



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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-----) ISCR Case No. 18-01630
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Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: *Pro se.*

03/25/2019

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated security concerns covering personal conduct allegations of falsification of his security clearance application and personal subject interview (PSI). Eligibility for access to classified information is denied.

Statement of the Case

On July 13, 2018, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons under the personal conduct guideline why DoD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 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 Security Executive Agent, Directive 4, *National Security Adjudicative Guidelines* (SEAD 4), effective June 8, 2017.

Applicant responded to the SOR on July 26, 2018, and requested a hearing. The case was assigned to me on January 9, 2019, and scheduled for hearing on February 13, 2019. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance.

At the hearing, the Government's case consisted of three exhibits (GEs 1-3). Applicant relied on one witness (himself) and one exhibit (AE A). Both the Government's exhibits and Applicant's exhibit were admitted without objection. The transcript was received on February 26, 2019.

Summary of Pleadings

Under Guideline E, Applicant allegedly (a) falsified his electronic questionnaires for electronic processing (e-QIP) of October 2017 by misrepresenting the circumstances of his leaving his employment (i.e., by mutual agreement) and failing to acknowledge he was fired in May 2015 due to having an inappropriate relationship with a subordinate, in violation of company policy; (b) falsified his e-QIP of October 2017 by omitting his use of marijuana in October 2010 and in December 2013; and (c) falsified his personal subject interview (PSI) with an investigator from the Office of Personnel Management (OPM) by failing to disclose his firing in May 2015 due to an inappropriate relationship with a coworker, in violation of company policy and his illegal marijuana use in October 2010 and December 2013.

In his response to the SOR, Applicant admitted each of the allegations with explanations. He claimed to have attached a termination letter from his former employer, but no attachments were in the file. Whether the attachment was administratively removed in preparation for the hearing is unclear.

Findings of Fact

Applicant is a 31-year-old information technology (IT) consultant for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant never married and has no children. (GE 1) He attended college classes in the Ukraine between August 2010 and June 2014 and earned a bachelor's degree in June 2014 in computer engineering. (GE 1) He immigrated to the United States in 2005 and became a naturalized U.S. citizen in March 2012. (GEs 1-3) Applicant reported no military service.

Since April 2012, Applicant has been self-employed as an IT consultant. (GE 1) Contemporaneously with his self-employment as an IT consultant (since September 2017), he has worked as a Russian interpreter for a Russian linguist firm. (GE 1)

Between October 2011 and August 2013, he worked as an IT team lead for an IT firm. (GE 1) He reported self-employment as an IT consultant between April 2007 and April 2010. (GEs 1-3)

Employment termination

Records confirm that Applicant was terminated from his employment with a defense contractor (Company A) in May 2015 on the stated grounds that he had an inappropriate relationship with a subordinate, in violation of company policy. (AE A; Tr. 25-26) His termination and reasons are summarized in an email forwarded to him in May 2015 by his manager. (AE A) as follows: (a) Applicant was found to have engaged in a "significant personal relationship with another employee, resulting in a conflict of interest," and (b) he failed to notify his human resource office or his manager about the existence of the conflict of interest. (AE A; Tr. 26-27)

Applicant never denied the cited bases of his termination. Applicant worked for Company A between June 2013 and May 2015, and was fired over his engaging in a personal romantic relationship with a coworker. (GEs 1 and 3 and AE A; Tr. 25-26)

Drug use

Applicant admitted, and records confirmed that he used marijuana in October 2011 and in December 2013. (GE 3) He self-reported in his PSI that he used medically prescribed cannabis oil in 2017 on 10 to 15 occasions. (GEs 2-3) There is no evidence in the record to indicate he used marijuana on any other occasions.

E-QIP omissions

Asked to complete an e-QIP in October 2017, Applicant falsified the form by omitting his termination from his employment with Company A in May 2015. (GE 1) In answering questions posed in section 13A of his 2017 e-QIP, Applicant answered "Left by mutual agreement following charges or allegations of misconduct" and explained the misconduct charges to mean engaging in a personal relationship resulting in a conflict of interest. (GE 1) At no point in the e-QIP Applicant completed in 2017 did he acknowledge his being fired or terminated from Company A in May 2015 as the result in his engaging in an inappropriate relationship with a coworker. (GEs 1 and 3 and AE A; Tr. 30-33)

In the same October 2017 e-QIP, Applicant omitted his prior drug use in October 2010 and again in December 2013, when responding to questions posed in section 23 about illegal use of drugs or controlled substances. (GE 1) Asked about past use of illegal drugs, Applicant disclosed his being examined by a medical provider for help with his sleep and being furnished a medical marijuana card, which he used to purchase marijuana around 10-15 times in August 2017. (GE 1) He provided no further information about his past marijuana use in 2010 and 2013, either in section 23 or in the additional comment section of the e-QIP. (GE 1)

In a follow-up PSI conducted by an investigator from OPM in November 2017, Applicant failed again to disclose both his firing due to his having an inappropriate relationship with another employee and his past use of marijuana in October 2010 and December 2013. (GE 2) In his PSI, he acknowledged only that he told the OPM investigator that he (a) resigned in lieu of being fired and (b) he used prescribed marijuana in 2017 as a sleep aid on 10 to 15 occasions. (GE 2; Tr. 32-33, 40)

Nowhere in Applicant's 2017 OPM interview did he disclose his being fired from Company A due to his having a personal relationship with another employee without reporting it to his human resources department or manager, or that he used marijuana in 2010 and 2013. (GE 3 and AE A) Basically, he stuck to the same story he furnished in his earlier 2017 e-QIP. (GEs 1-2)

In December 2017, Applicant completed a counterintelligence security screening questionnaire. (GE 2) In this questionnaire, Applicant admitted his firing from a previous employer for having an inappropriate relationship with another employee.

