



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 07-07817
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
Applicant: *Pro Se*

December 16, 2008

Decision

CREAN, Thomas M., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigative Processing (e-QIP) on January 19, 2007. Applicant also submitted a Security Clearance Application (SF 86) on June 20, 2005. He updated that application and re-signed and re-dated it on January 23, 2008. On February 22, 2008, The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline H for drug involvement and Guideline J for criminal conduct. 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on February 28, 2008, and answered the allegations in writing on March 18, 2008. He admitted all of the allegations under Guidelines H and J, and requested a decision on the record without a hearing. On March 2, 2008, pursuant to Paragraph E3.1.7 of the Directive, Department Counsel requested a hearing in this case. On August 13, 2008, Department Counsel amended

the SOR to add seven allegations under Guideline E for personal conduct. Applicant acknowledged receipt of the amended SOR on September 6, 2008, and admitted the allegations under Guideline E with explanation.

Department Counsel was prepared to proceed with the case on October 27, 2008, and the case was assigned to me the same day. DOHA issued a notice of hearing on November 3, 2008, for a hearing on November 19, 2008. I convened the hearing as scheduled. The government offered 15 exhibits, marked Government Exhibits (Gov. Ex.) 1 through 15, which were received without objection. Applicant testified on his behalf. DOHA received the transcript (Tr.) of the hearing on December 1, 2008. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

Applicant is 27 years old and has worked for the last four years as a telecom technician for a defense contractor. He held an interim security clearance since working with the defense contractor. He is a high school graduate with some college courses. He is married with no children. Applicant graduated from high school in June 1999 and entered active duty with the Navy in September 1999. He served on active duty for over five years until December 2004 as an operations specialist radar technician. He held a security clearance while on active duty. He received an administrative discharge under other than honorable conditions in lieu of a court-martial (Tr. 47-50; Gov. Ex. 1, E-QIP, dated January 19, 2007; Gov. Ex. 13, DD-214, Certificate of Release or Discharge from Active Duty, dated December 4, 2004).

Applicant received three non-judicial punishments while on active duty. In December 2001, he received a non-judicial punishment for misbehavior of a sentinel when he fell asleep while serving as a lookout on a cruiser. He was sentenced to 15 days restriction to his ship and 15 days extra duty (Gov. Ex. 7, Administrative Remarks, dated December 18, 2001). In November 2003, Applicant received non-judicial punishment for being drunk and disorderly and unfit for duty. He was sentenced to a reduction in grade, suspended for six months, forfeiture of \$200 pay per month for one month, and 30 days restriction to the ship and extra duty (Gov. Ex. 8, Court Memorandum dated November 18, 2003). He received another non-judicial punishment in January 2004 for failure to obey the order on his restriction. The suspension of his reduction was vacated and he received 15 additional days of restriction and extra duty (Tr. 54-59; Gov. Ex. 9, Court Memorandum, dated January 13, 2004; Gov. Ex. 10, Captain's Mast, dated January 13, 2004).

Applicant was arrested in August 2004 for possession and use of marijuana on various occasions from January 2003 until June 2004. Applicant admitted to Japanese police that he used and possessed marijuana (Gov. Ex. 11, Statement, dated October 5, 2004). On the advice of counsel, Applicant submitted a request for separation in lieu of court-martial. His request was granted and he was separated in December 2004 under other than honorable conditions (Gov. Ex. 12, Administrative Separation, dated

October 28, 2004; See also, Gov. Ex. 14, Federal Bureau of Investigation Criminal Justice Information, dated February 13, 2007).

Applicant admits that he used marijuana about five or six times in high school starting when he was 15 years old. He admits to using marijuana about ten times while on active duty and while holding a security clearance spread out over the years of 2002 and 2003. He was tested by urinalysis numerous times while on active duty but never tested positive. He admitted to the use and possession of marijuana in 2004 because he was advised if he did not admit to the offense he would be turned over to the Japanese criminal authorities and jailed in a Japanese jail. He did not want to be sent to a Japanese jail (Tr-51-54; Gov. Ex. 3, Interview, dated April 9, 2007). Applicant stated that his last use of marijuana was shortly before being apprehended in 2004. He was last around people who used marijuana in 2005 when he attend a family function where some attendees used marijuana. He has never been involved with law enforcement except for the offenses listed above during his time in the Navy. He has not received any counseling for drug use or been advised he is a drug abuser or is drug dependent (Tr. 59-62).

