



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 14-05840
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

03/19/2015

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement) and E (Personal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on February 20, 2013, seeking to upgrade an existing clearance to a top secret clearance. (GX 1; AX B.) On December 8, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant received the SOR on December 18, 2014; answered it on December 19, 2014; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on January 16, 2015, and the case was assigned to me on

January 25, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 6, 2015, scheduling the hearing for February 25, 2015. I convened the hearing as scheduled. Government Exhibit (GX) 1 was admitted in evidence without objection.¹ Applicant testified and submitted Applicant's Exhibits (AX) A through G, which were admitted without objection. I kept the record open to enable both sides to submit additional documentary evidence. Department Counsel timely submitted GX 3 and Applicant submitted AX H. Both exhibits were admitted without objection. DOHA received the transcript (Tr.) on March 10, 2015.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶ 1.a in part and denied SOR ¶ 2.a. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 29-year-old help desk technician employed by a defense contractor since February 2013. He served on active duty in the U.S. Marine Corps from October 2005 to March 2010, and he held a security clearance while in the Marine Corps. He worked as an electrician in the private sector from March 2010 to August 2012. He worked for a federal contractor as a material management specialist from August to November 2012, when his employer's contract ended. He was unemployed from November 2012 to February 2013, when he began working for his current employer. He has held a security clearance since 2005.

The SOR alleges that Applicant used marijuana from approximately November 2001 to June 2012. It also alleges that he falsified his 2005 SCA by answering "No" to the questions about drug use and deliberately failing to disclose his drug use from June 2001 to March 2005. In his answer to the SOR, Applicant admitted using marijuana until 2003 but denied using it after he began his service in the Marine Corps.

Applicant enlisted in the Marines while in high school under a delayed-entry program. Applicant completed and submitted an SCA in March 2005. He entered on active duty in October 2005. When he submitted his SCA, he answered "No" to a question asking if he had been involved with drugs during the last seven years. (GX 3 at 5.)

When Applicant submitted his 2013 SCA, he answered "Yes" to the question whether he had illegally used drugs or controlled substances in the last seven years, and he stated that he used marijuana "no more than ten times." In response to questions about his first use and last use of marijuana, he estimated that his first use was in November 2001 and his last use was in June 2012. He answered "No" to the question whether he used drugs while possessing a security clearance. (GX 1 at 29.)

¹ GX 2, an unauthenticated summary of a personal subject interview conducted on April 22, 2013, was not admitted. I explained the authentication requirement of Directive ¶ E3.1.20, and Applicant declined to waive it. (Tr. 53-54.)

He also disclosed receiving nonjudicial punishment in August 2009 for oversleeping and missing a formation. (GX 1 at 20.)

At the hearing, Applicant testified that he has not used marijuana since high school, did not use it while on active duty, and that he distances himself from marijuana users and will walk away from a party if he sees it at a party. (Tr. 38-39, 42.) When he began working for defense contractors, he successfully passed a hair-follicle test and urinalysis. (Tr. 32.)

In Applicant's response to the allegation that he falsified his 2005 SCA, he stated, "I believe I misread the question" At the hearing, he testified, "It was one of those things where we were going through processing, and everything, we are just rushing to get everything done." (Tr. 22.) In response to Department Counsel's questioning, he testified that he completed his SCA during in-processing as part of a "battery of paperwork," and he and his fellow enlistees were under pressure to complete it. (Tr. 35.)

Applicant testified that he mistakenly stated in his 2013 SCA that his last use of marijuana was in June 2012, and that he meant to say June 2002 or 2003. (Tr. 43.) His explanation for this mistake is consistent with his negative answer to the question whether he ever used drugs while holding a security clearance, which was granted in 2005.