Under questioning by the screening investigator, Applicant admitted to not disclosing in his e-QIP his being fired from Company A for engaging in an inappropriate relationship with a coworker, in violation of company policy. (GE 2 and AE A) Applicant attributed his disclosure failures to his believing that leaving his Company A employment by mutual agreement sounded better than being fired. (GE 2 and AE A; Tr. 41-42).

Still, Applicant's explanations for his omissions of his being fired instead of leaving by mutual agreement and his understating his marijuana use, both individually and collectively, reflect a lack of candor. His explanations, while they reflected his reasoning at the time behind his employment termination omissions, document and confirm his knowing and wilful omissions of material information needed to develop background information pertinent to a determination of his eligibility to hold a security clearance.

On the strength of the evidence developed in the record, inferences are warranted that Applicant's omissions and understatements about the circumstances of his departure from Company A and the extent of his past marijuana use in 2010 and 2013 when completing his 2017 e-QIP were both knowing and wilful, and were left uncorrected in his ensuing PSI. Considering all of the circumstances surrounding his omissions and understatements, inferences are warranted of a material lack of candor by Appellant in his omitting and misstating the circumstances surrounding his Company A termination and the dates of his use of marijuana in 2010 and 2013 when completing his 2017 e-QIP.

Adverse inferences are warranted as well in connection with his failure to provide full and accurate accounts of his Company A termination and more extensive marijuana use when responding to OPM investigator questions in his ensuing PSI. Appellant's corrected admissions of his termination from Company A and more extensive use of marijuana were not provided until questioned by an investigator assigned to interview him in a subsequent counterintelligence screening questionnaire.

Endorsements

Applicant did not provide any personal endorsements from his supervisors and coworkers. Nor did he provide any performance evaluations, character references, nor evidence of community contributions.

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and many of the conditions that could mitigate security concerns. These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied.

The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should

err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

Personal Conduct

The Concern: 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 provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. . . AG ¶ 15.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). Because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Analysis

Applicant presents as an IT consultant for a defense contractor who seeks a security clearance. Principal security issues in this case center on Applicant's material omissions of his termination for cause by his Company A employer and his understating of the dates and extent of his marijuana use.

Security concerns are raised over Applicant's judgment, reliability, and trustworthiness under Guideline E as the result of his omissions of his termination for cause by his Company A employer and his understating of the dates and extent of his marijuana use in the e-QIP he completed in October 2017. Questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, are each core policy concerns of the personal conduct guideline (AG ¶ 15)

Section 1001 of Title 18 is a specific intent crime and perforce requires a showing of subjective intent to deceive the Government. See *United States v. Puente*, 982 F.2d 156, 159 (5th Cir.), *cert. denied*, 113 S. Ct. 2934 (1993); *United States v. Sweig*, 441 F.2d 1043, 1046-1047 (9th Cir.), *cert. denied*, 400 U.S. 847 (1970); *United States v. Bussey*, 942 F.2d 1241, 1250 (8th Cir. 1991). Probing for indices of knowing and wilful deceit involves considerations of motive and all the surrounding circumstances, recognizing how difficult it is to climb into the mind of the actor.

In Applicant's case, judgment and trustworthiness concerns are directly tied to Applicant's employment and marijuana omissions and understatement he furnished in his e-QIP of October 2017, and which he failed to correct in his ensuing OPM interview. Because his omissions are material to the Government's ability to fully investigate Applicant's suitability to hold a security clearance, they raise important trustworthiness, reliability, and judgment concerns under Guideline E. See ISCR Case No. 06-20964, at 6 (April 10, 2008).

Applicant's termination for cause stemming from his having an inappropriate relationship with another employee, in violation of his company's policy, and understatement of the dates and extent of his past marijuana use invite application of DC ¶¶ 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 national security eligibility or trustworthiness, or award fiduciary responsibilities," 16(b), "deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, or competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative," and 16(d)(3), "a pattern of dishonesty or rule violations." Each of these disqualifying conditions fully applies to Applicant's situation.

Applicant's proven intentional omissions of his Company A termination and understatement of the dates and extent of his marijuana use and ensuing failures to

make prompt, good-faith corrections when afforded opportunities to do so in his ensuing OPM interview preclude the application of any of the other mitigating conditions potentially available to him under Guideline E. His belated responses to questions posed to him in counterintelligence screening questionnaire about his termination and use of marijuana cannot be considered either prompt nor made in good-faith for mitigation purposes.

In evaluating all of the circumstances surrounding Applicant's omission of his termination for cause and understatements of the dates and extent of his use of marijuana in his 2017 e-QIP, considerations of the evidence covering the Government's Guideline E allegations warrant unfavorable conclusions. Applicant's omissions and understatements reflect candor lapses incompatible with clearance criteria.

Whole-person assessment

From a whole-person perspective, Applicant has established insufficient probative evidence of his overall honesty, trustworthiness, and understanding of DoD policy constraints on providing inaccurate information material to making clearance eligibility determination. At this time, Applicant is at continued risk of candor lapse recurrences. Evaluating all of the facts and circumstances developed in the record, Applicant fails to mitigate security concerns associated with the allegations covered by Guideline E.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE E (PERSONAL CONDUCT):	AGAINST APPLICANT
Subparas. 1.a -1.c:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