Applicant submitted his first security clearance application when he entered active duty. Even though he had used marijuana in high school starting in 1995, he answered "NO" to question 24 concerning the use of controlled substances since the age of 16 or in the last seven years. Applicant stated he was advised by the recruiter not to include his use of drugs in high school on the application (Tr. 66-67; Gov. Ex. 15, Questionnaire for National Security Position, dated March 27, 1999). Applicant completed a new security clearance application in June 2006 when he started employment for the defense contractor. He updated that form in January 2008. He answered "No" to questions 27 and 28 on both applications, concerning his use of illegal drugs in the last seven years or while holding a security clearance (Tr. 62-63; Gov. Ex. 5, Security Clearance Application, dated June 20, 2005). He also answered "No" to questions 24a and b on a security clearance application submitted on January 19, 2007 (Gov. Ex. 1, e-QIP, dated January 19, 2007).

Applicant responded to Interrogatories asking about his use of illegal drugs. He responded that he experimented with marijuana once or twice on weekends over two months in high school but stopped in September 1996. He stopped because he was more into sports. He stated that using illegal substance was one of his worst mistakes and he stays away for places where drugs are located as well as people using drugs (Gov. Ex. 4, Interrogatories, dated December 14, 2007).

A 20 year experienced security agent interviewed Applicant about his drug use. The agent had copies of a Navy Criminal Investigation Service (NCIS) report stating that Applicant admitted using marijuana in Japan in the summer of 2004. Applicant denied drug use in Japan in 2004 and admitted only that he used marijuana a few times in high school when he was 15 years old. He informed the agent that he admitted to the NCIS agent and the Japanese police that he used drugs because of the NCIS agent's threat to place him in a Japanese jail. Applicant insisted he did not use illegal drugs in the

Navy. The agent did not believe Applicant told the truth at the interview (Tr. 30-40; Gov. Ex. 3, Interview, dated April 9, 2007).

At the hearing, Applicant admitted that he did not tell the truth about his marijuana use in the Navy. Concerning the interview with the security agent, Applicant admitted that he did not tell the truth stating:

I'm not denying that, what Agent (X) said about me not being truthful about the marijuana usage. I mean I admitted that in a document and that was sent to DOHA. They have that on file, and, honestly, I was scared of losing my security clearance. That's why I wasn't truthful about it and I realize it was a bad decision, I know it was a bad decision and if I could take it back I would, but, just being honest, I was scared and I wasn't truthful about it.

Quite honestly, I'm basically here just to own up everything that's put out there. I mean, I've been truthful, I haven't been truthful before, but I'm being truthful now and everything, the whole allegations have been against me, and basically, I'm here just to own up to it, whatever, I have to own up to." (Tr. 45-46).

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised 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 common sense 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. 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 H, Drug Involvement

The 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. Drugs are mood and behavior altering substances, and include those listed on the Controlled Substances Act of 1970. Drug abuse is the illegal use of a drug or the use of a legal drug in a manner that deviates from approved medical direction (AG ¶ 24).

The information in the exhibits presented at the hearing by the government and Applicant's answers and testimony are sufficient to raise Drug Involvement Disqualifying Conditions (DI DC) AG ¶ 25(a) "any drug use", DI DC AG ¶ 25(c) "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution", and DI DC AG ¶ 25(g) "any illegal drug use after being granted a security clearance". It is clear from Applicant's own statement that he used marijuana in high school until 1999, and from about 2002 until 2004 while in the Navy and while holding a security clearance. His drug use was continuous and not simply drug experimentation and causes security clearance concerns.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a), (c), and (g), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate his use of illegal drug (Directive ¶ E3.1.15). An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden of disproving it never shifts to the government.

I considered Drug Involvement Mitigating Conditions (DI MC) ¶ 26(a) "the behavior happened so long ago, was so infrequent, or 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"; and DI MC ¶ 26(b) "a demonstrated intent not to abuse 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 last use of an illegal drug was in the summer of 2004. While he had an opportunity to use illegal drugs in the summer of 2005, he did not do so. It has been four years since his last reported use of illegal drugs, and there has been no adverse information about drug use since then. Applicant has stated his intent not to use drugs in the future. He stated he no longer goes to places where drugs are used or associates with people that use drugs. His testimony is sufficient information to establish he no longer uses illegal drugs. Additionally, sufficient time has passed since his last use of illegal drugs to indicate he no longer uses illegal drugs. Applicant met his heavy burden of establishing that his past drug use does not now raise questions concerning his reliability, trustworthiness, judgment, or willingness to comply with rules and regulations. I find for Applicant as to drug involvement under Guideline H.