Applicant testified that he believed that he was required to disclose any drug use during the past ten years preceding the submission of the SCA, rather than seven years. (Tr. 45, 49.) He testified that he was never asked about the June 2012 date during the background investigation following the submission of his SCA. (Tr. 50.) He also testified that he described his use in his 2013 SCA as "no more than ten times" because there were only three or four drug-using incidents, but some involved multiple uses. (Tr. 51, 58.)

Applicant enlisted in the Marines for four years, but he voluntarily extended his enlistment for an extra year in order to complete a combat-zone deployment. He served in Operation Iraqi Freedom and a one-year tour in Iraq. He received a Good Conduct Medal, Global War on Terrorism Expeditionary Medal, two awards of the Sea Service Deployment Ribbon, the Iraq Campaign Medal with Bronze Service Star, Global War on Terrorism Service Medal, and the National Defense Service Medal. (AX H.)

Applicant has attended a university part time since April 2010. He is two classes away from receiving his associate's degree. (GX 1 at 11; Tr. 30.) He has obtained numerous professional certifications in information technology. (AX C through G.) His immediate supervisor, a Marine Corps captain, regards him as a "true expert," who "constantly seeks out increased responsibility, and provides valuable mentorship to Marines and civilians alike." Applicant "is heavily relied upon for his creative solutions to difficult problems and maintains a positive attitude in an often chaotic environment." (AX A.)

Policies

“[N]o 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 applicants 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 AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and 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 that 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 made “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. Thus, a 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition,

and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). “[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

Guideline H, Drug Involvement

The SOR alleges that Applicant used marijuana from approximately November 2001 to June 2012.² The concern under this guideline is set out in AG ¶ 24: “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 defined in AG ¶ 24(a)(1) as “[d]rugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens).”

Applicant's disclosures in his 2013 SCA raise the following disqualifying conditions under this guideline:

AG ¶ 25(a): any drug abuse, defined in AG ¶ 24(b) as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction”; and

AG ¶ 25(c): illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The following mitigating conditions are potentially relevant:

AG ¶ 26(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

AG ¶ 26(b): a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2)

² The SOR does not allege and the evidence does not establish that Applicant used marijuana while holding a security clearance. Thus, AG ¶ 25(g) (“any illegal drug use after being granted a security clearance”) is not applicable.

changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation;

AG ¶ 26(a) is established. Applicant has not been involved with drugs since his high school days, his drug involvement is unlikely to recur, and his high-school experimentation with drugs does not cast doubt on his current reliability, trustworthiness, and good judgment.

AG ¶ 26(b) is established. Applicant has disassociated himself from drug users, avoids environment where drugs are used, and he has abstained from drugs since 2003.

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified his 2005 SCA by deliberately failing to disclose that he used marijuana from approximately June 2001 to March 2005. In his answer to the SOR and at the hearing, he admitted using marijuana from 2001 to 2003 and asserted that he misread the question while rushing through the SCA, which was included in a “battery of paperwork.”

The concern under this 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.

The relevant disqualifying condition in this case is AG ¶ 16(a): (“deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . .”). When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant’s state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant’s level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

In light of Applicant’s youth and inexperience when he submitted his SCA in 2005, I found his description of the circumstances in which he submitted his SCA and his explanation for his negative answer to the question about drug use plausible and credible. He was scrupulously candid in his 2013 SCA, disclosing drug use outside the

seven-year period encompassed by the questions and disclosing a minor military infraction that resulted in nonjudicial punishment. Thus, I conclude that AG ¶ 16(a) is not established.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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 have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant was candid, sincere, and credible at the hearing. He is enthusiastic about his current job and his future as an information technology professional. In addition to performing his job well, he has worked hard to increase his professional credentials. He has served in combat as a Marine and held a security clearance since 2005. He has the respect of his supervisor, an active-duty Marine captain. After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has refuted the allegation that he deliberately falsified his 2005 SCA and mitigated the security concerns raised by his drug use. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement): FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2, Guideline E (Personal Conduct):

FOR APPLICANT

Subparagraph 2.a:

For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge