



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-09050
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Nicole Noel, Esq., Department Counsel
For Applicant: *Pro Se*

April 10, 2008

Decision

CURRY, Marc E., Administrative Judge:

On October 30, 2007, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concern under Guidelines E and J. 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.

DOHA received Applicant's answer, requesting a hearing, on November 15, 2007. I received the case assignment on December 27, 2007. DOHA issued a notice of hearing on February 20, 2008, and I convened the hearing as scheduled on March 4, 2008. During the hearing, I received six government exhibits and Applicant's testimony. I received the transcript on March 19, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Rulings of Evidence

Department Counsel moved to amend the SOR by withdrawing subparagraph 1.c, and adding the following subparagraphs:

1.d. You falsified material facts on a National Agency Questionnaire executed by you on August 15, 1991, in response to the following question: **20. Drug/Alcohol Use and Mental Health a.** Have you ever tried or used or possessed any narcotic (to include heroin or cocaine), depressant (to include quaaludes), stimulant, hallucinogen (to include LSD or PCP), or cannabis (to include marijuana or hashish), or any mind-altering substance (to include glue or paint), even one time or on an experimental basis, except as prescribed by a physician?" You answered "yes" and stated, "I experimented with marijuana during high school parties and have no desires to continue or partake in the use of illegal mind altering drugs at this time or in the future," whereas in truth, you deliberately failed to disclose that you used marijuana once every couple of months after high school through at least 1991.

1.e. In a signed, sworn statement executed by you on April 15 1992, and offered to a Special Agent of the Defense Investigative Service, you falsified material facts when you stated, "After graduation from high school, I left the area and never smoked any marijuana after that period. I would estimate this to have been in May/June 83," whereas in truth, you had used marijuana once every couple of months after high school through at least 1991.

2.g. You used marijuana with various degrees of intensity from 1981 to approximately 2001.

Applicant did not object, and I granted the motion.

Findings of Fact

Applicant is a 43-year-old married man with one child, age three. He is a high school graduate, and has taken some college courses. He is a communications technician who supports information transfer systems such as telecommunications systems on military installations (Tr. 25). Recently, his employer promoted him to senior project manager. He has been working in this field for 20 years, and has held a security clearance since 1992.

In March 1986, Applicant lived in an apartment complex that had cable television service. He routed the cable to his television without paying for it. Later, a cable television repairman discovered the connection, and reported it to the cable television company. Then, Applicant was charged with unlawful cable television tampering and fined (Tr. 35).

One evening in May 1986, after an evening of heavy alcohol consumption with friends, Applicant threw a rock through a window at a neighborhood school. He was arrested and charged with burglary (Tr. 34). The charge was dropped after he attended a pre-trial intervention program.

In 1989, Applicant was charged with driving with a suspended license (Tr. 32). He paid a \$25 fee to reinstate his license, and the charge was *nolle prossed*.

Applicant was charged with driving under the influence of alcohol (DUI) in 1992. He pleaded no contest, paid a fine, and attended a court-sponsored substance abuse program (Tr. 31).

In 1998, Applicant, during the course of an argument with his then girlfriend, asked her to leave his home. She refused and grew hostile, whereupon he called the police (Tr. 30). The police arrived and arrested both Applicant and his then girlfriend, and charged both with criminal domestic violence. He pleaded guilty and was fined \$25.

Applicant smoked marijuana occasionally from the early 1980s while in high school through approximately 1991. He resumed in 1999, at age 34, and smoked through 2001. When Applicant first applied for a clearance in 1991, he disclosed his marijuana use on his security clearance application. Later, when an investigative agent asked him to elaborate, he stated that he stopped smoking marijuana in approximately 1983 (Exhibit 4 at 1).

Applicant completed another security clearance application in March 2005. He was required to disclose any illegal drug use in the past seven years. Fearing he would lose his job and his security clearance, he did not disclose his recurrent, late 1990s marijuana use. He later disclosed it to an investigative agent in January 2006. By then, the agent had interviewed him once before, and had interviewed his wife (Exhibit 3). The agent's January 2006 re-interview was prompted by Applicant's wife, who informed the agent during her interview of Applicant's past marijuana use.

Applicant is an active volunteer with the Boy Scouts of America, and works with children in various camping clubs. (Tr. 59).

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 overarching

adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a 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. 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.

Analysis

Personal Conduct

Under this guideline, “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 particular interest is any failure to provide truthful answers during the security clearance process (*Id.*).

Applicant intentionally failed to disclose marijuana use, as required in response to Question 27 of his 2005 security clearance application. AG ¶ 16(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” applies.

Lying to the government in the belief that it is necessary to save one’s job does not mitigate Guideline E security concerns (DISCR OSD 87-0763 (App. Board Decision, January 10, 1989)). Moreover, Applicant had previously provided false information about his marijuana use during an earlier security clearance investigation. His eventual disclosure did not occur until a second interview with an investigative agent that was prompted after his wife had informed the agent of his past marijuana use.

Assuming for the sake of argument that Applicant’s explanation for omitting past marijuana use in response to Question 27 is true, he would not have disclosed the marijuana use whether he understood Question 28 or not. I conclude he falsified Question 28, also.

I have considered the mitigating conditions and conclude none apply. Applicant has failed to mitigate the personal conduct security concerns.

Guideline J

Applicant's history of criminal behavior triggers the application of AG ¶ 31(a), "a single, serious crime or multiple lesser offense," and AG ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted." Most of Applicant's offenses were petty crimes that occurred more than 20 years ago in his youth. Although the domestic violence and the DUI charge are more recent and serious, neither occurred in the last nine years, and no additional evidence supports any propensity toward domestic violence or drinking and driving.

Applicant has not smoked marijuana since 2001. He is a productive member of society who is committed to his family, and is actively involved in volunteer organizations. He was recently promoted to a supervisory position at work. Under these circumstances, his security clearance falsifications, though technically criminal violations, are not indicative of an ongoing pattern of criminality that pose a security concern under the criminal conduct guideline. AG ¶ 32(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," applies. He has mitigated the criminal conduct security concern.

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 commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

Evaluating this case in the context of the whole person, I conclude Applicant's falsifications of his 2005 security clearance and his falsification to an investigative agent in approximately 1991 continue to pose a security concern. Clearance is denied.

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.b:	Against Applicant
Subparagraphs 1.c:	WITHDRAWN
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraphs 2.a - 2.g:	For 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.

MARC E. CURRY
Administrative Judge