DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 18-02925
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Regis N. Rice, Esq.

11/05/2019

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Decision

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on February 15, 2014. He submitted a second SCA on June 6, 2017. On March 15, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline E. The DOD CAF acted 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 adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on April 12, 2019, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on May 29, 2019,

and the case was assigned to me on June 21, 2019. On August 6, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for August 26, 2019. On August 22, 2019, Applicant retained an attorney, who requested a continuance. I granted the continuance, and the hearing was rescheduled for September 25, 2019. I conducted the hearing as rescheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) I through V, which were admitted without objection. DOHA received the transcript (Tr.) on October 11, 2019.

Findings of Fact

In Applicant's answer to the SOR, he denied the allegations in SOR ¶¶ 1.a and 1.b and admitted the allegation in SOR ¶ 1.c. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 37-year-old engineer employed by a defense contractor. He worked part time as a customer service agent for a commercial airline from September 2014 until he was hired for his current job in September 2018. (Tr. 15.) He was a full-time federal employee at another government agency from June 2016 to May 2017, when he was terminated for unsatisfactory performance. (GX 1 at 13-14.)

Applicant served in the Army National Guard (ARNG) from January 2000 to January 2008. He served on active duty from January 2003 to January 2004. He received an honorable discharge in January 2008. He held a security clearance while in the ARNG.

Applicant was hired by a federal contractor as a security officer in April 2006. He was fired in October 2009 for misuse of government equipment by using a government computer to search for a stripper to perform at a private party. The contractor's records reflect that he was fired "per government request." At the hearing, he submitted a document from this contractor stating that he was eligible for rehire. (AX V.)

Applicant earned an associate's degree from a community college in May 2010 and a bachelor's degree from a university in May 2013. He married in December 2016 and has no children.

Applicant submitted an SCA in February 2014. In response to a question whether, in the last seven years, he had illegally used any drugs or controlled substances, he disclosed that he had smoked marijuana three times between May 2004 and January 2014. (GX 2 at 35.)

During a personal subject interview (PSI) in March 2014, Applicant was questioned by a security investigator about his admitted use of marijuana. He told the investigator that he used marijuana in 2002 and 2004, but he was unable to remember the detailed circumstances of his use. He told the investigator that he remembered using marijuana in January 2014 with a woman who asked him if he knew anyone who

sold marijuana. He responded that he did, and they drove to the home of the seller, where he made the purchase. They went to Applicant's residence, where they smoked it. He told the investigator that he purchased and smoked the marijuana to impress the woman, but that it had no effect on his behavior. (GX 4 at 5.)

Applicant submitted another SCA in June 2017. In response to the question whether, in the last seven years, he had illegally used any drugs or controlled substances, he answered "No." He also answered "No" to a question whether, in the last seven years, he had been involved in the illegal purchase, manufacture, cultivation, trafficking, production, transfer, shipping, receiving, handling, or sale of any drug or controlled substance. (GX 1 at 57-58.) His negative answer to the second question was not alleged in the SOR.

In a second PSI on June 21, 2018, Applicant was confronted with his admissions of marijuana involvement during the March 2014 PSI. He denied making those admissions. He then "clarified" that unless the substance was tested in a lab, he was not sure it was actually marijuana. (GX 5 at 11.)

In response to DOHA interrogatories in February 2019, Applicant stated that the summaries of the March 2014 and June 2018 interviews were not accurate. He explained:

> To clarify, these incidents which are being called "drug involvements." There is no proof of such incidents or drugs. There are no police reports, or criminal charges or no drug test results or anything of such, just my words. . . .
>
> To clarify, at the time of each "drug involvement," I naively believed the substances of question were marijuana, and I tried to answer the investigator's questions from what I believed at that time. Whether I believed the substances to be marijuana at the time of each incident, a belief does not make it factual.
>
> I know that the only way to confirm a substance is marijuana, is by lab testing, and since the substances of questioning of all incidents I stated in the previous 2014 report were never tested, so therefor I cannot, without a doubt, state that the substances were marijuana. Therefore, this is the reason I stated no to the questions.

(GX 3 at 6.)

At the hearing, Applicant testified that his research on the effects of marijuana was on "legitimate websites, government websites." (Tr.17-18.) He submitted a treatise from the National Institute on Drug Abuse, published in June 2018 (no specific date in June 2018 indicated), a fact sheet from the Drug Enforcement Administration on which

the publication date is illegible, and a January 2005 article from the Federal Bureau of Investigation on the methods of drug analysis and identification. (AX I and II.)

On cross-examination, Applicant testified that he did not recall when he conducted his research or what caused him to conduct it, but it was before he submitted his 2017 SCA. He testified that in the second PSI he told the investigator that he was not sure the substance was marijuana unless it was tested in a lab. He testified that he did not mention his research because the investigator did not ask him about it. (Tr. 40.)

In Applicant's response to the SOR, he submitted 21 letters from friends, associates, former teachers, a deputy sheriff, and coworkers attesting to his good character. At the hearing, he resubmitted several of the same letters. In addition, he submitted letters from three university professors, an ARNG recruiter, several supervisors of community activities in which Applicant participates, and his current supervisor. The letters attest to his good character, reliability, honesty, and trustworthiness. (AX II.)

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 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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." 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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.

Analysis

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified his June 2017 SCA by deliberately failing to disclose that he used marijuana from 2002 to 2014 and answering “No” to the question, “In the last seven (7) years, have you illegally used any drugs or controlled substances?” (SOR ¶ 1.a). The SOR does not allege Applicant’s negative answer to the second question in the SCA about involvement in “the illegal purchase, manufacture, cultivation, trafficking, production, shipping, receiving, handling, or sale of any drug or controlled substance.”

The SOR also alleges that Applicant falsified material facts during the June 2018 PSI when he denied use of marijuana from 2002 to about 2014 and deliberately sought to conceal his use of marijuana from 2002 to 2014 (SOR ¶ 1.b). Finally, it alleges that Applicant was terminated from employment by a federal contractor in October 2009 for using a government computer to search websites for a stripper for hire. (SOR ¶ 1.c.)

The security 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility: . . . (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The following disqualifying conditions under this guideline are potentially applicable:

> 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 national security eligibility or trustworthiness, or award fiduciary responsibilities;

> AG ¶16(b): deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

> AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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. This includes, but is not limited to, consideration of: . . . (3) a pattern of dishonesty or rule violations; and (4) evidence of significant misuse of Government or other employer's time or resources; and

> AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing . . . .

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 experience and level of education 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).

I have noted that Applicant's negative answer to the second question in Section 23 was not alleged in the SOR. However, it may be considered in determining whether his negative answer to the first question was an intentional falsification. *See* ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). Furthermore, in considering the adequacy of an SOR, it is important to note that an SOR is an administrative pleading, and such pleadings are not held to the stringent standards of criminal indictments. As explained by the Appeal Board:

> [A]dministrative pleadings are not an end in themselves, but rather a means to assist the disposition of a case on its merits rather than pleading niceties. Accordingly, as long as there is fair notice to the affected party and the affected party has a reasonable opportunity to respond, a case should be adjudicated on the merits of relevant issues and should not be concerned with pleading niceties.

ISCR Case No. 99-0710 at 2 (App. Bd. Mar. 19, 2001). (Footnotes omitted.) In this case, Applicant knew that his drug involvement in 2014 was at issue and that his disclosures in his 2014 SCA were detrimental.

When Applicant submitted his June 2017 SCA, he knew that his answers to the drug-related questions in his 2014 SCA were problematic and that the same answers in the June 2017 SCA would likely result in denial of his application for a clearance. After thinking about his answers and conducting research, he answered all the drug-related questions in the negative when he submitted his 2017 SCA. He carefully crafted his answers in his 2017 SCA and the June 2018 PSI in an effort to overcome his disclosures in 2014. His testimony at the hearing was vague and uncertain about the timing of his research and the materials he reviewed. At least one of the documents he submitted at the hearing was a June 2018 publication. In any event, his rationale for answering all the drug-related questions in the negative is flawed, for several reasons.

First, the policy set out in AG ¶ 15(b) makes it clear that "full, frank, and truthful" answers are required during the adjudicative process. This policy was amplified by the Appeal Board in ISCR Case No. 01-03132 at 3 (App. Bd. Aug. 8, 2002):

> A security clearance investigation is not a forum for an applicant to split hairs or parse the truth narrowly. The government has a compelling interest in protecting and safeguarding classified information. That compelling interest includes the government's legitimate interest in being able to make sound decisions, based on complete and accurate information, about who will be granted access to classified information. An

> applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the industrial security program.

Second, the security-clearance process is not a drug-enforcement tool. It is an evaluation of an Applicant's trustworthiness, reliability, good judgment, and willingness to follow rules and regulations. The focus of the drug-related questions in the SCA is not on the nature of the substance involved, but on the willingness of an applicant to follow rules and regulations. Even if Applicant and his friend were swindled in 2014, he demonstrated and admitted his willingness to violate the rules regarding illegal drug involvement.

Third, even Applicant and his friend were swindled in the 2014 transaction, Applicant's conduct fits squarely in the illegal drug activity covered by the second question in Section 23 of the SCA. Although the SOR alleged only the first question in Section 23, that section includes a second question pertaining to illegal purchase, trafficking, receiving, handling, and sale of illegal drugs. Applicant answered "No" to this second question. Applicant was asked by his friend to purchase marijuana, knowingly sought out a drug dealer, negotiated a purchase, received the product, and used it. In short, he knowingly involved himself in illegal drug trafficking with a known drug dealer. His demonstrated willingness to engage in illegal drug activity is sufficient to raise a security concern. He did not raise any question about the nature of the product that he purchased until his first attempt at obtaining a security clearance failed. Even under the more rigid guidelines of criminal law, he would be guilty of attempted purpose, possession, and use of marijuana. His attempt to recant his admissions in his 2014 SCA and the follow-up PSI is not credible.

I am satisfied that Applicant knew that his answers to the questions in Section 23 of the June 2017 SCA and his responses to the investigator's questions during the June 2018 PSI were deceptive and evasive. I conclude that the disqualifying conditions in AG ¶¶ 16(a) and 16(b) are established. The evidence of Applicant's termination of employment for misuse of a government computer, alleged in SOR ¶ 1.c, is sufficient to raise AG ¶ 16(d).

The following mitigating conditions are potentially applicable:

> AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and
>
> AG ¶ 17(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.

AG ¶ 17(a) is not established. Applicant made no effort to correct his false statements in the 2017 SCA and 2018 PSI. To the contrary, he persisted at the hearing in his efforts to recant his earlier admissions.

AG ¶ 17(c) is not established for Applicant's falsifications. They were recent and multiple. They were not minor, because a falsification of a security clearance application "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.)

AG ¶ 17(c) is established for Applicant's termination of employment in October 2009. It occurred long ago, has not recurred, and was regarded as minor by his employer, who has indicated that he is eligible for rehire.

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(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.

I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment. Applicant is a well-educated, mature, and experienced adult. His careful parsing of his answers in his 2017 SCA and the follow-up questions during the June PSI are inconsistent with the requirement for full, frank, candid, and truthful answers to questions during the investigative and adjudicative process. His attempt to apply criminal-law standards to an administrative adjudication is misplaced and inconsistent with the adjudicative guidelines. After weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his personal conduct.

Formal Findings

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

Paragraph 1, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraphs 1.a and 1.b: Against Applicant

Subparagraph 1.c: For Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge