



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



In the matter of:)
)
) ISCR Case No. 11-08529
)
Applicant for Security Clearance)

Appearances

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

06/05/2013

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, drug involvement; Guideline J, criminal conduct; Guideline E, personal conduct; and Guideline G, alcohol consumption. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On August 23, 2012, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement; Guideline J, criminal conduct; and Guideline E, personal conduct. DoD acted 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 DoD on September 1, 2006.

Applicant answered the SOR on October 17, 2012, and requested a hearing. The case was assigned to me on March 20, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 28, 2013, and the hearing was convened as scheduled on April 25, 2013. The Government offered exhibits (GE) 1 through 3, which were admitted into evidence without objection. The Government's exhibit index was marked as hearing exhibit (HE) I. Applicant testified and offered exhibits (AE) A through F, which were admitted into evidence without objection. The record was kept open for Applicant to submit additional evidence. He submitted AE G through M in a timely fashion and they were admitted without objection. DOHA received the hearing transcript (Tr.) on May 3, 2013.

Procedural Ruling

Motion to Amend SOR

Upon motion by Department Counsel, I amended the SOR by adding four allegations under Guideline G, alcohol consumption, as follows:

4.a. As set forth in subparagraph 2.b.

4.b. As set forth in subparagraph 2.c.

4.c. You were diagnosed with alcohol abuse in early remission in approximately June 2012, and as a problem stage I/II drinker in approximately September 2012.

4.d. You failed to follow a court order prohibiting you from consuming alcohol during your probationary period.

Applicant did not object to the amendment. He was afforded an opportunity to submit additional evidence regarding these amended allegations, which he did by submitting a post-hearing document admitting all the allegations.¹

On my own motion, I amended SOR allegation ¶ 1.c to change the dates stated therein as follows: "From April 2007 to August 2007." This amendment conforms the factual allegation to the evidence set forth in the record.²

Findings of Fact

In Applicant's answer, he admitted all the allegations in the SOR, except for SOR ¶ 3.a. He also admitted all the amended allegations.³ After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

¹ Tr. 65-67, 97-99; AE K.

² Tr. 97-99.

Applicant is 24 years old. He is single and has no children. Since January 2011, he has worked for a defense contractor as a quality engineer. He has a bachelor's degree. He has no military background and has never held a security clearance.⁴

Applicant's admitted conduct raised in the SOR and the amended SOR includes: (1) using marijuana on multiple occasions from about June 2006 to October 2009; using Adderall, without a prescription, on one occasion in July 2010; purchasing and reselling LSD and marijuana from about April 2007 to August 2007 (See SOR ¶¶ 1.a – 1.c); (2) being charged with underage drinking in April 2007; being arrested for driving under the influence of alcohol (DUI), eluding officers, and other related charges in February 2011 (See SOR ¶¶ 2.b and 2.c); (3) being diagnosed as an alcohol abuser in June 2012; and failing to follow a court order prohibiting him from drinking alcohol while on probation. (See SOR ¶¶ 4.c and 4.d). The conduct alleged in SOR ¶ 1.c was also alleged as criminal conduct under Guideline J. (See SOR ¶ 2.a) The conduct alleged in SOR ¶¶ 2.b and 2.c was also alleged as alcohol consumption under Guideline G. (See SOR ¶¶ 4.a and 4.b)

Applicant began using drugs after he graduated from high school in 2006. He claims to have used a pipe to smoke marijuana by taking it into his mouth, but because he started coughing, he did not inhale the smoke. He did not use marijuana again until the summer of 2008. He smoked marijuana with his friends two to three times a week during the summer. They smoked it by using a pipe. After he returned to college in the fall, he reduced his marijuana use to once a week with his friends and roommate. He stopped using marijuana in October 2009 because he was beginning to apply for jobs and wanted to be drug free. He has not used marijuana since then. In 2010, he used the drug Adderall without a prescription. He used the drug with friends after work one night when they wanted to stay up late. He took one pill and felt its effect by not being able to sleep.⁵

In about April 2007, Applicant began selling marijuana and LSD as a profit-making enterprise. He engaged in this activity for about five months until about August 2007. He bought the drugs from one person and sold to two of his friends. He sold about ten doses of LSD every three weeks and sold about three to four pounds of marijuana over the entire period. He made a profit of \$200 to \$300 per week. He sold these drugs because he needed the money and thought it would be a good way to make extra money. He stopped selling drugs when he went back to college in August 2007. He claims to have not sold drugs since then. He remains in contact with the two friends to whom he sold drugs.⁶

³ AE K.

