



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



In the matter of:)	
)	
)	ISCR Case No. 14-00159
)	
Applicant for Security Clearance)	

Appearances

For Government: Fahryn Hoffman, Esq., Department Counsel
For Applicant: *Pro se*

06/16/2014

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guideline for personal conduct. Accordingly, his request for a security clearance is denied.

Statement of the Case

On February 25, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) citing security concerns under Guideline E (personal conduct) of the Adjudicative Guidelines (AG).¹ In his Answer to the SOR, Applicant admitted the allegations. He requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on May 9, 2014, and I convened the hearing on May 28, 2014. I admitted four Government exhibits (GE 1-4), and two exhibits offered by the Applicant (AE A-B). I held the record

¹ Adjudication of the case is controlled by Executive Order 10865, as amended; DOD Directive 5220.6 (Directive), as amended; and the Adjudicative Guidelines, which supersede the guidelines listed in Enclosure 2 to the Directive. They apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

open, and Applicant timely submitted one additional exhibit after the hearing, admitted without objection, as AE C. DOHA received the transcript on June 6, 2014.

Findings of Fact

Applicant's admissions are incorporated as findings of fact. After a thorough review of the pleadings and the record evidence, I make the following findings of fact.

Applicant is 29 years old and unmarried. From 2003 to 2008, he attended college and completed a bachelor's degree in mechanical engineering. He received a master's degree in engineering management in 2010. From July 2008 to April 2011, he worked as an engineer for a military agency. In 2008, when he was 21 years old, he received his first security clearance at the secret level.² From April 2011 to March 2013, he was unemployed, and began an online retail business. However, it did not produce income. He started his current employment with a defense contractor in March 2013, where he works as a program analyst and engineer. (GE 1; Tr. 17-18, 48-49)

Before starting his job at the military agency in 2008, Applicant had a pre-employment drug test. He testified that he was aware of the agency's policy prohibiting illegal drug use. Between 2008 and 2011, he had two to three additional random drug tests. Results of all of these tests were negative. Applicant testified that the employees were often subject to random drug testing "[d]ue to the frequent use of explosives, so the chances of getting hurt was real high." (Tr. 19-22)

During a weekend in March 2011, when he visited his family in another state, he used marijuana for the first time. He was 26 years old. He smoked it three or four times that weekend with a cousin. At the end of the party, he realized he had made a mistake. He has not used marijuana since. After returning to work, he did not inform his security officer of his illegal conduct. He underwent a random drug test on March 15, 2011. The testing company informed Applicant that he had failed the test. Applicant informed his supervisor, who stated that the security office would be notified. On March 28, 2011, Applicant's access to classified information was suspended pending a security determination, his badges were confiscated, and he was escorted off base. (GE 2, 3, 4; Tr. 19-22, 34-35, 39, 54-55)

Applicant was informed he could resign or he could appeal the test results. If the results were confirmed, Applicant would be fired and would be ineligible for future federal employment. According to his July 2013 statement in his SF 86-C, Applicant believed that if he lost the appeal, he would be subject to disciplinary action, but if he resigned, no incident report would be filed and his record "would remain clean." Applicant discussed his options with his supervisor and his family. He resigned on April 7, 2011. (GE 3, 4; Tr. 22-24)

² The record is ambiguous as to the date of Applicant's first security clearance. His application shows 2006, but Applicant testified the year was 2008. (GE 1; Tr. 18)

In June 2013, Applicant completed a security clearance application for his current position with a defense contractor. (GE 1) He answered “No” to the following question:

Section 13C – Employment Record

Have any of the following happened to you **in the last seven (7) years** [emphasis in original]?

- Fired from a job?
- Quit a job after being told you would be fired?
- Have you left a job by mutual agreement following charges or allegations of misconduct?
- Left a job by mutual agreement following notice of unsatisfactory performance?
- Received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of a security policy?

