



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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 -----) ISCR Case No. 11-04465
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)
 Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

December 6, 2012

Decision

MOGUL, Martin H., Administrative Judge:

On May 9, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines E and G for Applicant. 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), effective within the Department of Defense for SORs issued after September 1, 2006.

On June 2, 2012, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. I received the case assignment on August 7, 2012. DOHA issued a notice of hearing on August 20, 2012, and I convened the hearing as scheduled on September 10, 2012. The Government offered Exhibits 1 through 6, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through J at the time of hearing, which were also received without objection. DOHA received the transcript of the hearing (Tr) on September 18, 2012. I granted Applicant's request to keep the record open until September 27, 2012,

to submit additional documents, and the additional documents that were received have been identified collectively and entered into evidence without objection as Exhibit K. Based upon a review of the exhibits, and the testimony of Applicant, eligibility for access to classified information is denied.

Findings of Fact

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 40 years old. He is married, and he has four children. Applicant received a Bachelor's degree in Information Technology in 2003, and a Master's Degree in Information Systems in 2009. Applicant has held a security clearance since 1996. He served in the United States Navy from 1992 to 1994. (Tr at 31-34.) Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Guideline E, Personal Conduct

The Government alleges that Applicant is ineligible for clearance because he exhibited conduct involving questionable judgement, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

1.a. It is alleged in the SOR that on about July 14, 1992, Applicant was arrested and charged with 1) Operating a Vehicle Under the Influence of Alcohol (DUI), and 2) DUI of .08% or more. Applicant was found guilty of count one and count two was dismissed due to a plea agreement. Applicant was fined as a result of this conviction.

Applicant admitted this allegation in his RSOR, and he testified that this incident occurred when he was 21 years of age. He was stopped by the police and his blood alcohol was .08%, right at the legal limit. He competed all of his legal obligations as a result of that arrest and conviction, and he testified that he has never again been arrested for DUI. (Tr at 34-35.)

1.b. It is alleged in the SOR that Applicant was discharged from the United States Navy on October 1996 Under Other than Honorable Conditions. While in the Navy he had received Non-Judicial Punishment for marijuana use on December 14, 1992, and Non-Judicial Punishment for possession of marijuana on February 23, 1994.

Applicant admitted this allegation in his RSOR, and he testified that he had been taking prescribed medication for knee surgery, and when marijuana was offered to him, he thought that since he was taking prescribed medication it would not show up positively if he was drug tested. He subsequently was drug tested and it did show positive for marijuana. Applicant testified that he was separated from the Navy under less than honorable conditions, but he claimed that he did not know what the actual

separation status was. He did not learn that it was "Other than Honorable" until he requested documentation from the Navy to explain his separation status. (Tr at 36-40.)

1.c. It is alleged in the SOR that Applicant was terminated from his employment in 2007. This occurred because Applicant was first issued a warning letter for failure to report to work on August 2006, as a result of consuming alcohol, and he was informed that a repeat of this behavior would result in termination. In June 2007, Applicant failed to appear for a business meeting, and he missed his return business flight because of his consumption of alcohol. This resulted in Applicant's employment termination two days later.

Applicant admitted this allegation in his RSOR, and he testified that in 2006, when he was on a business trip, he went out in the evening and he consumed alcohol to the point of intoxication. This resulted in him sleeping somewhere other than his business hotel, and he woke up late and did not attend his business meeting. This resulted in him receiving a written warning threatening termination for a repeat offense.

In 2007 he was in a foreign country, and he went out drinking alcohol with other individuals, during which time he also consumed cocaine. He failed to attend a meeting and he missed his return flight. Applicant contended he was with individuals whom he did not know, and because he was fearful of leaving, he stayed with the group rather than return to his hotel. However, upon questioning he did concede that no one threatened that he could not leave, nor keep him from taking a taxi back to his hotel room. As a result of his actions, he was terminated from his employment. (Tr at 44-50.)