⁴ Tr. 73-74; GE 1.

⁵ Tr. 39-40, 43-44; GE 2 (p. I-15).

⁶ Tr. 30-31, 49-50; GE (p. I-16).

In April 2007, Applicant was arrested for underage drinking on the campus of the college he was attending. He and some friends were drinking alcohol and he was 18 years old at the time. He was given a citation by a campus police officer. He pleaded guilty, was fined, and ordered to attend a drug and alcohol education class.⁷

In February 2011, Applicant was arrested for DUI, attempting to elude police officers, and other related charges. He was drinking alcohol at a local bar and then decided to drive home. He had about four beers and one shot of whiskey before he left the bar. He was stopped by local law enforcement after his car slid around a corner. He stopped as soon as he saw the flashing lights. In April 2012, he pleaded guilty to the DUI and eluding charges and was sentenced to 12 months' probation, a fine, and court-ordered evaluation and treatment for alcohol and/or drug dependency. One of the terms of his probation was no consumption of alcohol during the term of probation. His probation ended in April 2013.⁸

Applicant received about ten hours of court-ordered drug and alcohol counseling in June and September 2012. In June 2012, he was diagnosed by a licensed clinical social worker at an approved alcohol treatment center as an alcohol abuser in remission. In September 2012, he was further evaluated as a "Problem Stage I/II drinker." No treatment plan was recommended. After his arrest in February 2011, but before his court appearance in April 2012, Applicant admitted to driving under the influence of alcohol on another occasion. He does not remember how much he drank then, but it was "a lot." He also began violating his probation by drinking alcohol in April 2012, soon after his sentencing. He stopped drinking until September 2012 when he began drinking on a regular basis. After September 2012, he was drinking about twice a week and would consume three to four drinks each time. He did not inform his probation officer that he was drinking during his probation period. He knew he was violating his probation by consuming alcohol in this manner before his probation ended in April 2013. He does not believe he has a problem with alcohol use.⁹

Applicant filled out his security clearance application in March 2011. In the application he was asked about whether he illegally used any drugs, including prescription drugs, in the last seven years. He answered yes to the question and listed his marijuana use from June 2008 to October 2009. He did not list his marijuana use in 2006. He did not consider this a "use" of marijuana, since he coughed out the smoke before he could inhale it. Applicant did not inform the Office of Personnel Management (OPM) investigator about the "attempted" use in 2006 during his security clearance interview in March 2011. However, he did consider this incident a "use" of marijuana when he completed interrogatories sent out by DOHA because he answered the question of when he first used marijuana by stating that he first used marijuana in June

⁷ Tr. 30, 79; GE 2 (p. I-14).

⁸ Tr. 32, 51, 53-54; GE 2 (pp. I-13, I-34).

⁹ Tr. 32, 53-54, 56, 58, 60-62, 64, 82, 85; GE 2 (p. I-33); AE A, K.

2006. He also did not list his July 2010 use of Adderall on his security clearance application. He claims to have forgotten about this one-time use when he was filling out the application.¹⁰

Applicant offered two years of job evaluation reports that characterized him as an “exceptional contributor” to his organization for 2011, and gave him an overall rating of 4.2 (out of 5) for 2012. He is described by his supervisor as exhibiting maturity beyond his current salary grade. He also offered several character letters from coworkers and friends. He is described as having a high work ethic, and as being trustworthy, honest, loyal, respectful, and goal oriented.¹¹

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 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, these guidelines are applied 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, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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

¹⁰ Tr. 37, 39-42; GE 2 (p. I-8).

¹¹ AE C-G.

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 that an applicant may deliberately or inadvertently fail to 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 H, Drug Involvement

AG ¶ 24 expresses the drug involvement security concern:

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.

I have considered all of the evidence in this case and the disqualifying conditions under drug involvement AG ¶ 25 and found the following relevant:

(a) any drug abuse; and

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Between 2006 and 2010, Appellant illegally used marijuana on a number of occasions and used Adderall on one occasion. For a five-month period during 2007, he sold both marijuana and LSD for profit. I find that all the above disqualifying conditions apply.

I have considered all of the evidence in this case and the mitigating conditions under drug involvement AG ¶ 26 and found the following relevant:

(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 use of marijuana during 2008 and 2009 was frequent. His period of abstinence is insufficient to demonstrate his intent not to use illegal drugs in the future. Although three years have passed since his last drug use of Adderall in 2010, his overall behavior of drug use and distribution for profit cause me concern. He did not establish that recurrence is unlikely. Even though he apparently has abstained from drug use and distribution for several years, his past actions, particularly his conscious decision to sell drugs for profit, cast doubt on his current reliability, trustworthiness, and good judgment. It is too soon to tell whether his use will recur. Although he claims he no longer uses drugs, this is not enough to show a demonstrated intent not to use drugs in the future. AG ¶¶ 26(a) and 26(b) partially apply.

Guideline J, Criminal Conduct

The security concern relating to the guideline 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 in this case. 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's numerous drug sales, his underage drinking charge, and his DUI and eluding police charges constitute criminal action on his part. I find that both disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

- (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's DUI conviction was in April 2012 and his probation ended for that charge in April 2013. He has shown a steady pattern of criminal activity since 2007. There has not been a sufficient amount of time to determine whether his rehabilitative efforts will be successful. Given his past history of criminal activity, it cannot be determined that it is unlikely that future criminal behavior will recur. His past criminal behavior casts doubt on his reliability, trustworthiness, and good judgment. Under these circumstances, his last criminal act is not sufficiently attenuated after considering his behavior in its totality. AG ¶ 32(a) does not apply. Applicant admitted that he violated the terms of his probation not to drink alcohol on a weekly basis for several months. His actions show a lack of rehabilitation. AG ¶ 32(d) does not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security concern:

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 in this case. The following disqualifying condition is 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.

Applicant failed to list his illegal use of marijuana in 2006 because he did not consider what he did to be a "use" of marijuana. He claims to have forgotten about using Adderall in 2010. I did not find his testimony credible on either of these points. He deliberately failed to list these uses on his security clearance application in 2011. AG ¶ 16(a) applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

(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.

I considered all of the facts and circumstances surrounding Applicant's falsifications. Falsifying information on a security clearance application is not a minor offense and doing so casts doubt on his trustworthiness, reliability, and good judgment. AG ¶ 17(c) does not apply.

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining to alcohol consumption:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable in this case:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

(e) evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program; and

(g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

Applicant's underage drinking charge, his DUI conviction, his diagnosis as an alcohol abuser, in remission, and his violation of the court's order prohibiting his use of alcohol during his probationary period support the application of the above disqualifying conditions.

I have also considered all of the mitigating conditions for alcohol consumption under AG ¶ 23 and found the following relevant:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual acknowledges his alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser); and

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Applicant's underage drinking is remote in time, but is brought back to relevancy by his most recent DUI offense in 2011. His unwillingness to obey the court's order not to drink during his probation casts doubt on his current reliability, trustworthiness, and good judgment. Applicant did not meet his burden to show that similar behavior is unlikely to recur. AG ¶ 23(a) does not apply. He does not acknowledge having an alcohol problem. He was aware of the court order prohibiting him from drinking alcohol during his probation, yet he chose to do so anyway. AG ¶ 23(b) does not apply. He did attend an alcohol education program in September 2012, which recommended no further treatment. The treatment program was apparently unaware of his probation violations. Applicant continues to consume alcohol on a regular basis, despite his diagnosis as an alcohol abuser. There was no evidence presented that he participates in Alcoholics Anonymous (AA), or any similar group. AG ¶ 23(d) partially applies.

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. I considered Applicant's job evaluations and his coworker support. However, I also considered that he sold drugs for profit and violated a judge's order not to consume alcohol on multiple occasions. Despite the presence of some mitigation, Applicant failed to provide sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the Guidelines.

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: Subparagraphs 1.a-1.c:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline J: Subparagraphs 2.a-2.c:	AGAINST APPLICANT Against Applicant
Paragraph 3, Guideline E: Subparagraph 3.a:	AGAINST APPLICANT Against Applicant
Paragraph 4, Guideline G: Subparagraphs 4.a-4.d:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge