



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



In the matter of:)
)
) ISCR Case No. 09-07180
)
Applicant for Security Clearance)

Appearances

For Government: Candace L. Garcia, Esq., Department Counsel
For Applicant: *Pro se*

July 26, 2011

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the security concerns under Guideline E, Personal Conduct and Guideline F, Financial Considerations. Applicant's eligibility for a security clearance is granted.

Statement of the Case

On October 8, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct and Guideline F, Financial Considerations. 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 (Answer) on October 30, 2010. He requested a hearing before an administrative judge. The case was reassigned to a different judge who issued a notice of hearing on January 6, 2011, setting the hearing for January 26, 2011. Applicant requested a continuance that was granted on January 18, 2011. The hearing was cancelled and the case was reassigned to me on March 3, 2011. DOHA issued a notice of hearing on March 10, 2011, with a scheduled hearing date of April 13, 2011. Because of the threat of a government-wide shutdown, the hearing was postponed. A new notice of hearing was issued on April 12, 2011, setting the hearing for May 11, 2011. The hearing was convened as scheduled. The Government offered exhibits (GE) 1 through 8, which were admitted into evidence without any objection. Department Counsel's exhibit index was marked as hearing exhibit (HE) I. Applicant testified, presented one witness, and offered exhibits (AE) A through B that were admitted into evidence without any objections. The record was left open for submission of additional evidence. Applicant timely submitted AE C that was admitted into evidence without objection. Department Counsel's transmittal letter was marked as HE II. DOHA received the hearing transcript (Tr.) on May 19, 2011.

Findings of Fact

In Applicant's Answer, he admitted all the allegations, but denied deliberately falsifying his drug history in his security clearance application or his security interview. The admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits, I make the following findings of fact.

Applicant is 44 years old. He is married and has two children. He has worked as a manufacturing technician for a defense contractor for the last two years. He has a high school diploma and two years of college.¹

Applicant's conduct raised in the SOR includes: (1) failing a random drug test in December 2003 leading to his termination by his then employer (SOR ¶ 1.a); (2) receiving treatment through an inpatient drug treatment hospital where he was diagnosed as being marijuana dependant (SOR ¶ 1.b); (3) making false statements in response to security clearance application questions in March 2009 concerning past drug use (SOR ¶ 1.c); (4) making false statements to a defense investigator on April 7, 2009, concerning past drug use (SOR ¶ 1.d); (5) being arrested for contributing to the delinquency of a minor and solicitation of prostitution in 2005, although the charges were ultimately dropped (SOR ¶ 1.e); and (6) having a delinquent home equity line-of-credit in excess of \$10,500 (SOR ¶ 2.a).

In 2003 Applicant worked for a private company that implemented random drug testing. He was aware of the drug testing policy when he was hired. In December 2003, he was randomly selected for drug testing and tested positive for marijuana. He was terminated from his position because of the positive drug test. He challenged the test

¹ Tr. at 5, 29; GE 1.

through his union.² At the same time, he entered an inpatient drug treatment hospital on December 10, 2003. He remained in the program for 60 days and was discharged on February 10, 2004. During the course of his treatment, he admitted the extent of his prior use. He began using marijuana in 1988 and would smoke it about three times a week. His first use was when he was 21 years old and his last use was within two weeks of his admission date. While in treatment, he participated in narcotics anonymous (NA) and was drug tested on a weekly basis. He tested positive the first week he was in the program, but negative the remaining weeks. His treating physician gave him a discharge diagnosis as being a cannabis abuser. His prognosis was stated as "fair to good". Applicant stated that he has not used marijuana since his last use in November 2003.³

In October 2005, Applicant was arrested for solicitation of a prostitute (an undercover police officer). Because Applicant's 16 year-old step-son was with him at the time, he was also charged with contributing to the delinquency of a minor. Applicant claimed that he was just joking when he was approached by the undercover officer. Ultimately, the district attorney dropped the charges. No reason was given for this decision.⁴

