



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



In the matter of:)
)
) ISCR Case No. 10-01073
)
Applicant for Security Clearance)

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: *Pro se*

August 31, 2011

Decision

CURRY, Marc E., Administrative Judge:

In September 2009, approximately two months after completing a security clearance application, Applicant was arrested and charged, among other things, with possession of heroin. He later pleaded guilty. Although he has not used heroin since the arrest, and has completed court-ordered community service, the criminal case was still open at the time of the issuance of the Statement of Reasons (SOR). Under these circumstances, it is too soon to conclude Applicant has mitigated the security concern. Clearance is denied.

Statement of the Case

On November 30, 2010, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant detailing security concerns under Guidelines H, drug involvement, E, personal conduct, and J, criminal 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) implemented by the Department of Defense (DoD) on December 1, 2006.

Applicant answered the SOR on December 20, 2010, admitting all of the allegations except 2.b and 3.a. He requested a determination based on the administrative file rather than an administrative hearing. On May 2, 2011, Department Counsel prepared a File of Relevant Materials (FORM) setting forth the Government's case. Applicant received the FORM on May 23, 2011 and was given 30 days to file a response. He did not submit any additional information. The case was assigned to me on July 5, 2011.

Evidentiary Ruling

SOR subparagraph 2.b alleges Applicant lied to a DoD investigator regarding the circumstances of an arrest in September 2009. Applicant denies the allegation.

SOR subparagraph 2.b is based on the investigator's written recollection of a personal subject interview conducted in October 2009 and included in a Report of Investigation. (Item 5) When provided a copy of the interview summary as part of a Government interrogatory propounded in March 2010 asking whether the interview summary was accurate, Applicant disputed the portion of the investigator's interview summary detailing the circumstances of the arrest, stating that it did not accurately reflect the information he provided to the investigator during the interview. (Item 5 at 8)

I conclude that the Government has not properly authenticated the portion of the interview summary on which SOR subparagraph 2.b was based, rendering it inadmissible (AG ¶ E3.1.20). Because SOR subparagraph 2.b is based solely on the inadmissible portion of the investigator's interview summary, I resolve it in Applicant's favor.

Findings of Fact

Applicant is a 31-year-old single man with no children. Since 2009, he has worked for a defense contractor as a shipbuilder's apprentice. The majority of his jobs during his career have been in the automotive services industry.

Applicant smoked marijuana from about January 2007 through March 2007. He did so to please his girlfriend. Shortly after he stopped, he became increasingly outspoken about not wanting his girlfriend to smoke marijuana. She refused, and ultimately, they stopped seeing each other. (Item 5 at 3) Applicant has not smoked marijuana since March 2007.

On September 22, 2009, the local police conducted a sting operation in which an undercover officer received calls on a cell phone confiscated from a suspected drug dealer. He pretended to be the drug dealer and arranged for the callers to purchase drugs. When the callers arrived to the agreed-upon location, (a local fast food

restaurant), the undercover officer arrested the prospective purchasers. One of the people who called the suspected drug dealer's phone requesting to purchase heroin was Applicant. (Item 8 at 6) When speaking to the undercover police officer, Applicant identified the vehicle he would be driving to the pick-up location, and expressed a desire to buy six bags of heroin for \$100. (*Id.* at 7)

When Applicant arrived at the fast food restaurant parking lot, the police arrested him. A search of Applicant's car revealed several bags with heroin residue and two subaxone pills.¹ (*Id.* at 7)

Subsequently, Applicant was charged with attempt to possess heroin, possession of heroin (a felony), and possession of subaxone. (Item 4 at 1) Under a plea agreement memorialized at a court hearing on April 30, 2010, the attempt to possess heroin charge and the possession of subaxone were nolle prossed. In exchange, Applicant pleaded guilty to the possession of heroin charge. (Item 6) Applicant received probation before judgment. Under the probation terms, the court deferred judgment until April 11, 2011, and ordered Applicant to remain drug free, receive random drug tests, and successfully complete 100 hours of community service. (*Id.*) As of July 2010, Applicant had not used heroin or any other illegal drugs since the 2009 arrest, and had passed all of his court-ordered random drug tests. (Item 7 at 2) There is no record evidence of the April 2011 hearing. Also, other than Applicant's statements, there is no record evidence supporting his contention that he has been drug free since the arrest.

