



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 09-07116
)
)
Applicant for Security Clearance)

Appearances

For Government: Marc Laverdiere, Esq., Department Counsel
For Applicant: *Pro se*

April 15, 2011

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guidelines H, Drug Involvement and Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is granted.

On November 4, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. 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 on September 1, 2006.

In an undated answer, Applicant requested a hearing before an administrative judge. The case was assigned to me on February 8, 2011. DOHA issued a Notice of Hearing on February 9, 2011. I convened the hearing as scheduled on March 10, 2011. The Government offered exhibits (GE) 1 through 4. They were admitted into evidence without objection. Applicant offered exhibits (AE) A through C and they were admitted

into evidence without objection. Applicant and one witness testified on his behalf. DOHA received the hearing transcript (Tr.) on March 17, 2011.

Findings of Fact

Applicant admitted all the SOR allegations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 28 years old. He graduated from college in 2007. He married in 2009 and has a two-month-old child. He has worked for his employer, a federal contractor, since graduating from college. He has held a secret security clearance since May 2008.¹

Applicant used marijuana from about January 2001 to July 2006. He smoked marijuana a couple times a month. The marijuana was provided to him by friends. He stated he never purchased it. He stopped using it his junior year of college because he knew he would need a security clearance in the future for the work he intended to do. He was cautioned by his parents and sister that his lifestyle could impact his future. He stated he last used marijuana in July 2006.²

Applicant used hallucinogenic mushrooms on three occasions, from June 2004 to August 2004. He used them with friends. He did not like the way the mushrooms made him feel, so he stopped using them. He was aware that their use was illegal.³

Applicant used cocaine two to three times, from November 2004 to February 2005. He was curious and experimented with the drug. It was provided by a friend. He did not purchase it. He stopped using it because he did not like the way it made him feel.⁴

In January 2008, Applicant completed a security clearance application (SCA). In March 2008, he was interviewed by an investigator as part of his background investigation. He disclosed his past drug use on the SCA.⁵

In July 2008, Applicant was arrested for possession of marijuana and drug paraphernalia. Applicant stated he had met a friend for dinner and, unbeknownst to him the friend, who was a marijuana user in the past, was still a user. The friend accompanied Applicant to his car and had in his possession a bag of marijuana with a pipe. Applicant stated he was not happy, but because his friend did not want to take the

¹ Tr. 26-28.

² Tr. 28-33.

³ Tr. 33-37.

⁴ Tr. 37-41.

⁵ Tr. 42-45.

drugs into the restaurant, he allowed him to leave the marijuana in the car, while they went to dinner. While driving home that evening, Applicant forgot the marijuana was still in the car after his friend left. He stated he turned his car around and was driving back to his friends to return the drugs when he was stopped by the police. Applicant denied using any of the marijuana. He stated he was stopped by the police because the area where he was driving is considered a high drug traffic area. He gave the police permission to search his car and he was arrested.⁶

Applicant pled guilty to possession of drug paraphernalia, was given probation before judgment, and ordered to complete a drug addiction program. His probation was unsupervised and ended November 2010.⁷ He completed a 26-week drug addiction program. He was required to attend a weekly group session. It began around August 2008 and was completed around July 2009. He was not evaluated and did not receive a diagnosis. He started this program before it was court-ordered on the advice of his attorney. He has passed three random drug tests since then.⁸

In October 2008, Applicant was returning from an evening sporting event. He had consumed a couple of drinks at the game and had six to seven shots of alcohol over a two-hour period before driving home. He left the bar and was pulled over by the police. He failed a field sobriety test and his blood alcohol level was .09%. Applicant was arrested and charged with driving under the influence (DUI) of alcohol. In December 2008, he pled guilty to the offense and was given probation before judgment and two years of unsupervised probation. He was already attending a court-ordered drug class from his previous arrest, so he was sentenced to attend a class on alcohol awareness. Applicant's probation expired in December 2010.⁹

In August 2009, when Applicant was interviewed for his background investigation, he was still consuming alcohol on a regular basis and he drank to intoxication once a month. He also stated he no longer drinks and drives. Applicant timely disclosed his past arrests to his facilities security officer.¹⁰

In January 2010, Applicant continued to consume alcohol occasionally. On January 24, 2010, Applicant was consuming alcohol at a party. He was sitting on a second story outdoor ledge. He passed out and fell 15 feet to the ground. He suffered four broken ribs, a punctured lung, and a traumatic brain injury. He was hospitalized for

⁶ Tr. 22, 45-67.

⁷ GE 3. Tr. 64-67.

⁸ Tr. 45-67, 88.

⁹ At his hearing, Applicant testified he thought his probation expired in June or July 2011. After his hearing he contacted his attorney and confirmed his probation expired in December 2010. He then contacted Department Counsel, who confirmed the expiration date and notified me. Department Counsel did not object to the new information being considered. Tr. 67-73, 76-77.

¹⁰ Tr. 73-75, 86-87.

three weeks and convalesced for two months. He has no permanent damage. Applicant stated after this life-changing event, he no longer has a desire to drink. He has consumed approximately 10 drinks since then. He has not been intoxicated since that accident.¹¹

Applicant stated he began to turn his life around when he got married and became a father. He has changed his priorities. Although he stopped using drugs in 2006, because he realized it was time to grow up, he did not make a complete commitment to change his life until 2010. He now realizes he has a big responsibility to his wife, child, and their future. He stated he was young and made poor decisions. He has been truthful throughout the entire process. He stated he began making better choices as far as the people he associated with. He does not associate with people who use illegal drugs. Applicant's wife is aware of his prior drug use and offenses.¹²

Applicant's former supervisor and now coworker testified on his behalf. He is a retired naval officer. Applicant was hired by the witness and he worked directly for him from December 2007 to February 2009. He is aware of his past drug usage and offense, and his DUI. He believes Applicant is honest, reliable, and trustworthy. Applicant has always admitted to him if he made a mistake and has acted responsibly. He would not want him working for him in any capacity if Applicant did not have integrity. The senior management of the company discussed Applicant's offenses when they arose and decided to give him a second chance.¹³

Applicant provided numerous character letters attesting to his strong work ethic. The authors of those letters note that Applicant has grown up, learned from his past mistakes, and he understands the seriousness and responsibility that comes with having a security clearance. They consider him trustworthy, dependable, and reliable. There has been a significant and noticeable change in him since he married and has become a father. He has matured and his family is his priority.¹⁴

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.

¹¹ Tr. 24-26, 82-83.

¹² Tr. 24, 41, 75-76, 88-89.

¹³ Tr. 89-97.

¹⁴ AE A.

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. 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, 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 the applicant may deliberately or inadvertently fail to 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

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 the disqualifying conditions under drug involvement AG ¶ 25 and conclude the following have been raised:

(a) any drug abuse; and

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant used marijuana with varying frequency from about January 2001 to July 2006. He used mushrooms three times from June 2004 to August 2004. He used cocaine two to three times from about November 2004 to February 2005. He was arrested for possession of marijuana and drug paraphernalia in July 2008. He pled guilty to possession of drug paraphernalia and was on probation until November 2010. I find the above disqualifying conditions apply.

I have considered all of the mitigating conditions under drug involvement AG ¶ 26. The following three are potentially applicable:

(a) the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation; and

(d) 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.

Applicant credibly testified that he last used illegal drugs in July 2006, almost five years ago. Applicant's use was while he was in college. Applicant permitted a friend to leave marijuana in his car while they went to dinner. Both of them forgot it was in the car and shortly thereafter, Applicant was stopped by the police and arrested. Applicant pled guilty to possession of drug paraphernalia. Applicant admitted he made a grave error. He credibly testified he has changed his life and he is now a committed family man. He no longer associates with drug users. He completed a court-ordered drug addiction program, but was not evaluated or diagnosed. I find Applicant's drug use happened long ago and is unlikely to recur. I also find that the marijuana and drug paraphernalia arrest occurred under circumstances that are unlikely to recur. Therefore, I find AG ¶ 26(a)

applies. Applicant does not intend to use any illegal drugs in the future. He experienced a life-changing event that has shifted his priorities. He is remorseful for his past conduct and understands the gravity of the circumstances. I conclude AG ¶ 26(b) applies.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I have specifically considered:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules or regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior . . . ; 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 activities which, if known, may affect the person's personal, professional, or community standing.

Applicant used illegal drugs prior to July 2006. He was arrested for possession of marijuana and drug paraphernalia in 2008. He pled guilty to possession of drug paraphernalia and was on probation until November 2010. In October 2008, Applicant was charged and later found guilty of DUI. He was on probation until December 2010. I find both disqualifying conditions apply.

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

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

Applicant's prior drug use is mitigated as explained above. He admitted he made poor choices in his past. He understands the difficult situation he placed himself in by allowing a friend to put illegal drugs and drug paraphernalia in his car. He fully accepted responsibility for the DUI. I considered Applicant's testimony, his demeanor, candor, and responses to my questions, when assessing his credibility. He admitted that he used poor judgment and was immature when he engaged in the above stated criminal conduct. It was not until he experienced a life-threatening event, that he began to change his behavior and act responsibly. He now rarely drinks alcohol and does not drive after doing so. He is married and has an infant child. His priorities have changed and he understands his duty to act responsibly as a husband and father. Although those offenses were not minor, sufficient time has passed to conclude it is unlikely that similar behavior will recur. Applicant has come to a crossroad in his life and has taken the path to be a mature responsible adult. He expressed sincere remorse over his misconduct and has taken positive steps to ensure he does not repeat his mistakes. I find AG ¶¶ 17(c), 17(d), and 17(e) 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 and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant admittedly made some poor decisions in his past. He acknowledged and regrets his actions. He was forthcoming in telling his facilities security officer when he got in trouble. He was honest and candid at his hearing. His past conduct was irresponsible. He has now taken on the role of husband and father and understands he must use good judgment and act responsibly. This decision comes down to whether or not Applicant deserves a second chance. I do not believe he will repeat his past mistakes. I do not believe he will use illegal drugs again or drink alcohol and drive. I believe contact with his drug using friends is in the past. Applicant's supervisor, a person with considerable experience during his Navy career of dealing with young people who made mistakes while growing up and maturing, is willing to give him a second chance. I concur. Overall, the record evidence leaves me with no serious questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising under the guideline for Drug Involvement and Personal Conduct.

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:	FOR APPLICANT
Subparagraphs 1.a-1.e:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

Carol G. Ricciardello
Administrative Judge