



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



In the matter of:)	
)	
)	ISCR Case No. 17-01859
)	
Applicant for Security Clearance)	

Appearances

For Government: Adrienne M. Driskill, Esq., Department Counsel
For Applicant: Skyler Samp, Esq.

04/03/2019

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant failed to mitigate the personal conduct security concerns. National security eligibility for access to classified information is denied.

History of the Case

Applicant submitted security clearance applications (SCA) on December 15, 2010, and February 24, 2016. On August 10, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guideline E, (Personal Conduct). Applicant answered the SOR (Answer) on October 9, 2017, and requested a decision on the record without a hearing. On December 21, 2017, a complete copy of the File of Relevant Material (FORM), containing six Items, was mailed to Applicant.¹ He received the FORM on December 27, 2017. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. On February 14, 2018, Applicant submitted a supplemental Answer to the SOR and FORM, which I labeled Applicant Exhibit (AE) A. There were no objections to Items 1 through 6 or AE A, and they are admitted into evidence. The case was assigned to me on May 7, 2018.

¹ The SOR and Applicant's answer to the SOR were submitted by Department Counsel as Item 1. I labeled his response as "Answer".

Findings of Fact

Applicant is 38 years old. He has been married since August 2015 and has no children. He received a bachelor's degree in 2005. He has worked as a federal contractor since September 2005 and has held a security clearance since approximately 2006 or 2007.² Applicant has worked for his current employer, as a system software engineer, since October 2015. (Item 2)

Between March 2000 and January 2014, Applicant was arrested or charged eight times with various crimes or infractions. He was charged with alcohol-related offenses five times. He was also charged with a felony-level destruction of property offense, reckless driving, and driving without a license. He purchased drugs in 2010, while holding a security clearance, and he used marijuana in 2014, while holding a clearance. Additionally, Applicant falsified his February 2016 SCA regarding his criminal history and drug use. In his initial Answer to the SOR that described these facts, Applicant denied all of the allegations, with explanation. (Item 1, Answer)

SOR ¶¶ 1.a through 1.d allege that Applicant was charged with public intoxication four times between March 2000 and December 2002, while he was in college. He was involved in a bar fight during one of those incidents. Applicant disclosed the September 2000 and October 2002 incidents during his March 2010 personal subject interview (PSI). During that interview, he claimed he had no other alcohol-related incidents or arrests, which was untrue.³ Applicant disclosed all four arrests in his December 2010 SCA, but in his February 2016 SCA, he did not disclose the December 2002 incident.⁴ In his Answer, Applicant admitted the underlying conduct, but denied the allegations. He argued that all of these SOR allegations should have been alleged under Guideline G (Alcohol Consumption) or Guideline J (Criminal Conduct). (Item 1, Answer at 4-7; Item 2 at 54-56; Item 3 at 6-7, 13, 22-23; Item 4 at 53-55)

SOR ¶ 1.e alleged that, in February 2006, Applicant was charged with driving without a license, driving without registration, and driving on a suspended license. At the time of the arrest, his license was suspended because he had several outstanding parking tickets and he did not have the funds to register his vehicle. He was found guilty and spent three days in jail. In his Answer, Applicant denied the allegation, but admitted the underlying conduct. (Item 1, Answer at 7-8; Item 3 at 5-6, 13, 21; Item 4 at 53)

SOR ¶ 1.f alleged that Applicant was arrested and charged with felony-level destruction of property in July 2009. He claimed that early in the morning, after he left a club, he was assaulted by a group of young men. His girlfriend, who was with him, called

² Applicant was briefly unemployed between July 2010 and October 2010.

³ Because Applicant's failure to tell the truth to the investigator was not alleged in the SOR, I will only consider this information as a factor in evaluating credibility, mitigation, and whole-person factors.

⁴ Because Applicant's failure to disclose the December 2002 incident in his SCA was not alleged in the SOR, I will only consider this information as a factor in evaluating credibility, mitigation, and whole-person factors.

the police, and they gave statements. After the police left the scene, the men returned, and Applicant broke the window of their vehicle. He was subsequently arrested, but the charges were dismissed by a judge the next day. Applicant disclosed this arrest in his February 2016 SCA. In his Answer, Applicant denied the allegation, and the underlying criminal conduct. Additionally, he argued that the incident should have been alleged under Guideline J (Criminal Conduct). (Item 1, Answer at 8; Item 2 at 52-53; Item 3 at 4-5, 13, 22; Item 4 at 52-53; Item 6 at 4)

