



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



In the matter of:)	
)	
)	ISCR Case No. 11-03911
)	
Applicant for Security Clearance)	

Appearances

For Government: Ray Blank, Esq., Department Counsel
For Applicant: *Pro se*

07/11/2012

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated drug involvement, criminal conduct, and personal conduct security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On November 16, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H (drug involvement), J (criminal conduct), and E (personal 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) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on May 2, 2012, and requested a hearing before an administrative judge. The case was assigned to me on May 29, 2012. DOHA issued a notice of hearing on June 4, 2012, scheduling the hearing for June 20, 2012. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 4 were

admitted in evidence without objection. Applicant testified and called a witness, but he did not submit any documentary evidence. DOHA received the hearing transcript (Tr.) on June 28, 2012.

Findings of Fact

Applicant is a 40-year-old president and part owner of a company seeking to do business as a defense contractor. He has worked for the company since 1995, and he became president in 2009. He is applying for a security clearance for the first time. He has a bachelor's degree. He has been married for more than ten years, and he has one child.¹

From 2005 to 2010, Applicant periodically smoked marijuana while visiting family members in another state. When he submitted his Questionnaire for National Security Positions (SF 86) in December 2010, he wrote that his marijuana use occurred from "06/2005 (Estimated)" to "Present." He described the nature of the use and the frequency as "less than 5 times per year I have recreationally smoked marijuana – I have never purchased or sold any illegal drug."²

Applicant was interviewed for his background investigation in January 2011. A signed statement was not taken, but the interview was summarized in a report of investigation (ROI). The investigator reported that Applicant "provided voluntarily on his case papers that he has used marijuana less than five times per year for recreational purposes from "06/05 to 12/10." The investigator further reported that Applicant stated that he "last used marijuana in 12/10 with his biological father and two half siblings," and that he will "stop using marijuana if he needs to in order to obtain a security clearance."³

DOHA sent Applicant the ROI and asked if it accurately reflected the information that he provided to the investigator. Applicant indicated that it did not, and he submitted corrections to the ROI. He did not correct the information that stated that he last used marijuana in December 2010. Applicant reported that, subject to his additions and deletions, the ROI accurately reflected the interview, and he agreed that the "interrogatories, along with the content of the enclosed investigator's summary of the statement of [his] interview, may be admitted into evidence at a hearing to determine [his] suitability to hold a security clearance."⁴

Applicant testified that he does not remember the last time he used marijuana, but he knows it was not later than December 2010, and he believes it was in the summer of 2008 or 2009. He stated that he last used marijuana with his family and that he did not visit his family in December 2010. It is possible that the investigator used the

¹ Tr. at 34, 38-39, 48; GE 1.

² Tr. at 32, 37; Applicant's response to SOR; GE 1, 2, 4.

³ GE 3.

⁴ GE 3.

SF 86 for the dates of usage, and Applicant did not correct the dates when he responded to DOHA interrogatories. In any event, Applicant's testimony was credible, and I am convinced that he testified truthfully to the best of his recollection and he has not smoked marijuana since 2010 or earlier.⁵

Applicant was charged in December 2006 with driving while intoxicated (DWI) and refusal to take a breathalyzer test. Applicant admits that he drank two to three glasses of wine several hours before he was stopped by the police for speeding, but he denies that he was intoxicated. He stated that he passed a field sobriety test. He stated the deputy asked him to take a breathalyzer test on a machine that appeared to be archaic and out of date. He refused. Applicant was acquitted of all charges after a jury trial.⁶

Applicant used the prescription drug Xanax, without a prescription, on about three occasions in 2007. He stated he received about five to ten tablets from a friend and used it as a sleep aid during a stressful period for his family.⁷

Applicant was arrested in December 2007 and charged with driving under the influence (DUI) of alcohol/drugs and possession of a controlled substance without a prescription. Applicant readily admits that he had been drinking before he was arrested and that he should not have been driving. The police found Xanax when he was arrested. Applicant pleaded guilty to DUI, blood alcohol concentration (BAC) of .08%. He was sentenced to two days in jail and probation for 48 months. Applicant performed community service in lieu of jail. He also completed alcohol counseling as a requirement of his sentence.⁸

