



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



In the matter of:)
)
) ISCR Case No. 09-08579
)
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

April 13, 2011

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant has not mitigated the Drug Involvement or Criminal Conduct security concerns raised by his use of marijuana and methamphetamines from 2004 through 2007, while on probation. Eligibility for access to classified information is denied.

Statement of the Case

On November 30, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H, Drug Involvement, and J, Criminal Conduct. The action was taken under Executive Order (EO) 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 after September 1, 2006.

Applicant answered the SOR in writing in an undated submission, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel

submitted the Government's written case on January 31, 2011. A complete copy of the file of relevant material (FORM) was received by Applicant on February 1, 2011. He was afforded a 30-day opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. By March 16, 2011, Applicant responded with an undated, one page submission. Department Counsel had no objection to Applicant's submission, marked Applicant Exhibit (AE) 1 and it was entered into evidence. The case was assigned to me on March 24, 2011.

Findings of Fact

In Applicant's response to the SOR, he admitted the conduct alleged in SOR 1.a. through 1.b., and 2.a. through 2.c. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 45-year-old employee of a defense contractor since 2008. He is married to his second wife and has two children. In 2004, he went through a difficult divorce from his first wife. He is now remarried and is now active in his church. (Item 4; Item 5; AE 1.)

In April 2004 Applicant was arrested and charged with Driving While Intoxicated. He was convicted of Obstructing Public Highway and placed on probation until approximately February 25, 2007. As a condition of probation, Applicant was required to abstain for the use of controlled substances, dangerous drugs and alcoholic beverages. Despite the terms of probation, Applicant used controlled substances while on probation, as noted, below. (Item 4; Item 5; Item 8; Item 9.)

On Applicant's March 26, 2009 security clearance application, he estimated that from April 2005 to approximately May 2006, he "used marijuana with friends about seven or eight times" and "meth once." On his March 10, 2010 Answers to Interrogatories, Applicant indicated that he "smoked marijuana and used meth twice" during the course of his divorce in 2004, and again used marijuana and meth once in 2007. In AE 1, Applicant indicated that "I only used marijuana from 2005 to 2007," at a frequency of less than ten times. (Item 4; Item 5; Item 6; AE 1.)

On February 2, 2007, Applicant was arrested and charged with Possession of a Controlled Substance-Cocaine, after Applicant was pulled over for speeding and spotted attempting to conceal a glass pipe with white residue. The white residue tested positive for cocaine; however the charge against Applicant was eventually dropped. (Item 4; Item 5; Item 8; Item 9.)

Applicant's last admitted use of illegal substances occurred in 2007, while he was still on probation for Obstructing Public Highway. Applicant indicated he admitted his marijuana and meth use to his probation officer. His probation was revoked and he was required to serve three days in jail. (Item 4; Item 5; Item 8; Item 9.)

Applicant claims that he has not used any illegal substances since 2007. He indicated that he “let Jesus Christ into my life and the strongest thing I drink now is Dr[sic] pepper.” (Item 4; AE 1.)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be 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, administrative judges apply the 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.

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 the applicant or proven by Department Counsel.” The applicant 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 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 EO 10865 provides that adverse 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.

The Government presented sufficient information to support the factual allegations under Guideline H (SOR 1.a.-1.b.). Applicant began using illegal substances in approximately 2004. He continued to use marijuana and methamphetamines through at least 2007, even though it was in violation of the terms of his probation. These facts, established through the Government's information and through Applicant's admissions, raise a security concern under the above disqualifying condition.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement AG ¶ 26, including:

(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;

(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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; 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's use of marijuana and methamphetamines casts doubt on his reliability, trustworthiness, and good judgment. Not only was Applicant using illegal

substances, he continued to use marijuana and methamphetamines after being placed on probation. While Applicant claims he has not used any illegal substances since 2007, there is no bright line defining an appropriate period of reform and rehabilitation. In some cases, over four years of abstinence could be interpreted as a sufficient period. However, the fact that Applicant knowingly used an illegal drug after he was placed on probation, and the poor judgment shown by this conduct, weighs against a conclusion that sufficient time has passed. The partial mitigation under AG ¶ 26 does not overcome the gravity of the fact that Applicant chose to use drugs while he was on probation. He has not demonstrated that his drug use was infrequent or happened under unusual circumstances. AG ¶ 26(a) does not apply.

Applicant indicated that he stopped smoking marijuana and using methamphetamines. However, Applicant's past statements to the Department of Defense are fraught with inconsistencies regarding the dates and frequencies of Applicant's drug use. These inconsistencies undermine the credibility of his promise to abstain from future drug use. AG ¶ 26(b) does not apply.

Applicant failed to present evidence that he had ever been prescribed marijuana or methamphetamines. AG ¶ 26(c) does not apply.

Applicant presented no evidence to suggest that he participated in a prescribed drug treatment program. Further, he offered no prognosis about the possibility of recurrence of abuse. AG ¶ 26(d) does not apply.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was arrested in 2004 for DWI, and convicted in 2005 of the lesser offense of Obstructing Public Highway. His conviction led to him being placed on probation for two years. While on probation, he confessed he used illegal substances, despite a court order prohibiting their use. In addition, in February 2007, Applicant was stopped for speeding and was seen concealing drug paraphernalia, which later tested

positive for cocaine. The Government presented sufficient information to support the factual allegations under Guideline J (SOR 2.a.-2.c.). AG ¶¶ 31(a) and 31(c) apply.

Two Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

(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 cast doubt on the individual's reliability, trustworthiness, or good judgment;

(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.

Applicant admits that he engaged in criminal conduct from 2004 through 2007. During this three-year time span, Applicant drove his vehicle after consuming alcohol leading to his 2005 conviction for Obstructing Public Highway; he used marijuana and methamphetamines on a number of occasions; and he violated the terms of his probation. These decisions cast doubt on his reliability and judgment. Further, he presented little evidence of rehabilitation. AG ¶¶ 32(a) and 32(d) 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 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. I have incorporated my comments under Guidelines H and J in my whole-person analysis.

Weighing in Applicant's favor are several positive factors: he has remarried and is now attending church. However, other facts raise security concerns. Applicant used illegal substances at varying frequencies for approximately four years. His use continued, even though he was on probation and instructed not to use illegal substances. His conduct indicates a lack of judgment and trustworthiness.

Overall, the record evidence fails to satisfy the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guidelines.

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 |
| Subparagraph 1.b.: | Against Applicant |
| Paragraph 2, Guideline J: | AGAINST APPLICANT |
| Subparagraph 2.a.: | Against Applicant |
| Subparagraph 2.b.: | Against Applicant |
| Subparagraph 2.c.: | 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.

Jennifer I. Goldstein
Administrative Judge