



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



In the matter of:)
)
-----) ISCR Case No. 15-00014
)
Applicant for Security Clearance)

Appearances

For Government: Meg Foreman, Esq., Department Counsel
For Applicant: *Pro se*

03/15/2016

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges and the record establishes that Applicant used marijuana on about 10 occasions in early 2007. He intentionally failed to provide accurate information about his illegal drug use on his February 24, 2011 Questionnaire for National Security Positions or security clearance application (SCA). (Government Exhibit (GE) 1) Personal conduct security concerns are not mitigated. Eligibility for access to classified information is denied.

History of the Case

On February 24, 2011, and April 16, 2014, Applicant completed and signed two SCAs. (GE 1; GE 2) On August 7, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF could not make the affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or

revoked. (Hearing Exhibit (HE) 2) Specifically, the SOR set forth security concerns arising under Guideline E (personal conduct).

On August 20, 2015, Applicant responded to the SOR and waived his right to a hearing. (HE 3) On November 23, 2015, Department Counsel was ready to proceed. On January 4, 2016, the case was assigned to me. On February 5, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for February 25, 2016. (HE 1) The hearing was held as scheduled. During the hearing, Department Counsel offered three exhibits, and Applicant did not offer any documents. (Tr. 11, 16; GE 1-3) The three exhibits were admitted into evidence without objection. (Transcript (Tr.) 16; GE 1-3) On March 1, 2016, I received a transcript of the hearing.

Procedural Issue

Department Counsel moved to amend the date of Applicant's Office of Personnel Management personal subject interview (OPM PSI) in SOR ¶ 1.c to conform with the evidence. (Tr. 13) Applicant did not object, and I granted the motion. (Tr. 13)

Findings of Fact¹

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.a through 1.c. Applicant's admissions are accepted as findings of fact.

Applicant is a 28-year-old computer science engineer, who is seeking to retain his security clearance. (Tr. 6-7) He has worked to support the DOD for the previous five years. (Tr. 8) In 2006, he graduated from high school, and in 2010, he received a bachelor of arts degree in computer science. (Tr. 7) He has never been married, and he does not have any children. (Tr. 7; GE 1; GE 2) He has never served in the military. (Tr. 7; GE 1; GE 2)

Personal Conduct

In June 2007, Applicant completed his first SCA in connection with applying for summer employment. (Tr. 21) That SCA is not part of the record, and it is not known how he answered the questions concerning his involvement with illegal drugs. Applicant believed the SCA was not processed to completion because he returned to college. (Tr. 22)

On February 24, 2011, Applicant completed his SCA. Section 23 asks about illegal use of drugs or controlled substances, including marijuana, hashish, or THC, in the previous seven years. Applicant answered "No" to this question. (Tr. 18, 24-26; GE 1; SOR response; SOR ¶ 1.a) He used marijuana on about 10 occasions in early 2007. (Tr. 18)

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Prior to obtaining employment where he needed a security clearance, Applicant was working in a call center. (Tr. 19) He had an opportunity for better employment as a DOD contractor. (Tr. 19) At the time he was completing his February 24, 2011 SCA, he believed that if he revealed his marijuana use, his illegal drug use would preclude his employment as a DOD contractor. (Tr. 19) He admitted that he read the question about illegal drug use carefully, and he intentionally provided a false answer. (Tr. 26) He acknowledged that he lied when he completed his SCA. (Tr. 27) After completion of his February 24, 2011 SCA, he was awarded a secret security clearance. (Tr. 22) He did not receive a follow-up OPM PSI after completion of his February 24, 2011 SCA. (Tr. 23)

When Applicant completed his April 16, 2014 SCA, he was again asked whether he used any illegal drugs in the previous seven years. (Tr. 20; GE 2; SOR response; SOR ¶ 1.b) He answered, "No." He said this answer was correct because his marijuana use was in 2007, but prior to April 16, 2007. (Tr. 20, 28-29, 35-36)