Applicant credibly testified he does not intend to use illegal drugs in the future and he will not drink and drive. He realizes that he has employees relying on him for their livelihood. His wife knows about his first arrest, but she does not know about his second arrest. She had medical issues at the time, and he did not want to add to what she was going through. He would inform her about the arrest before he would let it be used as a basis for coercion or duress.⁹ I found him to be open, honest, remorseful, and appropriately embarrassed by his actions.

The security officer for Applicant's company testified that Applicant is responsible for \$45 million in sales. He believes Applicant has learned from his mistakes and that he is not a threat to national security.¹⁰

⁵ Tr. at 32; Applicant's response to SOR .

⁶ Tr. at 43-44; Applicant's response to SOR; GE 1, 2, 4.

⁷ Tr. at 42-43; Applicant's response to SOR; GE 1, 2.

⁸ Tr. at 45-46; Applicant's response to SOR; GE 1-4.

⁹ Tr. at 46-49, 54-55; Applicant's response to SOR; GE 4.

¹⁰ Tr. at 23-31.

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 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 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 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

The security concern for drug involvement is set out in AG ¶ 24:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. Two are potentially applicable in this case:

- (a) any drug abuse;¹¹ and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant's possession and use of marijuana and Xanax are sufficient to raise AG ¶¶ 25(a) and 25(c) as disqualifying conditions.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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; and
- (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.

Applicant's illegal drug use reflected a level of immaturity and irresponsibility. He now realizes that such behavior is inconsistent with his age and responsibilities as a 40-year-old president and part owner of a company seeking to do business as a defense contractor. He clearly, unequivocally, and credibly committed to remaining drug-free. I

¹¹ Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

find that he demonstrated an appropriate period of abstinence and that illegal drug use is unlikely to recur. AG ¶¶ 26(a) and 26(b) are applicable.

Guideline J, Criminal Conduct

The security concern 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 charged with DWI in 2006 and DUI and possession of a controlled substance without a prescription in 2007. Both disqualifying conditions have been established.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following 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;
- (c) evidence that the person did not commit the offense; and
- (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 denies that he was intoxicated when he was charged in 2006. He was found not guilty after a jury trial. While an acquittal does not necessarily equate to factual innocence, it is some evidence that he did not commit the offense. AG ¶ 32(c) is partially applicable.

Applicant readily admits that he had been drinking and should not have been driving in 2007. He also admits to possessing Xanax without a prescription. His use of marijuana after the arrest is troubling, but it has been more than 18 months since he used any illegal substance and it is more than four and a half years since his last arrest.

I find there is evidence of successful rehabilitation and Applicant's criminal behavior is unlikely to recur. AG ¶¶ 32(a) and (d) are applicable.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

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. The following disqualifying conditions are potentially applicable:

(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; and

(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's alcohol-related arrests and his involvement with illegal drugs showed poor judgment and an unwillingness to comply with rules and regulations. That conduct also created a vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(c) and 16(e) are applicable as disqualifying conditions.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are 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 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 has not told his wife about his 2007 arrest, but he has been open and honest with the Department of Defense, which reduces his vulnerability to exploitation, manipulation, and duress. AG ¶ 17(e) is partially applicable. AG ¶¶ 17(c) and 17(d) are also applicable under the same rationale discussed under Guidelines H and J.

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, J, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant exhibited immature behavior and a disregard for the law when he used illegal drugs and drove after drinking alcohol. He is now president and part owner of a multi-million dollar company. He realizes that such behavior is wrong, illegal, and stupid. I am convinced that he has put his inappropriate and illegal behavior behind him and it will not recur.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has mitigated drug involvement, criminal conduct, and personal conduct security concerns.

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.c:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraphs 3.a-3.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 eligibility for a security clearance. Eligibility for access to classified information is granted.

Edward W. Loughran
Administrative Judge