



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



In the matter of:)	
)	
)	ISCR Case No. 23-00242
)	
Applicant for Security Clearance)	

Appearances

For Government: Jenny Bayer, Esq., Department Counsel
For Applicant: *Pro se*

12/04/2023

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E, personal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On March 29, 2023, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, personal conduct. The action was taken under Executive Order (EO) 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 within the DOD on June 8, 2017.

Applicant answered the SOR on April 17, 2023, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's file of relevant material (FORM), and Applicant received it on June 27, 2023. He was afforded an opportunity to file objections and submit material in refutation,

extenuation, or mitigation within 30 days of receipt of the FORM. The Government's evidence is identified as Items 2 through 6 (Item 1 is the SOR). Applicant did not submit a response to the FORM or object to the Government's documents. Items 2 through 6 are admitted into evidence. The case was assigned to me on August 23, 2023.

Findings of Fact

Applicant admitted the sole SOR allegation. His admission is incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 27 years old. He graduated from college in 2019. He is not married and has no children. He began working for his present employer, a federal contractor, in November 2021. (Item 4)

In December 2021, Applicant completed a Questionnaire for Non-sensitive Position (SF 85). Section 14 asked if in the last year he had used, possessed, supplied, or manufactured illegal drugs in the past year. He responded "No." The section advised, "Neither your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding." (Item 5)

In May 2022, Applicant completed a Questionnaire for National Security Position (SF 86). Under Section 23-Illegal Use of Drugs or Drug Activity, it states with reference to this section that neither your truthful responses nor information derived from your responses to this section will be used as evidence against you in a subsequent criminal proceeding. (Item 4)

Section 23 asked if in the last seven years Applicant had illegally used drugs. He responded "No." In the section titled: "Additional comments" there were none. He certified that his responses in the SF 86 were true, complete, and correct to the best of his knowledge and belief and were made in good faith. He further affirmed that making a knowing and willful false statement was punishable under federal law. He affirmed that he understood that intentionally withholding, misrepresenting, or falsifying, or including classified information may have a negative effect on his security clearance, employment prospects, or job status, up to and including denial or revocation of a security clearance, or removal and debarment from Federal service.

Applicant was interviewed by a government investigator under oath in July 2022. When asked if he had used any illegal drugs in the past seven years, he admitted using marijuana in 2015 and again in 2019. When questioned as to why he did not disclose his drug use, he explained he was worried about what would happen if he listed his marijuana use. He said he did not know what would happen with his employment if he answered the question honestly, so he lied.

Applicant completed government interrogatories in March 2023. In them, he affirmed the accuracy of July 2022 background interview and said the reason he did not

disclose his marijuana use because: “This was my first government job, and I was scared/unsure what would happen.” (Item 6)

In Applicant’s April 2023 answer to the SOR, he stated he wanted to explain his conduct. He said he was nervous about the security process and had no idea how it worked, especially being a new employee for a big company. He stated,

I was scared of what would happen if I put “yes” on the e-quip for having done any drugs since I didn’t know if I was going to be rejected automatically, arrested, fired, taken out of the building by people in suits, or have a stain on my record. One that I have spent my entire life building. I also didn’t want to be painted with the same broad stroke brush as someone who does all kinds of drugs constantly or sells them. That isn’t me, never has, and never will.”

I received advice from a peer suggesting that I could answer “no” and explain in more detail during the interview. While this seemed like a reasonable approach at the time, and I did go into that detail in my interview, I now realize that it was not the best course of action. (Item 2)

Applicant further explained in his SOR answer that he recently learned that his company has people that help employees through the security process. He believed he got terrible advice and should have answered the question with a “yes.” He stated, “I wish I had known that during the time, but I was so new at the company and was overwhelmed by all of the paperwork.” (Item 2)

In his SOR answer, Applicant stated that he is committed to upholding the highest standards of integrity and honesty in his work and he understands the importance of maintaining a spotless record in order to hold a position of trust. He recognizes the seriousness of the clearance process and the importance of complete transparency and honesty. (Item 2)

Policies

When evaluating an applicant’s suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable

information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I find the following 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.

Applicant admitted and the evidence supports that he deliberately failed to disclose his past drug use on his SF 86. AG ¶ 16(a) applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

(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 process. Upon being made aware of the requirement to cooperate or provide information, the individual cooperated fully and truthfully; and

(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.

The evidence does not support the application of AG ¶ 17(a). There is insufficient evidence to conclude that Applicant made a prompt, good-faith effort to correct his omission. He did not disclose his past drug use until he was asked about any prior drug use by the government investigator during his background investigation.

Applicant told the government investigator that he did not disclose his past drug use because he was concerned about the potential impact on his job. He reiterated this explanation later when he answered government interrogatories. Neither time did he mention that he received bad advice from a friend who told him to respond "no" to the security question and provide his explanation to the investigator later. He had an opportunity to provide an explanation or clarifying information in the additional comments section of the SF 86 and did not. Clearly, if he consulted with a friend about how to answer questions on his SF 86, he could have easily asked those in his company with expertise in the process. He did not. AG ¶ 17(b) does not apply.

Being truthful and honest is the cornerstone of the security clearance process. Although the paperwork involved may be daunting and perhaps having guidance of how to proceed may be helpful, no one should need guidance on the requirement to tell the

truth. It is the simplest part of the process. The answer to any question that Applicant may have asked an expert in the process regarding how to respond to questions on his SF 86, is always, be honest. One should not need guidance on the requirement to tell the truth. The government relies on those who are trusted with the nation's secrets to always be honest, even when disclosure could potentially threaten one's career. National security always trumps one's personal considerations. Applicant deliberately chose to be untruthful. AG ¶ 17(c) does not apply because deliberately failing to disclose information on a SF 86 and swearing to its accuracy is not a minor offense. I find Applicant's omissions are serious and cast doubt on his reliability, trustworthiness, and good judgment.

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 the circumstances. The 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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis. Applicant has not met his burden of persuasion. The record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant failed to mitigate the security concerns arising under Guideline E, personal conduct.

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 E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge