



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. : 15-04485

Appearances

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

May 22, 2017

Decision

MOGUL, Martin H., Administrative Judge:

On December 13, 2015, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J, H, and E, for Applicant. (Item 1.) 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.

Applicant replied to the SOR (RSOR) in writing on January 12, 2016, and he requested that his case be decided on the written record in lieu of a hearing. (Item 2.) On March 14, 2016, Department Counsel issued the Department's written case. A complete copy of the file of relevant material (FORM) was provided to Applicant. In the FORM, Department Counsel offered five documentary exhibits. (Items 1-5.) Applicant

was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. A response was due on April 22, 2016. Applicant submitted no additional evidence. The case was assigned to this Administrative Judge on December 13, 2016. Based upon a review of the pleadings and exhibits, 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 FORM, and the admitted documents, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 33 years old. He has never been married, and he has no children. Applicant has been employed as a welder by his current employer, a defense contractor, since May 2014, and he seeks a DoD security clearance in connection with employment in the defense sector. (Item 3.)

Paragraph 1 (Guideline J - Criminal Conduct)

The SOR alleges that Applicant has engaged in criminal acts, which create doubt about his judgement, reliability, and trustworthiness. The SOR lists eight allegations (1.a. through 1.h.) regarding criminal conduct, under Adjudicative Guideline J. Applicant admitted each of these eight allegations of criminal conduct that occurred between July 2001 and May 2012, in his RSOR. (Item 2.) Allegations 1.a., 1.b., 1.d., 1.e., 1.g., and 1.h. are drug related; including possession with intent to distribute a Class A controlled substance, possession with intent to distribute a Class B controlled substance, possession of a Class C controlled substance, and possession of a Class D controlled substance. The most recent allegation, 1.h., which Applicant admitted, alleges that in May 2012 he was "arrested and charged with a felony possession of a Class B Substance." Allegation 1.c. alleges, and Applicant admitted, that in March 2002, he was arrested and charged with uttering and possession of a counterfeit note/cert/bill. Allegation 1.f. alleges, and Applicant admitted, that in March 2006 he was arrested and charged with uttering a counterfeit note/cert/bill and larceny by check.

Paragraph 2 (Guideline H - Drug Involvement)

The SOR lists two allegations (2.a. and 2.b.) under Adjudicative Guideline H.

2.a. The SOR alleges, and Applicant has admitted in his RSOR, that he, "used marijuana with varying frequency from 1997 to at least 2012." (Item 2.)

2.b. It is alleged in the SOR, and Applicant has admitted in his RSOR, that Applicant's conduct as set forth in subparagraphs 1.a., 1.b., and 1.d., above is a concern under Guideline H. (Item 2.)

Paragraph 3 (Guideline E - Personal Conduct)

3.a. Applicant executed a Security Clearance Application (SCA) certified by him on May 20, 2014. (Item 3.) The SOR alleges that Applicant falsified material facts in response to the questions under “Section 23 - Illegal Use of Drugs or Drug Activity.” The questions asked: “In the last 7 years, have you illegally used any drugs or controlled substances? Applicant answered, “No,” to this question. It is alleged in the SOR, that Applicant deliberately failed to disclose that information set forth in subparagraph 2.a., above.

In his RSOR, Applicant wrote that in April 2004, he was diagnosed with a mental disability, which was difficult for him to accept. Since he could not always obtain the prescribed medication, because he did not always have health insurance, he self-medicated with marijuana, and he wrote that a lot of what happened to him between 2004 through 2012 “has been a fog to me.” He contended that when he completed the SCA he thought it had been more than 7 years since he last used marijuana.

3.b. The SOR alleges that on the SCA Applicant executed on May 20, 2014, Applicant falsified material facts in response to the questions under “Section 23 - Illegal Use of Drugs or Drug Activity.” The questions asked: “In the last 7 years, have you been involved in the illegal purchase, manufacture, cultivation . . . or sale of any drug or controlled substance?” Applicant answered, “No,” to this question. It is alleged in the SOR, that Applicant deliberately failed to disclose that he engaged in the conduct alleged in subparagraphs 1.a., 1.b., and 1.d. through 1.h., above.

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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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, “[t]he 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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.

Analysis

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 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.

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

Applicant has a recent history of multiple criminal arrests and convictions that occurred from 2001 to at least 2012. These offenses give rise to concerns about Applicant’s judgment and reliability, both because of the nature of the offenses and the

quantity of criminal offenses. The aforementioned disqualifying conditions have been established.

Four Criminal Conduct mitigating conditions under AG ¶ 32 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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (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's criminal past continues to cast doubt on his trustworthiness and judgment. Because of his long history of criminal offenses, and his failure to accurately and honestly provide full information about said conduct, as alleged under Guideline E, Applicant has failed to present evidence to show that similar criminal conduct is unlikely to recur. I do not find that any of the mitigating factors under AG ¶ 32 provides mitigation in this case. I, therefore, find Guideline J against Applicant.

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to 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.

I have considered all of the evidence in this case and the disqualifying conditions under Drug Involvement AG ¶ 25, and the following are potentially applicable:

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

The Government presented sufficient information to support the factual allegations under SOR ¶ 2.a. and 2.b. Applicant used marijuana and was involved with illegal drug conduct, for many years.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement AG ¶ 26. Because of Applicant's long and continuing history of using marijuana, his illegal drug-related conduct over many years, and his failure to reveal to the Government this history, I find that none of the mitigating factors can be considered in this case. I find Guideline H against Applicant.

Guideline E, Personal Conduct

The security concern for the personal conduct guideline 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 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 disclose his long history of drug usage and criminal conduct related to his drug usage. While Applicant may not have recalled all of his drug usage and drug related arrests, it is unfathomable that he did not recall any of his marijuana usage from 1997 to at least 2012, nor his arrests from 2001 to 2012, when he was arrested and charged with a felony possession of a Class B substance. This behavior indicates questionable judgment, unreliability, and untrustworthiness. I find that Applicant did intentionally falsify section 23 on the SCA that Applicant executed on May 20, 2014.

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 advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the 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; and

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

After considering the mitigating conditions outlined above in AG ¶ 17, none of them were established in this case. Applicant did not make prompt or good-faith efforts to correct his falsification and concealment. Falsifying material information is a serious offense, and Applicant has done nothing to show that similar lapses in judgment are unlikely to recur. He has not provided sufficient evidence to meet his burden of proof with respect to his personal conduct. I find Guideline E 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 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. 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 have incorporated my comments under Guidelines J, H, and E in my whole-person analysis. Overall, the record evidence raises significant doubts about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from the cited adjudicative guidelines under the whole-person concept.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

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| Paragraph 1, Guideline J: | AGAINST APPLICANT |
| Subparagraphs 1.a through 1.h.: | Against Applicant |
| Paragraph 2 Guideline H: | AGAINST APPLICANT |
| Subparagraphs 2.a. and 2.b.: | Against Applicant |
| Paragraph 3, Guideline E: | AGAINST APPLICANT |
| Subparagraphs 3.a. and 3.b.: | 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