



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



In the matter of:)
)
-----) ISCR Case No. 10-04835
)
Applicant for Security Clearance)

Appearances

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

February 17, 2012

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

On September 7, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) noting security concerns arising under Guideline J (Criminal Conduct), Guideline H (Drug Involvement) and Guideline E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

In an undated response received on September 22, 2011, Applicant admitted all allegations and requested an administrative determination in lieu of a hearing. On December 2, 2011, Department Counsel submitted a File of Relevant Material (FORM), which included six attached items. Applicant did not submit a response to the FORM. The case was assigned to me on February 7, 2012. Based on a review of the case file, I find Applicant failed to meet his burden regarding the security concerns raised. Security clearance is denied.

Findings of Fact

Applicant is a 25-year-old aircraft mechanic who has worked for the same defense contractor since December 2008. He is single and has no children. Applicant completed a post-secondary course of academic study. He admits all facts raised in the SOR allegations. He is contrite over his past misdeeds.

In April 2002, at the age of 15, Applicant was arrested and charged with felony commercial burglary and misdemeanor criminal mischief after being caught entering a building without permission. He was sent to juvenile detention for two days before he was released to his parents. At trial, the charges were dropped when the building owner's wife testified that she had forgotten to lock the door to the building.

In about January 2003, Applicant began using marijuana. Around that same time, he was stopped by police at a road check. The officer found a pipe used for smoking marijuana that contained traces of the substance. Applicant was charged with possession of marijuana and drug paraphernalia. He was fined \$480.

Applicant continued using marijuana daily until about January 2005, at which time he reduced his marijuana consumption to about twice a week. As of January 2006, he had reduced his drug use to about twice a month. He decided to quit using marijuana in May 2007 because he did not want to jeopardize his future professional aspirations. However, in September 2007, he again used marijuana. The following day, he was subjected to a random drug test, failed the test, and consequently was fired from his job. Throughout this period, Applicant bought the drug on occasion.

In July 2008, Applicant and some friends entered a school that was under construction. He was arrested and charged with felony commercial burglary and convicted of misdemeanor attempted breaking and entering. He was sentenced to one year suspended confinement, fined approximately \$1,000, banned from the local public schools, and ordered to perform 80 hours of community service.¹ To date, he has only served between 12 to 30 hours of that requirement.²

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the AG. The AG lists potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's over-arching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2 (c), this process is a conscientious scrutiny of a number of variables known as

¹ The SOR alleged that Applicant was ordered to complete 40 hours of community service. In his response to the SOR, Applicant volunteered that he was ordered to fulfill 80 hours.

² Compare FORM, Item 5, to Response to the SOR.

the “whole-person concept.” An 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.

The United States Government (Government) must present evidence to establish controverted facts alleged in the SOR. It is an applicant’s responsibility to present “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”³ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.⁴

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 about 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.”⁵ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁶ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁷ A security clearance denial does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

³ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

⁴ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁵ See also EO 12968, § 3.1(b) and EO 10865 § 7.

⁶ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁷ *Id.*

Analysis

Guideline J – Criminal Conduct

The concern under this guideline is that “criminal activity creates doubt about a person’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.”⁸ In this case, Applicant admitted he was arrested and charged with commercial burglary and fined for possession of marijuana and drug paraphernalia when he was a teen. He also admitted that he was found guilty of attempted breaking and entering in 2008, and ordered to complete 80 hours of community service. He has yet to complete his community service requirement. Such facts are sufficient to raise both Criminal Conduct Disqualifying Condition AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*). Consequently, it is Applicant’s burden to mitigate the security concerns raised.

Applicant admitted the allegations raised under this guideline. In relying on an administrative determination, there are scant available facts tending to show successful rehabilitation or otherwise mitigate the security concerns at issue. While the 2002 and 2003 incidents could be amenable to mitigation as being dated incidents from his teenage years, the 2008 breaking and entering incident and his failure to complete his required community service hours sustain security concerns. Consequently, none of the mitigating conditions under AG ¶ 32(a)-(e) apply.

Guideline H - 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.⁹ “Drugs” are defined as mood and behavior-altering substances and include drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended, (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens) and inhalants and other substances.¹⁰ “Drug abuse” is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.¹¹

Applicant admitted he used and occasionally purchased marijuana between 2003 and 2007. He was fired from a job in September 2007 after it was discovered

⁸ AG ¶ 30.

⁹ AG ¶ 24.

¹⁰ *Id.* at ¶ 24(a)(1-2).

¹¹ *Id.* at ¶ 24(b).

through a drug test that he had been using marijuana. Such facts are sufficient to raise Drug Involvement Disqualifying Conditions AG ¶ 25(a) (*any drug abuse*) and AG ¶ 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*). With disqualifying conditions raised, the burden shifts to Applicant to mitigate related security concerns.

Although his last admitted use of marijuana was in late 2007, Applicant did not avail himself of the opportunity to provide any evidence tending to demonstrate his intent not to use marijuana again in the future, such as those noted at AG ¶ 27(b)-(d). At best, AG ¶ 27(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*) applies to a limited extent.

Guideline E – Personal Conduct

Security concerns arise from matters of personal conduct because “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.”¹² In addition, “any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process” is of special interest.¹³

Applicant was charged with three offenses between 2002 and 2008. He has yet to complete the required community service hours to complete his sentence for the 2008 attempted breaking and entering incident. Moreover, he was terminated from a job for using marijuana in 2007. Personal Conduct Disqualifying Condition (PC DC) AG ¶ 16(c) (*credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information*) applies. With a PC DC raised, the burden shifts to Applicant to mitigate the security concerns.

As was the case in the analysis under Guideline J, the significance of the more remote incidents from 2002 and 2003 was renewed because of the 2008 attempted breaking and entering charge in 2008. Related security concerns are sustained by his failure to complete his sentence and fulfill his community service requirements to date. Although security concerns regarding his 2007 dismissal from employment could be mitigated due to the passage of time, the security concerns renewed by the 2008 charge and the incomplete community service requirement obviate application of the mitigating conditions under AG ¶ 17.

¹² AG ¶ 15.

¹³ *Id.*

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 an applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. In choosing a decision without a hearing, however, there are scant facts of record. It is noted that Applicant is an educated 25-year-old who regrets his past misdeeds. As a teen, he was twice arrested. As an adult in July 2008, he was found guilty of breaking and entering. To date, however, he has yet to complete his court-ordered 80 hours of community service. Consequently, he has yet to complete his sentence for that conviction. Moreover, while he has apparently ceased using marijuana, there is scant evidence demonstrating any intent not to use illegal drugs in the future.

While completion of his community service requirement could do much toward mitigating related security concerns, security concerns remain unmitigated. As previously noted, the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials. Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information. Given the scant facts of record, I conclude that Applicant failed to meet his burden. Clearance is denied.

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 J: Subparagraphs 1.a-1.c:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline H: Subparagraphs 2.a-2.d:	AGAINST APPLICANT Against Applicant
Paragraph 3, Guideline E: Subparagraph 3.a:	AGAINST APPLICANT 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 access to classified information. Clearance is denied.

ARTHUR E. MARSHALL, JR.
Administrative Judge