SOR ¶ 1.g alleged that, in September 2010, Applicant purchased cocaine in the form of a “Thai stick”. He was not employed at this time, but he still held a security clearance. He disclosed information regarding this incident in his December 2010 SCA, and during his 2011 PSI, and 2017 PSI. While Applicant was in Las Vegas with his girlfriend on vacation, they attempted to identify drug users on the street by the way people appeared, and they decided to see if they could purchase drugs from a stranger. Applicant asked the strangest person he saw if he could purchase cocaine from him. When the person said yes, Applicant claimed he told the individual that he was just joking, because he did not really intend to purchase drugs. However, according to Applicant, the individual made Applicant go to an ATM and withdraw money for the cocaine. After the sale was completed, Applicant claimed he destroyed the cocaine and did not use it. In his Answer, Applicant admitted the underlying conduct, but claimed he was coerced into the purchase. Additionally, he claimed that this incident occurred in September 2012, which is inconsistent with his disclosures in his 2010 SCA and 2011 PSI. Applicant asserted that this allegation should have been alleged under Guideline H (Drug Involvement or Substance Abuse) (Item 1, Answer at 8-9; Item 2 at 57-59; Item 3 at 14, 24, 28)

SOR ¶ 1.h alleged that, in June 2012, Applicant was arrested and charged with driving while intoxicated, first offense; driving under the influence (DUI); and operating while impaired. He did not disclose this arrest in his 2016 SCA. During his February 2017 PSI, the investigator confronted Applicant regarding his arrest history twice, before he questioned Applicant about this arrest.⁵ Applicant told the investigator that after leaving a bar, he ran a red light, and was pulled over by law enforcement. According to Applicant, he passed the field sobriety test, but was arrested and taken to the police station. He claimed he never heard anything from the arresting agency after the arrest. Applicant told the investigator that he thought the incident was outside the reporting period. Additionally, he stated he was unaware that he was charged with an offense or that the arrest would be on his record. In his Answer, Applicant denied the allegation, because he claimed he passed the field sobriety tests. (Item 1, Answer at 9-10; Item 3 at 28; Item 6 at 4-5)

SOR ¶ 1.i alleged that, in November 2013, Applicant was arrested and charged with reckless driving. He pled guilty to this charge in March 2014, and was ordered to pay a \$500 fine and costs. Applicant did not disclose this arrest in his 2016 SCA, or during

⁵ Because Applicant’s failure to be truthful and forthcoming with the investigator was not alleged in the SOR, I will only consider this information as a factor in evaluating credibility, mitigation, and whole–person factors.

the January 2017 PSI or February 2017 PSI.⁶ In his Answer to the SOR, he denied the allegation, and claimed the arresting officer did not use a radar gun; therefore, there was no evidence that his speeding rose to the level of reckless driving. He asserted that the underlying conduct should have been alleged under Guideline J (Criminal Conduct). (Item 1, Answer at 9-10; Item 3; Item 5 at 1)

SOR ¶ 1.j alleged that Applicant used marijuana, multiple times during the summer of 2014, while holding a security clearance. He told the government investigator that he used marijuana with his siblings and their spouses. In his Answer, he denied the allegation because he believed the underlying conduct should have been alleged under Guideline H (Drug Involvement or Substance Misuse). Additionally, he claimed he no longer uses marijuana. (Item 3 at 23-24)

SOR ¶¶ 1.k through 1.m alleged that in his February 2016 SCA, Applicant failed to disclose the June 2012 DUI arrest, the January 2014 reckless driving arrest, and his 2014 use of marijuana. During his February 2017 PSI, Applicant told the investigator that he did not disclose his 2014 marijuana use in his February 2016 SCA because he forgot that he used marijuana in 2014. In his Answer, Applicant denied the allegations, because he claimed he was “rushing when he completed the form.” (Item 3 at 28)

In his supplemental Answer to the SOR and FORM, Applicant claimed he did not disclose the June 2012 DUI arrest and 2014 drug use in his 2016 PSA because he misunderstood the term, “charged and convicted,” which does not appear in the question to which he falsely responded. He also claimed he did not disclose the 2014 reckless driving arrest because he did not know he was fined more than \$300. (AE A)

During Applicant’s March 2010 PSI, Applicant discussed his earlier disclosure of drug use that included use of marijuana approximately three times in October 2000, mushrooms two times in April 2001, and ecstasy twice in October 2001. Applicant told the investigator that he did not intend to try or experiment with drugs ever again. During his March 2011 PSI, Applicant reaffirmed the extent of his previous drug use, and claimed that he did not intend to ever use drugs again.⁷ (Item 3 at 8-9, 14-15)

In January 2017, Applicant was confronted by an investigator regarding the full extent of his drug history. He admitted he used marijuana three times between 1995 and 2003; he used mushrooms six times between March 2000 and March 2004; he used ecstasy five times between October 2001 and March 2003; and he used cocaine once in 2000.⁸ (Item 3 at 23-24)

⁶ Because Applicant’s failure to disclose this arrest to the investigator was not alleged in the SOR, I will only consider this information as a factor in evaluating credibility, mitigation, and whole–person factors.

⁷ Because Applicant’s failure to be truthful regarding his drug use during his PSIs was not alleged in the SOR, I will only consider this information as a factor in evaluating credibility, mitigation, and whole–person factors.

⁸ Because Applicant’s involvement with drugs prior to 2010 was not alleged in the SOR, I will only consider this information as a factor in evaluating credibility, mitigation, and whole–person factors.

