



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-03964
)
Applicant for Security Clearance)

Appearances

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

08/20/2021

Decision

CERVI, Gregg A., Administrative Judge

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 28, 2019. On July 27, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The DCSA 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) effective June 8, 2017.

Applicant answered the SOR on November 9, 2020 (Ans.), and requested a decision based on the written record without a hearing. The Government's written brief with supporting documents, known as the file of relevant material (FORM), was submitted

by Department Counsel on December 29, 2020. A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, rebut, or mitigate the security concerns. Applicant received the FORM on May 4, 2021, and did not reply to the FORM, submit evidence in mitigation, or object to any documents submitted for the record. The case was assigned to me on July 6, 2021. Government Exhibits (GE) 1 through 11 are admitted into evidence.

Findings of Fact

Applicant is a 32-year-old senior consultant, employed by a government contractor since October 2014. He previously worked for another government contractor from July 2011 to September 2014. Applicant was born in 1989 in China, and entered the United States in 1992. He became a naturalized U.S. citizen in 2002. He graduated from high school in 2007 and attended university from September 2007 to May 2011, when he was awarded a bachelor's degree. Applicant is unmarried. He was previously denied a security clearance in 2010 by the U.S. Department of State based on drug involvement, however he was granted a DOD security clearance and sensitive compartmented information (SCI) eligibility in 2011 while working for a defense contractor. He was denied SCI eligibility by another government agency in 2017 for illegal drug use, involvement with prostitution, and falsifying a SCA.

The SOR alleges under Guideline H that Applicant purchased and used marijuana from June 2008 to June 2010 (SOR ¶ 1.a) and from October 2015 to December 2015 (SOR ¶ 1.b); that he attempted to grow marijuana in 2015 (SOR ¶ 1.c); used cocaine from October 2015 to December 2015 (SOR ¶ 1.d); and Applicant's 2015 drug involvement (SOR ¶¶ 1.b – 1.d) occurred after being granted a DOD security clearance in 2011 (SOR ¶ 1.e).

The SOR also alleges under Guideline E that Applicant falsified his 2011 SCA by failing to report his purchases and use of marijuana as alleged in SOR ¶ 1.a, above. (SOR ¶¶ 2.a and 2.b) SOR ¶ 2.c alleges Applicant twice engaged with a prostitute in November 2015. SOR ¶¶ 2.d, 2.e, and 2.f allege Applicant's failure to disclose his drug use, purchases, attempt to grow marijuana, and use while holding a security clearance in his May 2016 SCA. SOR ¶¶ 2.g, 2.h, and 2.i allege Applicant failed to disclose his drug use, including while holding a clearance, his purchases, and attempts to grow marijuana on his August 2016 SCA. Finally, SOR ¶ 2.j alleges that Applicant failed to disclose drug use, other than while in college in 2009 (under SOR ¶¶ 1.a, 1.b, and 1.d), in his personal subject interview with a DOD investigator on May 14, 2018. Applicant admitted all of the SOR allegations with explanations.

Applicant admitted that he used marijuana from June 2008 to June 2010 while in college, and from October 2015 to December 2015. He admitted to purchasing marijuana, and using marijuana and cocaine at various times from October 2015 to December 2015, and attempted to grow marijuana in 2015. He also admitted to twice engaging a prostitute in Hong Kong while visiting in 2015. (Ans., Items 7, 8, and 9) Applicant stated that he first applied for a civilian position with the U.S. Navy in 2010 and completed an SCA in May

2010, but he did not get the job. He noted in his 2010 SCA that he used and purchased marijuana from June 2008 to May 2020, and that he used Concerta and Ritalin without a prescription in 2008.

He again completed an SCA in February 2011. In his 2011 SCA, Applicant noted that he was investigated in 2010 for a secret security clearance, but was denied by the Department of State because they were “unhappy with my use of marijuana and did not believe I have stopped for good. I have learned my lesson from this experience and regret ever using marijuana. I have not smoked for over half a year now and don’t plan on smoking again.” (Item 4) Despite the disclosure in his 2011 SCA about being denied a security clearance due to drug involvement, he denied any involvement with illegal drugs in the preceding seven years, including while holding a security clearance.

From July 2011 to September 2014, Applicant worked for a company he listed in his 2016 SCA as a government contractor (Item 5) Applicant asserted that he first learned in 2013 that he was previously granted a security clearance in 2011. A Joint Personnel Adjudication System (JPAS) entry for Applicant shows that the Department of Navy CAF granted Applicant eligibility for access to SCI in May 2011. (Item 10) In October 2014, Applicant began working for his current employer and clearance sponsor. (Item 5) In March 2015, Applicant signed a Classified Information Nondisclosure Agreement. (Item 11)

Applicant completed two additional SCAs in May and August 2016. In both, he denied previous involvement with illegal drugs, including while holding a security clearance, but he did note that he was denied a clearance in 2011 “due to experimental marijuana use in college.” (Items 5, 6) In October 2016, Applicant was interviewed for a polygraph examination by another government agency. During the pre-test interview, he admitted his past drug use and involvement with prostitution as alleged in the SOR. (Item 7) In January 2017, that agency denied him eligibility for access to SCI.

On May 14, 2018, Applicant was interviewed by a Government investigator. He failed at that time to fully disclose his drug use history, other than while in college. In July 2019, Applicant was again interviewed by a Government investigator in an enhanced subject interview. In this interview, he disclosed his use of marijuana in 2014 to 2015 in social settings with friends. He stated that he believed at the time, that his clearance was “not active” since he was not working on government projects that required a clearance. He also stated that smoking marijuana was not illegal, as it is legal in the city in which he lived at the time, and where he currently lives. He also acknowledged using cocaine two to three times from 2014 to 2015, but admitted after being confronted, that he used cocaine three-to-four times. He also acknowledged using marijuana from 2007 to 2010, and purchasing it from 2009 to 2010. Applicant claimed that he did not report his drug involvement in three SCAs due to being influenced by a Navy job recruiter not to admit to drug use because it is viewed unfavorably. He followed that advice during subsequent security applications.

