



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



In the matter of:)
)
) ISCR Case No. 11-05536
)
Applicant for Security Clearance)

Appearances

For Government: Pamela Benson, Esq., Department Counsel
For Applicant: *Pro se*

05/09/2013

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns under Guidelines J (Criminal Conduct) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

On January 24, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On June 29, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J and E. This 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 on September 1, 2006.

The SOR set forth reasons why DOD could not make the affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. In an undated response,

Applicant answered the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. On December 18, 2012, Department Counsel prepared the Government's File of Relevant Material (FORM) that contained documents identified as Items 1 through 13.

The Defense Office of Hearings and Appeals (DOHA) forwarded to Applicant a copy of the FORM with instructions to submit any objections and additional information within 30 days of its receipt. Applicant received the FORM on February 7, 2013, and did not submit any objections or additional matters within the allotted time period. The case was assigned to me on March 30, 2013. Items 1 through 13 are entered into the record.

Findings of Facts

Applicant is a 23-year-old software engineer who works for a defense contractor. He has worked for his current employer since September 2010. He graduated from high school in 2007, earned an associate's degree in 2010, and is currently pursuing a bachelor's degree. He has never been married and has no children. This is the first time that he is seeking a security clearance.¹

The SOR listed four Guideline J allegations and three Guideline E allegations. In his Answer to the SOR, Applicant admitted two Guideline J allegations (SOR ¶¶ 1.a and 1.b), denied one of those allegations (SOR ¶ 1.c), and admitted and denied parts of the remaining allegation (SOR ¶ 1.d). He admitted all of the Guideline E allegations. His admissions are incorporated as findings of fact.²

A police report reflected that Applicant was arrested for possession of marijuana in State A on June 16, 2007. He was a juvenile at that time. On that occasion, a police officer stopped him while he was driving a vehicle that had an improperly displayed license plate. Two juvenile passengers were in the vehicle. Upon making the stop, the police officer noticed that Applicant had glossy, red eyes; was shaking slightly; and appeared very nervous. The police officer asked him to step out of the vehicle. The police officer asked Applicant if he had been drinking or had used any controlled substances. Applicant initially denied doing so. The police officer explained that if Applicant was honest that he would be able to simply go home and the officer would make a report of the found narcotics. When asked again, Applicant admitted that he had used marijuana and indicated marijuana was present in the vehicle. The police officer searched the vehicle and found a baggie of marijuana in the center console. Applicant admitted that the baggie of marijuana belonged to him. The police officer drove Applicant and the two passengers to their homes. In September 2007, law enforcement authorities informed Applicant that a warrant was issued for his arrest on the possession of marijuana charge. The warrant remained outstanding until April 2010, when Applicant pled guilty to that drug charge by mailing in his plea. In May 2010, he was sentenced to a fine and court costs totaling \$1,083; had his driver's license suspended for 30 days;

¹ Items 5 and 13.

² Items 1 and 4.

and was placed on probation for 12 months. Among other restrictions, his probation prohibited him from consuming, possessing, or purchasing alcoholic beverages. He made monthly reports to his probation officer by telephone. At the end of the probation, Applicant's probation officer reported that he complied with all conditions of his probation. His probation ended on May 18, 2011.³

Three SOR allegations pertain to the incident described above. SOR ¶ 1.a set forth the charge, Applicant's plea, and the sentence. SOR ¶ 2.a indicated that Applicant lied to the police officer during that incident by initially stating he had not used marijuana that day. SOR ¶ 2.b asserted that Applicant was informed of the issuance of an arrest warrant against him for the drug charge in September 2007, and the warrant remained outstanding until his arraignment in April 2010. In his Answer to the SOR, Applicant admitted each of these allegations without providing any comments or explanation.⁴

At about 1:30 a.m. on March 1, 2008, the police arrived at Applicant's apartment in State B in response to a disturbance of the peace complaint. At that time, Applicant and the 18 other individuals in his apartment were less than 21 years old. Upon entering the apartment, the police discovered opened and unopened cans of beer. A search of the cupboard revealed two marijuana pipes with residue in them and several plastic containers that had inside what appeared to be marijuana residue. In a drawer was a leaf grinder that also had green leaf particles inside it. Applicant and his roommate informed the police that the drug paraphernalia was their property. One police officer noted that he could smell the odor of marijuana in one of the bedrooms. Applicant was charged with possession of drug paraphernalia and minor in possession of liquor. On March 26, 2008, he pled guilty to the amended charges of excessive noise and littering and was sentenced to a fine and court costs totaling \$1,022. In his Answer to SOR ¶ 1.b, Applicant admitted the original charges, his pleas to the amended charges, and the sentence arising from this incident.⁵

On May 2, 2008, the police arrived at Applicant's apartment in State B after the landlord complained that the residents were selling drugs and that she observed a glass smoking pipe on a coffee table. In the apartment, the police found various items of drug paraphernalia including a marijuana roach, glass smoking pipe with residue, rolling papers, and a pill cutter. The Offense/Incident Report reflected that the charges were use or possession of drugs with the intent to use and possession of 35 grams or less of marijuana. However, the report did not indicate that Applicant was arrested for those charges or was summoned to appear in court for them. The disposition of those charges is unknown. In his Answer to the SOR ¶ 1.c, Applicant denied the allegation setting forth those charges.⁶

³ Items 7 and 8.

⁴ Items 1 and 4.

⁵ Items 4, 9 and 10.

⁶ Items 4 and 11.

On August 7, 2010, the police cited Applicant for possession of an open container of an alcoholic beverage in a moving vehicle in State B. This citation was later amended to an equipment violation and Applicant was fined. In his Answer to SOR ¶ 1.d, Applicant admitted that he was cited for an open container offense. This SOR allegation also asserted that he was cited for selling liquor to an intoxicated person, which he denied. There is no evidence in the FORM that Applicant was ever cited or charged for that latter offense.⁷

In his e-QIP dated January 24, 2011, Applicant disclosed that he was fired from a job in August 2010 for inadequate job performance, but noted that he had a discrimination complaint pending against that employer. In the e-QIP, he also disclosed that he used marijuana about two to three times a month from September 2005 to July 2007 and stopped using that substance before he obtained a job in 2007. In the police record section, he checked the “Yes” blocks for Section 22.a that asked whether he had any pending criminal proceedings against him and Section 22.e that asked whether he had ever been charged with any offense related to alcohol or drugs. In the comments for that section, he provided information about two offenses. First, he disclosed that he was charged in August 2010 with failure to appear in court for an earlier substance abuse charge and that later charge was dismissed when he contacted authorities to address the earlier charge. Second, he disclosed that he was charged with a possession of a controlled substance (marijuana) in July 2007 and that he was placed on probation from May 2010 to May 2011 for that offense. In responding to interrogatories in April 2012, he reiterated again that he stopped using marijuana in July 2007.⁸

SOR ¶ 2.c alleged that Applicant falsified his e-QIP by deliberately omitting information about his alcohol and drug charges arising from the March 2008, May 2008, and August 2010 incidents discussed above. In his Answer to the SOR, Applicant admitted SOR ¶ 2.c without providing any comments or explanation.⁹

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AGs. In addition to brief introductory explanations for each guideline, the AGs 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

⁷ Items 1 and 4.

⁸ Items 5 and 6.

⁹ Items 1 and 4.

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 J, Criminal Conduct

AG ¶ 30 sets out the security concern relating to criminal conduct:

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.

I have considered the disqualifying conditions under AG ¶ 31 for this guideline. Three of those disqualifying conditions are potentially applicable in this case:

(a) a single serious crime or multiple lesser offenses;

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and

(e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Between June 2007 and August 2010, Applicant was charged on four separate occasions with alcohol- and drug-related offenses. In two of those incidents, he pled guilty to minor, amended charges. In one of those incidents, it appears that the local authorities did not pursue the charges. In April 2010, he pled guilty to a possession of marijuana offense and was sentenced to 12 months of probation. He was prohibited from possessing or consuming alcohol during his probation. While on probation in August 2010, he was cited for possession of an open container of alcohol in a motor vehicle, but was later found guilty of an equipment violation. The evidence is sufficient to establish the above disqualifying conditions.

I have considered all of the mitigating conditions for Criminal Conduct under AG ¶ 32 and the following potentially apply:

(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; 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 has repeatedly engaged in criminal conduct. Some of the alleged misconduct occurred while he was a juvenile. His latest police citation was issued less than three years ago. His delay in resolving an outstanding arrest warrant is particularly troubling. He knew that warrant had been issued against him for a possession of marijuana offense in 2007, but he failed to take any action to resolve it until April 2010. Based on the evidence presented, I cannot find that Applicant has reformed and rehabilitated himself or that he is unlikely to engage in criminal conduct in the future. His criminal conduct continues to cast doubt on his current reliability, trustworthiness, or good judgment. AG 32(a) and 32(d) do not apply.

Guideline E, Personal Conduct

The security concern for Personal Conduct is set out in AG ¶ 15, as follows:

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:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(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 including that the person may not properly safeguard protected information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined will all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics including that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior . . . ; (3) a pattern of dishonesty or rule violations

In his Answer to the SOR, Applicant admitted that he lied to a police officer in 2007, that he falsified his e-QIP in 2011, and that he failed to take action to resolve an outstanding arrest warrant for over two and half years. Based on his admissions, AG ¶¶ 16(a) through 16(d) apply.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advise of

unauthorized personnel or legal counsel advising or instructing the individual specifically concerning security clearance process. Upon being made aware of the requirement to cooperate or provide information, the individual cooperated fully and truthfully;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant engaged in repetitive and recent misconduct that raises serious questions about his reliability, trustworthiness, and good judgment. He has failed to present evidence that would mitigate such security concerns. None of the above mitigating conditions 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 relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines 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 is a young man who has been working for his current employer for about two and a half years. He has obtained an associate's degree and is pursuing a bachelor's degree. While the alleged misconduct could be characterized as youthful indiscretions, Applicant has failed to show that he has matured and will not engage in misconduct in the future. A recent example of his unreliability arises from his probation violation. In May 2010, he was placed on probation for 12 months in State A. He was prohibited from possessing or consuming alcohol while on probation and was required to make monthly reports to his probation officer. In August 2010, he was cited for possessing an open container of alcohol in a vehicle in State B. The abstract of Applicant's probation report does not reflect that he advised the probation officer of his citation for that alcohol-related offense in State B. At the end of his probation, the probation officer reported that he had complied with all conditions of his probation. Such evidence raises questions about whether Applicant was forthcoming and honest with the probation officer. From the evidence presented, Applicant has failed to show that he has reformed and rehabilitated himself.

Overall, the record evidence leaves me with questions and doubts about his eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has failed to mitigate the criminal conduct and personal conduct security concerns.

Formal Findings

Formal findings 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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a – 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.

James F. Duffy
Administrative Judge