1.d. It is alleged in the SOR that on about June 27, 2009, Applicant snorted two lines of cocaine. As reviewed in 1.c., above, Applicant admitted that when he was in a foreign country on business, he was with a group of individuals whom he did not know, and he claimed that he felt some intimidation from these people to use cocaine. Applicant failed to cite any specific reason or offer any example of action taken by these individuals that would justify his claim that he had pressure to use cocaine. Applicant did offer that he had not used cocaine at any other time. (Tr at 46.)

1.e. It is alleged in the SOR that on about January 12, 2009, Applicant was charged with Unauthorized Use of a Motor Vehicle. This occurred after Applicant had consumed alcohol. Applicant plead guilty and he was fined.

Applicant testified that this incident occurred as he was using a rental vehicle, and a friend of his cousin told Applicant that he had left his hat in the vehicle. Applicant contended that he gave the individual the key just for the express purpose of his getting his hat, but unbeknownst to Applicant, the individual drove the car away and ultimately got into a vehicular accident. Applicant testified that he explained this to the police and to the judge, but he was found guilty, ordered to pay a fine of \$640, and placed on probation for one year. (Tr at 51-56.) I do not find that Applicant's explanation of this event is reasonable or has a ring of truth about it.

1.f. It is alleged in the SOR that Applicant falsified material facts in a Security Clearance Application (SCA) executed by Applicant on March 31, 2010. (Exhibit 2.) Question 13 c asked Applicant if in the last 7 years he had been officially reprimanded, suspended or disciplined for misconduct in the workplace? Applicant answered, "Yes," to this question and responded that in July 2007 he had been laid off from employer for excessive travel. Applicant failed to disclose that information set forth in subparagraph 1.c., above.

During his testimony, Applicant conceded that he was not terminated from his employment because of excessive travel, and that his failures as cited in 1.c, above, were the primary reason for his termination. (Tr at 62-65.) I find that Applicant did not furnish honest, complete information to the Government on SCA question 13 c.

1.g. It is alleged in the SOR that Applicant falsified material facts in a Security Clearance Application (SCA) executed by Applicant on March 31, 2010. (Exhibit 2.) Question 15 c asks if Applicant had "EVER received a discharge that was not honorable." Applicant answered, "Yes," to this question and responded that he received a General Discharge from the United States Navy. Applicant failed to disclose that information set forth in subparagraph 1.b., above.

Applicant testified that he was not certain what was the nature of the discharge that he received, as he had never seen the actual discharge orders before the time he completed the SCA. He indicated that before he saw the documentation he believed he received a Dishonorable discharge, but he could not explain why he did not write Dishonorable Discharge, if that is what he believed. (Tr at 36-40.) I find that Applicant did not furnish honest, complete information to the Government on SCA question 15 c.

1.h. It is alleged in the SOR that Applicant falsified material facts in a Security Clearance Application (SCA) executed by Applicant on March 31, 2010. (Exhibit 2.) Question 22 e asks, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" Applicant answered, "No," to this question, but he should have answered, "Yes," and disclosed the information in subparagraph 1.a., above.

During his testimony Applicant explained "that was a mistake on my part." (Tr at 61-62.) I find that Applicant did not furnish honest, complete information to the Government on SCA question 22 e.

1.i. It is alleged in the SOR that Applicant falsified material facts in a Security Clearance Application (SCA) executed by Applicant on March 31, 2010. (Exhibit 2.) Question 23 a of the SCA asked Applicant if in the last 7 years he had illegally used any controlled substance. Applicant answered, "No," to this question. Applicant failed to disclose that information set forth in subparagraph 1.b., above. Applicant admitted that he had used cocaine two years before he completed this application, and he should have answered, "Yes," to this question. He claimed that the reason he did not list his cocaine use was because, "I made a mistake." (Tr at 60.) I find that Applicant did not furnish honest, complete information to the Government on SCA question 23 a.

Question 23 b of the SCA. asks, “Have you EVER illegally used a controlled substance, while possessing a security clearance, . . . or while in a position directly and immediately affecting the public safety?” Applicant answered, “No.” Applicant failed to disclose that information set forth in subparagraphs 1.b. and 1.d., above.

Applicant testified that he should have answered, “Yes,” to this question. (Tr at 59.) I find that Applicant did not furnish honest, complete information to the Government on SCA question 23 b.

Guideline G, Alcohol Consumption

1.a. The SOR alleges that Applicant is ineligible for clearance because he has engaged in excessive alcohol consumption, as set forth in subparagraphs 1.a., and 1.c., above. Applicant testified that he has abstained from consuming alcohol many times in the past for periods of six months, nine months and a year. Applicant explained that he went to an inpatient alcohol treatment program for four months in 1999 and 2000, after which time he stopped consuming alcohol for four months, before he started drinking again. He indicated that his last drink of alcohol was on July 23, 2010, and he now believes he will not drink alcohol again in the future. Applicant believes he is allergic to alcohol. He has used Alcoholics Anonymous since 2000 to help him abstain from alcohol. (Tr at 65-72, 84.)

Mitigation

Applicant submitted a payment receipt showing that he had paid \$648 ordered by the court for the criminal conduct reviewed in subparagraph 1.e. (Exhibit C.) There is also a letter from a law firm showing Applicant paid \$10,000 for the rental vehicle involved in the incident discussed in subparagraph 1.e. (Exhibit D.) Applicant also submitted documents showing he received an Outstanding Performance Award in 2011 from his current employer. (Exhibits E, F.) Additionally, Applicant submitted a document establishing that he received a Master’s degree on September 30, 2009. (Exhibit G.) Applicant submitted five very laudatory character letters in Exhibit I, and copies of awards that he received in Exhibit J.

In his post-hearing documents, Applicant submitted six positive character letters. He also submitted a document establishing that he received a Bachelor of Science degree on May 31, 2006. Finally, he submitted a document that shows he is a Deacon of his church. (Exhibit I.)

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 useful 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 over-arching 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 "[any] 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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.

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 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

With respect to Guideline E, the evidence establishes that Applicant furnished to the Government incomplete, untruthful answers regarding his employment termination record, his military discharge, his police record, his drug usage, including while he was holding a security clearance.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts or fails to furnish relevant information to a Government investigator, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, I conclude that Applicant knowingly and willingly failed to give complete, honest answers to the Government on a SCA.

Applicant's conduct as a whole also involves questionable judgement and unwillingness to comply with rules and regulations, including a DUI, use of marijuana while in the military, termination from employment because of alcohol consumption causing unacceptable conduct, and arrest and conviction for unauthorized use of a motor vehicle .

In reviewing the disqualifying conditions under Guideline E, I conclude that, because of Applicant's "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire," ¶ 16(a) applies against Applicant.

I also find that Applicant's conduct supports disqualifying condition ¶ 16(d) "a whole-person assessment of questionable judgement, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations" under this guideline. I do not find any mitigating condition under ¶ 17 is applicable. I therefore, resolve Guideline E against Applicant.

Guideline G, Alcohol Consumption

Applicant's alcohol consumption resulted in a conviction for DUI in 1992, termination from his employment in 2007, and a guilty plea for Unauthorized Use of a Motor Vehicle in 2009. The Government established that Applicant was involved in "alcohol-related incidents away from work," and "binge consumption of alcohol to the point of impaired judgement." Disqualifying conditions AG ¶ 22(a) and (c) apply to this case. AG ¶ 22(b) "alcohol-related incidents at work" is also applicable because of Applicant's conduct as listed under subparagraph 1.c.

In reviewing the mitigating conditions, I do not find that ¶ 23(a) is applicable, because not enough time has passed since Applicant last consumed alcohol, based on his long history of abstaining for periods of time from alcohol consumption and then going back to drinking alcohol again. I do not find that any other mitigating factor under this guideline applies in this case. I find Guideline G against Applicant.

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. Based on all of the reasons cited above as to why the Disqualifying Conditions apply and no Mitigating Condition applies under Guideline E or G, I find that the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the 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 E:	AGAINST APPLICANT
Subparagraphs 1.a.-1.i:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.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.

Martin H. Mogul
Administrative Judge