In his Answer to the SOR, Applicant noted, “[p]lease accept this letter as my signed statement of intent to abstain from all drug involvement, substance misuse, illegal sexual behavior, and any other personal conduct involving questionable judgment and dishonesty” with the understanding that future infractions would serve as grounds for revocation of his clearance. (Ans.) He stated that events in 2015 occurred while he was in his 20s, and single, and did he “did not have the slightest clue how important a government clearance really was.” He regrets the events that occurred in 2015, including his use of marijuana, cocaine, and procurement of prostitution, and has since married, bought a house, and lives responsibly. When he went to the 2016 interview, he says that he was already a “changed man.” He considers his activities in 2015 to be “isolated events” that will not be repeated. (Ans.)

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.

National security eligibility 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 a person’s stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

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. *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, e.g., ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015).

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, e.g., 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 ¶ 1(d).

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Controlled substance means any “controlled substance” as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);

- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and

Applicant used and purchased illegal drugs while holding a security clearance. He also tried to grow marijuana, and indicated in his 2011 SCA that he did not intend to continue using marijuana, however he used it again in 2015. AG ¶¶ 25(a), (c), and (f) apply.

AG ¶ 26 provides conditions that could mitigate security concerns. I have considered all of the mitigating conditions, and find the following conditions as potentially applicable:

(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;

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant has a history of drug use while in college that continued until 2015 after using marijuana and cocaine at social gatherings. He knew by at least 2013, that he had a security clearance, and had been working for a defense contractor since 2011. Applicant noted in his 2011 SCA that he would abstain from further marijuana use, but he failed to follow through on that statement of intent. In November 2020, he again stated his intent to abstain from any involvement with illegal drugs with the understanding that future infractions would serve as grounds for revocation of a clearance. However, based on his past behavior, his renewed promises ring hollow.

Based on Applicant's broken promises in the past and history of illegal drug use, purchase, and cultivation while employed by a defense contractor and holding a security clearance, I am not convinced of his recent attestations of change. He has not provided sufficient evidence of actions taken to overcome this problem or persuaded me that his expressed abstinence is truthful given his relapse history. He has also not indicated that he has disassociated from drug-using associates and contacts and changed the environment where drug use has occurred in the past. These are mitigating elements of AG ¶ 26(b) that have not been satisfied. Although he may be sincere about being a changed man, he has not supplied sufficient or persuasive evidence of such changed behavior or that he has finally refrained from illegal drug involvement once and for all. AG ¶ 26(a) is not fully satisfied. There is no indication in the record that Applicant has

received drug abuse counseling.

Applicant's past behavior and history of involvement with illegal drugs, including with a security clearance, continue to reflect poorly on his current reliability, trustworthiness, and good judgment. No mitigating condition is fully applicable.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 may be disqualifying. The following disqualifying condition is potentially applicable:

(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;

(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;

(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;

(2) while in another country, engaging in any activity that is illegal in that country;

(3) while in another country, engaging in any activity that, while legal there, is illegal in the United States; and

(g) association with persons involved in criminal activity.

Applicant falsified his 2011 SCA by failing to report his purchases and use of marijuana. He also failed to disclose on his May 2016 SCA, his drug use, purchases, and attempts to grow marijuana in 2014 or 2015, including while holding a security clearance. In his August 2016 SCA, he failed to disclose his drug use, including while holding a clearance, his purchases, and attempts to grow marijuana; and he failed to fully disclose his drug use, other than while in college, during his personal subject interview with a DOD investigator on May 14, 2018. Finally, Applicant twice engaged with a prostitute in 2015, in a foreign country. AG ¶¶ 16(a), (b), (e), and (g) apply.

The 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.

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

The record evidence establishes that Applicant failed to fully disclose his drug activity in his SCAs as noted above. Despite noting that he was denied a clearance in 2010 by the Department of State due to drug involvement, his failure to fully disclose his drug involvement shows an intentional attempt to obfuscate or minimize his conduct. The evidence shows that Applicant clearly was aware of his clearance status by at least 2013, but failed to disclose his drug involvement while holding a security clearance. He later noted in his enhanced personal subject interview that he believed that his clearance was not active; however, there is no record evidence from his employer supporting that contention.

I am convinced that Applicants omissions, concealments, and falsifications of relevant facts from his SCAs were intentional. Additionally, his engagement with illegal prostitution in 2015 evidences personal conduct that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group.

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

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. 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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

None of the mitigating conditions fully apply to Applicant's repeated failures to disclose his drug involvement on his SCAs. In his SOR Answer, Applicant takes responsibility for his conduct and noted that he is a changed man. His past admissions came during a pre-polygraph test interview or after he finally disclosed his conduct and needed a security clearance. I reject his reasoning for falsifying his SCA, as a recruiter's advice should not influence one to make subsequent years of false statements. I am not satisfied that sufficient time has passed or that Applicant has provided substantial and convincing evidence that this conduct will not recur. His past behavior continues to cast doubt on his reliability, trustworthiness, and good judgment. Personal conduct security concerns are not mitigated.

Whole-Person Concept

The ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the 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 relevant circumstances. AG ¶¶ 2(a), 2(c), and 2(d). The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guidelines H and E in my whole-person analysis. Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant or continue 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 section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a - 1.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a – 2.j:	Against Applicant

Conclusion

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

Gregg A. Cervi
Administrative Judge