



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



In the matter of:)
)
) ISCR Case No. 09-04149
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: Alan K. Hahn, Esq.

December 23, 2010

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline G, Alcohol Consumption; however, he failed to mitigate security concerns under Guideline H, Drug Involvement and Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On February 26, 2010, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement, Guideline G, Alcohol Consumption and Guideline E, Personal Conduct. DOHA acted 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 on September 1, 2006.

Applicant answered the SOR on April 2, 2010, and requested a hearing before an administrative judge. The case was assigned to me on July 2, 2010. DOHA issued a notice of hearing on July 27, 2010, and the hearing was convened as scheduled on August 17, 2010. The Government offered Exhibits (GE) 1 through 5, which were admitted without objection. The Government's exhibit list was marked as Hearing Exhibit (HE) I. Applicant testified and offered exhibits (AE) A-C, which were admitted without objection. DOHA received the hearing transcript (Tr.) on August 25, 2010.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations except for SOR ¶ 3.d. I have adopted these admissions in my findings of fact, and after a thorough and careful review of the pleadings and exhibits submitted, I also make the following findings of fact.

Applicant is 41 years old. He is divorced and has no children. Since March 2005, he has worked as a systems engineer for a defense contractor. He has a high school diploma and is taking some college courses. He joined the Navy in 1995 and remained on active duty for 10 years. He served on several overseas deployments while in the Navy. He was honorably discharged in the pay grade of E-6.¹

Applicant's conduct raised in the SOR includes: (1) using marijuana, from about 1983 (when he was 15 years old) to January 2007 (admitted); (2) consuming alcohol, to the point of intoxication, from about 1982 (when he was 13 years old) to 2008 (admitted); (3) receiving treatment for alcohol dependence in September 2007 from an alcohol treatment hospital (admitted); (4) consuming alcohol after his participation in an alcohol recovery program (admitted); (5) using marijuana after being granted a security clearance and (6) making multiple false statements on February 8, 2007, on his security clearance application about his past drug use; and making a false statement on March 6, 2008, to an investigator, also about his past drug use (admitted, except for the statement to an investigator).

When Applicant was 13 years old and through his high school years, he and a friend drank alcohol about once every two weeks. Most of the time they drank beer, but sometimes they also drank liquor. After high school, Applicant's use of alcohol slowed to about once every two or three months. In November 2004, Applicant increased his alcohol use to about eight to twelve ounces of liquor per day. He mostly drank at home by himself. He frequently became intoxicated. There were several reasons for his increased consumption. First, he was going through a divorce; second he was leaving the Navy and looking for a job; and third, his father was ill.²

¹ Tr. at 20-23, 45; GE 1.

² Tr. at 29-30; GE 4, 5.

In September 2007, Applicant voluntarily entered an alcohol treatment center. He spent two weeks as an inpatient followed by six weeks in outpatient treatment. He believes he was diagnosed as alcohol dependant. Since his treatment, he has consumed a minimal amount of alcohol. He quantifies the amount at about one glass of wine per year. His last drink was on New Year's Eve 2009. He has never been arrested nor had any legal trouble resulting from his use of alcohol. From this point forward, he intends to totally abstain from alcohol.³

Similar to his use of alcohol, Applicant started using marijuana at a young age. Between the ages of 15 and 18, he used marijuana for recreational purposes about three to four times a week. From the ages 18 to 24, he used marijuana about two to three times a month. In 1994, He stopped using marijuana as he prepared for his enlistment into the Navy. He did not use marijuana during his Navy career. After he was out of the Navy, in May 2005, Applicant was at a friend's house and was offered marijuana. He used marijuana by inhaling from a pipe, but he did not like the taste so he did not use it again. The reason he used marijuana was out of curiosity. In January 2007, Applicant had some friends over to watch a football game and someone offered him marijuana. He used the marijuana one time by smoking from a pipe, but again did not like the taste so he did not use it again. He worked for his current defense contractor employer and held a security clearance both times he used marijuana. At the times he used marijuana, his employer had a company policy against using drugs and he was aware of that policy.⁴

On February 8, 2007, Applicant certified his Electronic Questionnaire for Investigations Processing (e-QIP). In response to "Section 24: Your Use of Illegal Drugs and Drug Activity", Applicant answered negatively to whether he had ever used any controlled substance (including marijuana) in the last seven years, and negatively to whether he had ever used a controlled substance while possessing a security clearance. On March 6, 2008, Applicant prepared a sworn affidavit where he discussed his past drug use, alcohol use, and medical treatment. While he discussed his pre-Navy marijuana use, he failed to disclose his marijuana use in May 2005 and January 2007. During his testimony, Applicant stated that the reason he did not disclose this information on either his e-QIP or in his March 6, 2008, affidavit was because he rationalized his minimal uses and therefore did not think he needed to disclose them.⁵

Applicant is supported by three character letters attesting to his honesty, trustworthiness, and reliability. Applicant is viewed as a valued employee and loyal friend.⁶

³ Tr. at 31-33, 71-74; GE 4, 5.