On May 12, 2014, an OPM investigator interviewed Applicant. (GE 3) At page 6 of his OPM PSI, the summary indicates, "Subject has had no illegal use of drugs or drug activity." (GE 3) Applicant said the OPM investigator asked him whether he used illegal drugs in the previous seven years, and he truthfully answered, "No." (Tr. 29-30)

On September 29, 2014, an OPM investigator conducted a "Special Investigation Interview" of Applicant. (GE 3) Applicant told the OPM investigator that he used marijuana about ten times while in college in 2007. (Tr. 34; GE 3) His most recent marijuana use was in the spring of 2007. (GE 3) He did not disclose the marijuana use on his security forms because of fear. He "was concerned and afraid that if he had listed the marijuana use he would not have been able to gain this employment position. Additionally, [he] reasoned that he did not think he needed to include the marijuana use if he did not hold a security clearance at the time of the marijuana use." (GE 3 at 9)

Applicant has worked diligently for his employer and for DOD. (Tr. 35) He does not associate with drug users. (Tr. 35) He promised not to use illegal drugs in the future. (GE 3) He expressed his remorse about his false February 24, 2011 SCA.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. This decision is not based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. Thus, any decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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 one condition that could raise a security concern and may be disqualifying with respect to the falsification of Applicant's February 24, 2011 SF 86, which was used to process the adjudication of his security clearance in this case:

(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.²

When Applicant completed his February 24, 2011 SCA, he was asked about illegal drug use in the previous seven years, and he denied any illegal drug use. He used marijuana in 2007 about 10 times. He acknowledged that he intentionally lied on his SCA because he believed he would lose his employment. He said he ended his marijuana use before April 16, 2007.

Applicant made a technically accurate statement on his April 16, 2014 SCA when he denied marijuana use in the previous seven years. On May 12, 2014, an OPM investigator interviewed Applicant, and Applicant said the OPM investigator only asked him about marijuana use in the previous seven years. At page 6 of his May 12, 2014, OPM PSI, the summary indicates, "Subject has had no illegal use of drugs or drug

²The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

activity.” Applicant did not adopt the OPM interview summary at the time it was transcribed. I accept Applicant’s statement that the interview summary is incomplete, and he did not lie to the OPM investigator on May 12, 2014. Applicant has refuted SOR ¶¶ 1.b and 1.c.

The Appeal Board concisely explained Applicant’s responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶ 17 provides four conditions that could mitigate security concerns in this case:

(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.

None of the mitigating conditions apply. Applicant’s failure to be fully frank about his drug use on his February 24, 2011 SCA is too recent and serious to be mitigated. From 2011 to 2014, Applicant’s false SCA was part of the basis for approval of

Applicant's access to classified information. He did not disclose that his February 24, 2011 SCA contained false information about his drug-use history until September 2014. Personal conduct security concerns are not mitigated.

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 have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant has achieved important education and employment goals, demonstrating some self-discipline, responsibility, and dedication; however, this evidence is insufficient to mitigate security concerns. Applicant is a 28-year-old computer science engineer. He has worked to support the DOD for the previous five years. In 2010, he received a bachelor of arts degree in computer science. There are no allegations of security violations, arrests, convictions, or alcohol abuse.

The adverse information is more significant. In early 2007, Applicant possessed and used marijuana on about 10 occasions. He intentionally and falsely denied any illegal drug use on his February 24, 2011 SCA. The protection of national security requires that those entrusted with access to classified information self-report derogatory information. Should a security violation occur, security clearance holders with knowledge of the facts must be sufficiently reliable and responsible to disclose the security violation, even if it reflects poorly on the security clearance holder. Applicant's failure to disclose facts about his history of marijuana use on his February 24, 2011 SCA raises unresolved questions about his reliability, trustworthiness and ability to protect classified information.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated personal conduct

concerns lead me to conclude that grant or continuation of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. In the future, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Personal conduct security concerns are not mitigated.

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
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b and 1.c:	For 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 or reinstate Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

MARK HARVEY
Administrative Judge