Applicant submitted three employment-related awards and an October 2017 certificate that he completed a drug and alcohol course. He also submitted two letters of recommendation. There is no evidence as to whether Applicant disclosed his 2014 arrest and 2014 drug use to his facility security officer or company. (Item 1, Answer at 19, 20, 22-25)

Policies

“[N]o one has a ‘right’ to a security clearance.”⁹ 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.”¹⁰ 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.”¹¹

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.

Adverse 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.”¹² Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Security Executive Agent have established for issuing national security eligibility.

⁹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹⁰ *Egan* at 527.

¹¹ EO 10865 § 2.

¹² EO 10865 § 7.

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.¹³ “Substantial evidence” is “more than a scintilla but less than a preponderance.”¹⁴ The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability.¹⁵ Once the Government establishes a disqualifying condition, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the alleged facts.¹⁶ An applicant has the burden of proving a potential mitigating condition, and the burden of disproving it never shifts to the Government.¹⁷

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”¹⁸ “[S]ecurity clearance determinations should err, if they must, on the side of denials.”¹⁹

Analysis

Guideline E: Personal Conduct

The security concern under Guideline E 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and be disqualifying. The following are potentially applicable under the established facts in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar

¹³ Directive ¶ E3.1.14.

¹⁴ See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

¹⁵ ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

¹⁶ Directive ¶ E3.1.15.

¹⁷ ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

¹⁸ ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive ¶ E3.1.15.

¹⁹ *Egan*, 484 U.S. at 531; See also AG ¶ 2(b).

form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

Applicant intentionally failed to disclose adverse criminal information and drug use in his February 2016 SCA. He was either ticketed or arrested eight times between 2000 and 2014. He used drugs on more than one occasion while holding a security clearance. His history of misconduct, when considered as a whole, raises serious security concerns and demonstrates his questionable judgment, lack of candor, and unwillingness to comply with rules and regulations. AG ¶¶ 16(a) and 16(c) are established.²⁰

AG ¶ 17 describes conditions that could mitigate the 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;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstance that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressor, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant did not disclose two arrests, or his use of marijuana, while holding a clearance, in his February 2016 SCA. Additionally, he did not disclose the full extent of his criminal history and drug use until he was confronted multiple times by investigators in 2017. Applicant did not demonstrate a prompt or good-faith effort to correct his omissions, concealment, or falsifications before he was confronted with the facts. There is insufficient evidence to establish mitigation under AG ¶ 17(a).

²⁰ Applicant denied the allegations alleged in SOR ¶¶ 1.a, 1.b, 1.c, 1.d, 1.f, 1.g, 1.h, 1.i, and 1.j on the basis that they should have been alleged under different guidelines. Based on the evidence, including the history and the pattern of Applicant's offenses, evaluating these security concerns under Guideline E is appropriate.

Applicant asserted, in his February 2017 PSI, Answer, and supplemental Answer, that he did not intentionally falsify his 2016 SCA. He claimed that he forgot about his arrests and his drug use, even though the incidents occurred only two years before he completed his most recent SCA. Applicant was an educated and experienced professional when he completed the 2016 SCA. This was not his first security clearance application, having completed one in 2010, and another prior to 2010. The evidence as a whole reflects that he was aware of his arrest history and drug use when he completed his most recent SCA. Applicant's inconsistent explanations for failing to disclose adverse information lack credibility, and do not alleviate concerns as to his trustworthiness, judgment, candor, integrity, and unwillingness to comply with rules and regulations. His failure to disclose requested information is serious, as is his pattern of misconduct over the years. There is insufficient evidence to establish mitigation under AG ¶ 17(c).

Applicant attended an eight hour drug and alcohol educational class in October 2017, shortly after the SOR was issued. This provides minimal mitigation, due to the timing of the counseling and the fact that Applicant used drugs while holding a clearance, and when he was in his mid-thirties. The evidence does not establish persuasive mitigation under AG ¶ 17(d).

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the applicable guidelines, each of which is to be evaluated in the context of the whole person. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (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.

Applicant is an educated and experienced professional, as evidenced by his letter of recommendation and performance awards. His lengthy history of questionable judgment, unwillingness to comply with rules and regulations, and lack of candor when completing government forms and during government interviews, leaves me with doubt as to his ability to protect classified and sensitive information. He concealed derogatory information multiple times from the government, and his varied and inconsistent explanations lack credibility.

Many of the allegations are related to behavior that occurred when Applicant was young and immature. However, the criminal behavior continued until four or five years ago, and Applicant made false statements to investigators as recently as two years ago. His behavior established a lengthy pattern of rule violations, and a failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

I have incorporated my comments under the guideline at issue in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under this guideline, and evaluating all the evidence in the context of the whole person, Applicant has not mitigated the personal conduct security concerns at issue. Accordingly, Applicant has not carried his burden to show that it is clearly consistent with the interests of the United States to grant him national security eligibility for access to classified information.

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:

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a – 1.m:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for access to classified information. National security eligibility is denied.

CAROLINE E. HEINTZELMAN
Administrative Judge