⁴ Tr. at 25-27, 33, 56-70; GE 4.

⁵ Tr. at 33-34; GE 1, 5.

⁶ AE A-C.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion 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 that an applicant may deliberately or inadvertently fail to 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).

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to 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.

I have considered all of the evidence in this case and the disqualifying conditions under Drug Involvement AG ¶ 25 and especially considered the following:

(a) any drug abuse; and

(g) any illegal drug use after being granted a security clearance.

Appellant used marijuana on multiple occasions before 1995 and more recently in 2005 and 2007 while holding a security clearance. I find that both the above disqualifying conditions apply.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement 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 current 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 were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Most of Applicant's marijuana use was remote and would otherwise have been mitigated by the passage of time except that he recently used marijuana again in 2005 and 2007. Appellant's recent use although infrequent (two uses), occurred while he held a security clearance. He was well aware of his responsibilities not to engage in illegal drug use pursuant to his company's drug policy and as a former member of the United States Navy. Despite this knowledge, Appellant still engaged in illegal drug abuse. Appellant was 36 and 38 years old when he most recently used marijuana. His willingness to use marijuana casts doubt on his reliability, trustworthiness and good judgment. Even though Appellant stated his intent not to use drugs in the future, sufficient time has not passed to conclude that he has demonstrated an intent not to

abuse drugs. His history shows he gave up marijuana before, while in the Navy, only to use it again shortly after his discharge. I find that neither of the above mitigating circumstance fully applies.

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining to alcohol consumption:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying. One is applicable in this case:

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.

Applicant's pattern of drinking through September 2007 and his voluntary seeking of alcohol rehabilitation treatment support the application of AG ¶ 22(c). Although Applicant entered an alcohol treatment program, there was no formal diagnosis rendered by a qualified medical professional offered by the government.

I have also considered all of the mitigating conditions for Alcohol Consumption under AG ¶ 23 and especially considered the following:

(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser).

Applicant recognized that alcohol was causing problems in his life and voluntarily entered an alcohol treatment program. Applicant did not have any alcohol incidents at work or that caused him to be arrested. After his treatment, Applicant significantly limited his consumption of alcohol to about one glass of wine a year. I find Applicant acknowledged that he had an alcohol problem, took action to address the problem, and thereafter, committed himself to very limited alcohol use. I find AG ¶ 23(b) applies.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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 conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying conditions are potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire;

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

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant's use of marijuana on two occasions while holding a security clearance created a vulnerability to his personal standing. AG ¶ 16(e) applies to SOR ¶ 3.a. Applicant admitted that he failed to disclose his 2005 and 2007 marijuana uses on both his e-QIP in February 2007 and during his March 2008 interview. He rationalized his non-disclosure by viewing the uses as limited and therefore inconsequential. I find Applicant deliberately failed to disclose his most recent marijuana uses. AG ¶ 16(a) applies to SOR ¶¶ 3.b and 3.c; and AG ¶ 16(b) applies to SOR ¶ 3.d.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and especially considered the following:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is

unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation or duress.

I have considered all of the facts and circumstances surrounding Appellant's drug use while holding a security clearance and his false statements. Neither are minor offenses and both cast doubt on Applicant's trustworthiness. Nothing about Applicant's actions reduced his vulnerability to exploitation, manipulation or duress. AG ¶¶ 17(c) and (e) do not apply.

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 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. I have incorporated my comments under Guidelines H, G, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. I have considered Appellant's honorable service in the Navy. I considered his alcohol recovery efforts. However, I am concerned with Appellant's lack of honesty when he failed to disclose his recent marijuana use while holding a security clearance. This was not the case of someone making a youthful mistake. Applicant was in his mid-30s when he resumed using marijuana after ten years of naval service and non-use. He was also aware of his company's policy about drug use when he recently used marijuana. Appellant's actions raise questions about his reliability, trustworthiness, and ability to protect classified information.

Overall, the record evidence leaves me with questions and doubts about Appellant's eligibility and suitability for a security clearance. For all these reasons, I conclude Appellant has mitigated Alcohol Consumption security concerns, but has not mitigated the concerns raised under both the Drug Involvement guideline and the Personal Conduct guideline.

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 H: | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |
| Paragraph 2, Guideline G: | FOR APPLICANT |
| Subparagraphs 2.a – 2.c: | For Applicant |
| Paragraph 3, Guideline E: | AGAINST APPLICANT |
| Subparagraphs 3.a – 3.d: | Against 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.

Robert E. Coacher
Administrative Judge