive disposition is very important for us.

His love for God and our community has been an instrument utilized to engage in different activities that represent the Mission. Because of these and other factors, I highly recommend [Applicant]. (AE A.)

Applicant credibly conveyed that he is not the same person he was ten years ago, that he is a committed family man, active in his church, a law abiding citizen and, a contributing member of society. (Response to SOR, Tr. 18.)

Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used 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 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.

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 in seeking to obtain 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 an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude that three relevant security concerns exist under Guidelines H (drug involvement), J (criminal conduct), and E (personal conduct) with respect to the allegations set forth in the SOR.

Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

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.

The Government established its case under Guideline H through Applicant’s admissions and the evidence presented.

A review of the evidence supports application of two drug involvement disqualifying conditions. AG ¶ 25(a): “any drug abuse (see above definition);”² and AG ¶ 25(c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia.”

Considering the totality of the circumstances in this case, two drug involvement mitigating conditions apply: AG ¶ 26(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 current reliability, trustworthiness, or good judgment;” and AG ¶ 26(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 were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.”

Concerning AG ¶ 26(a), 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 record within the parameters set by the Directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant’s last use of marijuana occurring approximately 17 months before the hearing was not recent. 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.”³

² 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 medication direction.

³ ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge’s decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle change and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant’s last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant’s efforts at alcohol rehabilitation.”) (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

AG ¶ 26(a) applies. Applicant's last drug use was 2003, about seven years before his hearing. His overall illegal drug use occurred primarily in his early years and tapered off as he matured, and ceased altogether at age 32 when his church, family responsibilities and desire to be a better role model and responsible citizen became more of a priority to him than a life involving drugs. The absence of evidence of more recent or extensive drug use, and his promise not to use illegal drugs in the future eliminates doubts about his current reliability, trustworthiness, or good judgment with respect to abstaining from illegal drug use.⁴

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. With advanced maturity and the concomitant responsibilities of being a husband, father, and citizen, he has broken his ties with the drug world. He no longer associates with his former friends involved with drugs. He has abstained from drug use for at least seven years and has no problem in doing so. He expressed a sincere intent to remain free of further drug involvement. He also no longer consumes alcohol. AG ¶ 26(b) fully applies.

His reference letter from his pastor supports his assertion that his religious involvement is not a passing phase, but involves a longstanding and sincere commitment to lead a more wholesome life and be a responsible member of the community. His supervisors are aware of his past drug history and continue to support him. His work behavior has not been indicative of having a drug problem. He is a valuable employee, who is reliable, dependable, and contributes to the company mission. He enjoys the support of his employer. At his hearing, Applicant acknowledged that future drug abuse is incompatible with his career and family plans, and manifested a steadfast commitment to continue lifestyle changes consistent with total abstinence from marijuana or any other drugs.

Criminal Conduct

AG ¶ 30G articulates the security concern concerning criminal conduct:

Criminal activity 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.

The Government established its case under Guideline J through Applicant's admissions and the evidence presented. As noted, the criminal conduct allegation is cross alleged under drug involvement.

A review of the evidence supports application of two criminal conduct disqualifying conditions. AG ¶ 31(a) "a single serious crime or multiple lesser offenses;"

⁴In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

and AG ¶ 31(c) “allegation or admission of criminal conduct regardless of whether the person was formally charged, formally prosecuted or convicted.”

For reasons discussed under Drug Involvement, *supra*, I find that criminal conduct mitigating conditions AG ¶ 32(a) “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 case doubt on the individual’s reliability, trustworthiness, or good judgment;” and AG ¶ 32(d) “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;” apply.

The record is void of any criminal involvement of any nature other than the incidents in question. Although not an excuse or exoneration for what happened, the offenses in question occurred 19 years ago and his marijuana use occurred seven years ago when Applicant was associating with a different crowd. Applicant has expressed remorse for past criminal behavior, feels he has paid his debt to society, and is making every effort to be a law-abiding member of society.

Personal Conduct

The security concern relation to the Guideline for personal conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case in regard to the allegation Applicant provided a false security clearance application:

- (a) 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; and
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

In January 2009, Applicant provided incomplete responses on his e-QIP regarding past drug use. Applicant failed to disclose his past use, possession, and sale

of marijuana, which occurred in approximately 2003, close to the seven-year window envisioned by the scope of the question. He did, however, disclose his 1991 arrest involving marijuana and the fact that he was sentenced to prison.

Applicant acknowledged his answer was incorrect, but added that there was no intent on his part to deliberately falsify his e-QIP. Of note, he listed his more serious drug involvement which resulted in his being sent to prison. He also disclosed his past drug involvement and prison record with his supervisors and fully discussed his drug past in his February 2009 OPM interview. While not proud of his past, he candidly discussed his past drug use at his hearing. His felony drug arrest clearly put the Government on notice that he did not have a record free of drug involvement. I also took into account Applicant's educational background.

A statement is false when it is made deliberately. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported. Applicant was candid and forthright at his hearing about his drug past. In evaluating his testimony, I note he is unable to recall with specificity start and stop dates given the frequency and circumstances under which his past drug use occurred. Applicant was contrite, yet forthright in his demeanor without being evasive. His character evidence strongly supports the notion that he is an honest individual. The falsification allegations are not substantiated. I am satisfied Applicant did not deliberately and intentionally fail to disclose his past drug use, as alleged, with intent to deceive.⁵

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

⁵The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

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.

There is some evidence against mitigating Applicant's criminal conduct. Applicant's past drug involvement spanned a 16-year period from 1986 to 2003. Of note, he was convicted of felony conspiracy to transport marijuana for which he served two and one-half years in prison. He foolishly resumed marijuana use after completing his probation in 1997 and did not stop using marijuana until 2003. These factors show a certain level of culpability and lack of judgment on Applicant's part.

The mitigating evidence under the whole-person concept is sufficient to warrant reinstatement of Applicant's security clearance. Applicant has successfully held a security clearance for two years. Of note, he overcame some rather challenging odds and turned his back on a pattern of behavior that was self-destructive and without a future. His road to rehabilitation was not without setbacks. He stumbled and resumed marijuana use after completing his probation. Fortunately, he had the good sense to overcome his serious lapse in judgment. In Applicant's case, his church was instrumental in providing him the incentive and motivation to turn his behavior around. He recognized his life was on a dead end path and he would leave his children a disappointing legacy. To Applicant's credit, he has not used drugs or alcohol for seven years. He has disassociated himself from friends and acquaintances whose values are not consistent with his. For someone who earned his GED in prison, he takes considerable pride in the fact that his oldest daughter is in university. In short, Applicant has come too far to revert to the life he once led.

Applicant's incomplete and incorrect descriptions of his past arrests placed his credibility into question. The Government relies on each applicant for a security clearance to thoroughly and accurately respond to questions asked on a security clearance application. Information applicants provide forms the basis to grant or deny security clearances. Applicant's failure to provide accurate and complete information required further costly and time consuming inquiries that could have been avoided. However, his lack of due diligence is not imputed to be intentional or deliberate.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances in the context of the whole person, I conclude Applicant has mitigated drug involvement, criminal, and personal conduct security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the Adjudicative

Process, and my interpretation of my responsibilities under the Guidelines. Applicant has fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is eligible for access to classified information.

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: Subparagraphs 1.a. - d.: | FOR APPLICANT For Applicant |
| Paragraph 2, Guideline J: Subparagraph 2.a.: | FOR APPLICANT For Applicant |
| Paragraph 3, Guideline E: Subparagraph 3.a.: | FOR APPLICANT For Applicant |

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for a security clearance is granted.

ROBERT J. TUIDER
Administrative Judge