Applicant was not using subaxone illegally at the time of the September 2009 arrest. Rather, his doctor had prescribed it to remedy his addiction to pain killers. (Item 7 at 1) The two pills that the police found in his car were not in the medicine bottle. The state agreed to drop the possession of subaxone charge in part because Applicant's attorney provided a copy of the prescription to the prosecutor. (*Id.*) Applicant continues to take this medication twice per day as prescribed. (*Id.*)

SOR subparagraph 2.c alleges Applicant executed an affidavit in July 2010 expressing an unwillingness to answer additional questions related to the investigation without union representation. (Item 4 at 2) Applicant completed an affidavit, as alleged. (Item 7) He stated as follows:

I was previously interviewed in the fall of 2009 . . . regarding my security clearance and discussed my use of illegal substances . . . I also thoroughly discussed an arrest on 9/22/2009 . . . If any further inquiry is made or required [,] I will seek counsel with my union representative before discussing or providing any other information.

Applicant then proceeded to discuss the details addressed in his earlier interview.

¹Subaxone is a prescription pain reliever.

Policies

In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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. 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."

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 as to obtaining a favorable security decision.

Analysis

Guideline H, Drug Involvement

Under this guideline, "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." (AG ¶ 24) Applicant's used marijuana for several months in 2007. In September 2009, he was arrested after being caught by an undercover officer attempting to buy heroin. A subsequent search of his car revealed heroin residue in several plastic bags. AG ¶¶ 25(a), "any drug abuse," and 25(c), "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," apply.

Although two subaxone pills, a legal narcotic drug, were found in Applicant's car when he was arrested, he was taking it in accordance with a doctor's prescription to treat his addiction to pain killers. Absent any evidence that he has or has ever abused any pain killers, I resolve SOR subparagraph 1.b in Applicant's favor.

Although Applicant has not used any illegal drugs since his arrest, as of the date of the SOR, he was still subject to court-ordered random drug screening. Also, he produced no evidence that he has either dissasociated himself from other illegal drug

users or has avoided the environment where drugs were used. None of the mitigating conditions apply.

Guideline E, Personal Conduct

Under this guideline, “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 ¶ 15)

The Government alleges that Applicant’s July 2010 affidavit in which he stated he was not willing to supply any additional information about his September 2009 arrest triggers a security concern. The potentially relevant disqualifying condition is AG ¶ 15(a), “refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation.” Applicant’s desire to consult a union representative or retain a lawyer before he answered any additional questions during the investigative process does not constitute a refusal to cooperate with the investigation. Assuming for the sake of argument that it does constitute a refusal to cooperate, Applicant’s desire to consult a union representative or retain a lawyer before cooperating further constitutes reasonable cause. I resolve SOR subparagraph 2.c in Applicant’s favor.

Applicant’s 2009 arrest together with the subsequent discovery of heroin in his car triggers the application of AG ¶ 16(e), “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person’s personal, professional, or community standing.” Applicant has not used heroin since the arrest and has passed all random drug tests. AG ¶ 17(e), “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation or duress,” applies.

Applicant’s criminal behavior occurred after he completed his security clearance application. As of the date of the SOR, he was still subject to court-ordered random drug screening. Applicant has failed to mitigate the Guideline E security concern.

Guideline J, Criminal Conduct

Under this guideline, “criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness [and] by its very nature . . . calls into question a person’s ability or willingness to comply with laws, rules and regulations.” (AG ¶ 30) Applicant’s heroin-related arrest triggers the application of AG ¶ 31(a), “a single serious crime or multiple lesser offenses.” Although Applicant was on probation when the SOR was issued, a disposition hearing was scheduled for April 11, 2011 approximately two weeks after Department Counsel filed the FORM. There is no record evidence concerning whether the hearing was held or whether Applicant remains on probation.

Consequently, AG ¶ 31(c), “the individual is currently on parole or probation,” is inapplicable.

Approximately two years have passed since Applicant’s heroin-related arrest. 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,” is partially applicable. Given the seriousness of the crime and the uncertainty as to whether Applicant is still on probation, the amount of time that has elapsed since Applicant’s heroin-related arrest is insufficient to mitigate the criminal conduct security concern.

Whole-Person Concept

Under the whole-person concept, 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.

I have considered the whole-person factors in my analysis of the guidelines, and they do not warrant a favorable conclusion. Applicant failed to mitigate the security concern.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Subparagraphs 2b - 2.c:

For Applicant

Paragraph 3, Guideline J:

AGAINST APPLICANT

Subparagraph 3.a:

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.

MARC E. CURRY
Administrative Judge