Guideline E, Personal Conduct

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, 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 ¶ 15) Personal conduct is always a security concern because it asks the central question does the person's past conduct justify confidence the person can be entrusted to properly safeguard classified information.

The security clearance system depends on the individual providing correct and accurate information during the security clearance process. If a person conceals or provides false information, the security clearance process cannot function properly to ensure that granting access to classified information is in the best interest of the United States Government. Applicant's false answers to questions on his security clearance applications, his answers to the questions in the Interrogatories, as well as the answers to the security agent concerning drug use raise security concerns under Personal Conduct Disqualifying Condition (PC DC) AG ¶ 16(a) (the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history, or similar form used to conduct investigations, to determine security eligibility or trustworthiness); and PC DC AG ¶ 16(b) (deliberately providing false and misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative).

Appellant admitted he provided false information on his security clearance applications, as well as in response to the Interrogatory questions, and to the security agent. He admitted at the hearing that he had not been truthful about his use of drugs in the past. At the hearing, Applicant was truthful about his past drug use and his past false answers during the security clearance process. Applicant's admission leaves no doubt that he deliberately provided false information with the intent to deceive up to the hearing part of the security clearance process. I find that Applicant deliberately provided false information on his security applications and to security investigators.

I considered all of the Personal Conduct Mitigating Conditions under AG ¶ 17 and determine none apply. Applicant did not make a good faith effort to correct erroneous or inaccurate information even though he had numerous opportunities to do so. He did not even tell the truth to the security agent In April 2007 even after being reminded of his statement to the Japanese police and NCIS agents. He did not provide correct information until he decided to tell the truth at the hearing. He was not erroneously advised by anyone to provide false information. His untruthful statements are numerous and the last false statement to the security agent was only a little over a year ago.

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. (AG ¶ 30) Applicant violated federal law by knowingly and willfully providing false information on his security clearance application and to a security investigator (18 U.S.C. § 1001) but this was not alleged as a criminal conduct security concern and will not be considered a criminal conduct security concern. Applicant was discharged from the Navy with a discharge under other than honorable conditions in lieu of court-martial for use and possession of an illegal drug, marijuana. This conduct raises Criminal Conduct Disqualifying Conditions (CC DC) AG ¶ 31 (a) "a single serious crime or multiple lesser offenses", and CD DC AG ¶ 31 (c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted".

I have considered Criminal Conduct Mitigating Condition (CC MC) ¶ 32(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." The use of an illegal drug in violation of the Uniform Code of Military Justice took place over four years ago. Applicant received a discharge from the Navy under other than honorable conditions in lieu of court-martial for this criminal act. The passage of time and the unusual nature of the offense show it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment. I find for Applicant as to criminal conduct.

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) 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 common sense 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 that Applicant served over five years on active duty in the Navy and has held a security clearance for a number of years. I considered that his employment record is good and that he has not tested positive for drug use. I considered that Applicant used illegal drugs for many years and then lied about his use on security clearance applications and to a security investigator. Applicant has now admitted that he provided false information with the intent to deceive. Acknowledging deceitful conduct is a step in rehabilitation. But Applicant had about five opportunities to provide correct information and did not do so. He only recently spoke the truth at the hearing. Sufficient time to establish a record of truthfulness has not passed to indicate that Applicant will continue to tell the truth in the future. Only a period of time of truthfulness will overcome the previous numerous untruthfulness. The record evidence leaves me with questions and doubts about Applicant's continued truthfulness. I have doubts about his eligibility and suitability for a security clearance because he repeatedly provided false information on his security clearance applications and to a security investigator. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his personal conduct. He has mitigated security concerns for his criminal conduct and drug involvement.

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 J: FOR APPLICANT

Subparagraph 1.a: For Applicant

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| Paragraph 2, Guideline H: | FOR APPLICANT |
| Subparagraph 2.a: | For Applicant |
| Subparagraph 2.b: | For Applicant |
| Paragraph 3, Guideline E: | AGAINST Applicant |
| Subparagraph 3.a: | Against Applicant |
| Subparagraph 3.b: | Against Applicant |
| Subparagraph 3.c: | Against Applicant |
| Subparagraph 3.d: | Against Applicant |
| Subparagraph 3.e: | Against Applicant |
| Subparagraph 3.f: | Against Applicant |
| Subparagraph 3.g: | Against Applicant |

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is denied.

THOMAS M. CREAN
Administrative Judge