On March 19, 2009, Applicant completed his security clearance application. He answered yes to the question asking if he had used drugs during the last seven years. He then explained that his marijuana use was from "12/2002 (Estimated) to 02/2003 (Estimated)." He also explained that he participated in a drug treatment program at a hospital. Subsequently, he was interviewed by a Department of Defense investigator in April 2009. When asked about his drug use history, Applicant responded that he used marijuana since 1999 about three times a week. In his Answer and during his testimony, Applicant stated that the start dates of his marijuana use were erroneous. He stated that he did not intend to mislead, but explained concerning his application he could not recall the specific dates and during his interview he believed he only needed to go back ten years. His drug treatment medical records revealed he admitted to first using marijuana in 1988.⁵

Applicant's financial delinquency involves a home equity line-of-credit for over \$47,000. It is past due approximately \$10,500. Part of the reason the loan became delinquent was because his wife lost her job as a loan officer when her company went out of business in March 2008. She now works two part-time jobs. Applicant contacted the creditor and qualified for its "Fresh Start Program." Under the program, he was required to make monthly payments in the amount of \$135 for six months. Once that

² Applicant was determined eligible for rehire but he took a position with another company to moot the issue.

³ Tr. at 51; GE 2, 5.

⁴ Tr. at 58; GE 2, 4.

⁵ Tr. at 55; GE 1, 2, 5.

was completed, his loan arrearages would be forgiven and his loan modified. Applicant has made the payments from January through May 2011 under this plan.⁶

Applicant presented the testimony of his wife and the statement of a current supervisor. His wife testified that he has been a great provider for the family. His supervisor stated Applicant has performed all his duties in an outstanding manner. He also stated Applicant is dedicated to the program he works on and his team.⁷

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

⁶ Tr. at 32-33; AE B, C.

⁷ Tr. at 32-44; AE A.

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 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 failed drug test, his diagnosis as marijuana dependent, and his arrest for solicitation all reflect personal conduct that creates a vulnerability to his personal standing. AG ¶ 16(e) applies to SOR ¶¶ 1.a, 1.b, and 1.e.

Applicant did not deliberately provide false information about his past marijuana use on his security clearance application or to the defense investigator. If he intended to deceive the government about his past drug use he would not have listed his drug treatment information in his security clearance application (the source of the accurate drug use information). Moreover, under the circumstances of this case, since he acknowledged his past marijuana use in both his security clearance application and during his interview, the incorrect dates regarding when his use began were not material. Therefore, AG ¶¶ 16(a) and 16(b) do not apply to SOR ¶¶ 1.c and 1.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 considered the following as potentially applicable:

(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; and

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

Applicant's use of marijuana and his arrest occurred over five years ago and are remote under these circumstances. The passage of more than five years without recurrence supports a conclusion that such behavior will not recur in the future. Applicant's reliability, trustworthiness, and good judgment is no longer in doubt. Additionally, his successful completion of a drug treatment program and seven years of drug-free living are positive steps that reduce his vulnerability to exploitation, manipulation, or duress. Therefore, all the above mitigating conditions apply to SOR ¶¶ 1.a, 1.b, and 1.e.

Guideline F, Financial Considerations

The security concern for Financial Considerations is set out in AG ¶ 18 as follows:

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. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant was unable to pay his home equity line of credit payments over an extended period. The evidence is sufficient to raise the above disqualifying conditions.

Several Financial Considerations mitigating conditions under AG ¶ 20 are potentially applicable:

- (b) 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;
- (c) 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; and
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's financial difficulties were caused in part when his wife lost her full-time job. This put a strain on the household finances and resulted in the delinquent loan. This was a condition beyond his control. He acted responsibly concerning his delinquent debt when he sought a modification of the loan terms. He also provided evidence that he has made the required monthly payments to meet the creditor's terms to receive a loan modification. There are clear indications that the problem is being resolved and that Applicant has made a good-faith effort to repay his creditor. All the above mitigating conditions 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 considered Applicant's service to his company and his character evidence. I also considered the passage of time since his last drug use, his arrest, and successful drug treatment program. He also took responsible action to seek a modification for his delinquent loan. Applicant's evidence is sufficient mitigate the security concerns in this case.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guideline E, Personal Conduct and Guideline F, Financial Considerations.

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 E:	FOR APPLICANT
Subparagraphs 1.a-1.e:	For Applicant
Paragraph 2, Guideline F:	FOR APPLICANT
Subparagraph 1.a:	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 eligibility for a security clearance. Eligibility for access to classified information is granted.

Robert E. Coacher
Administrative Judge