Before answering Section 13C, Applicant contacted the human resources department at the military agency to ensure that “[n]o trail of this information existed” and he was assured that it did not. He asked if his resignation should be reported, and was informed he did not need to report it. He also contacted the security officer for the military agency, who told him that he had no disciplinary record on file, because he had resigned. Applicant testified,

This is the main reason as to why I did not originally report it on my SF-86 application. Since there was no incident report shown on my [DOD personnel] record and no disciplinary action was taken against me at the time, I did not feel the question was truly applicable in my situation. (GE 3)

At the hearing, Applicant stated, “Nonetheless, it was my decision what to put on this form, and . . . I should have known to put Yes.” (Tr. 24-25)

In Section 13A, regarding employment and unemployment history, the security clearance application asked why Applicant left his position at the military agency, and the reason for his subsequent unemployment. To both questions, he answered the following:

Resignation from previous position as Engineer at [agency]. The resignation was due to a search of different career opportunities within the field of engineering.³ (GE 1, Tr. 26)

³ The SOR does not allege falsification of the employment/unemployment question. I will not rely on Applicant's answers to these questions to reach conclusions, but only for the limited purposes outlined by the Appeal Board: Conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a

Applicant also answered “No” to the following questions:

Section 23 – Illegal Use of Drugs or Drug Activity

- **In the last seven (7) years** [emphasis in original], have you illegally used any drugs or controlled substances?
- Have you **EVER** [emphasis in original] illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed?

Section 25: Investigation and Clearance Record

- Have you **EVER** [emphasis in original] had a security clearance eligibility/access authorization denied, suspended, or revoked?

Applicant testified that he answered “No” to these questions because he had been told,

[T]here was no record of what had happened, and knowing that I’m not a habitual drug user, this is why I put “No” on the form. I felt like if I brought – I didn’t want to bring something up again that had just been haunting me for the past three years—or two years—before I could even get a job with [current company]. . . . Nonetheless, the question is clearly stated, and I should have filled out Yes. (Tr. 26-28)

Shortly after Applicant completed his security clearance application in June 2013, his security officer notified him that his application had been flagged because of an incident report. Applicant told the security officer the likely cause. He was instructed to contact his security officer at the military agency, who suggested he complete a Form SF-86C “Standard Form 86 Certification” to correct his answers. In July 2013, he completed the SF-86C, revealing his drug use and his resignation from the military agency because of the positive drug test. In the SF-86C, he stated he had misinterpreted Section 23. He also stated that he had no intention to deliberately withhold any information or to be misleading during his clearance investigation. In his 2014 Answer to the SOR, he repeated that he had no intent to withhold information or mislead the Government. (Answer; GE 3, 4; Tr. 28-33, 51-53)

In September 2013, Applicant was interviewed by an agent of the Office of Personnel Management.⁴ The agent was unaware of Applicant's SF-86C, and Applicant volunteered the information about his drug use, positive drug test, and subsequent resignation. He also stated that he chose not to disclose his drug test and resignation

particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

⁴ Applicant testified that he had reviewed the report of his security interview, and confirmed that it accurately reflected his statements during the interview. (Tr. 29-30)

because he feared it would jeopardize his security clearance. Applicant stated that he told his parents and two friends the reason he lost his job, but he was embarrassed about the events, and informed all others that he had been laid off due to government cutbacks. At the hearing, he stated that he told close family members, but not others.

Yeah. I mean, I felt as if at the time I – I was living a lie. I wasn't telling people why I had left my former job. I had just told them I had resigned for personal reasons, you know, kept it real vague. (Tr. 36-37)

He testified that he became depressed at how his life had changed from "doing real well for myself, to all of a sudden just having nothing, for one evening. Or for a weekend. And it wasn't worth it." He explained that he remained embarrassed about the events for years. At his security interview, he stated he made a poor choice when he concealed these events because of his shame and fear. His parents, some family members, his supervisor and security officer, several friends, and coworkers are now aware of the events. He testified that now that he has revealed it, he feels stronger, is working again in his field, and is free from his former embarrassment. (GE 4; Tr. 31-32, 36-37, 39)

When questioned at the hearing, Applicant admitted that if he had not had the random drug test, he would most likely not have informed his security officer about his marijuana use and resignation. In his July 2013 SF 86-C, he stated he "never had any intention of deliberately withholding any information from my clearance investigation." Three months later, at his September 2013 security interview, he admitted that he deliberately sought to conceal his history because he was embarrassed and he feared losing his security clearance. However, in his March 2014 Answer to the SOR, Applicant stated he had "[n]o intention of withholding any information or being misleading in efforts of completing this investigation application. (Answer; GE 3; Tr. 34-35)

Applicant offered a document showing the results of a pre-employment drug test for his current position on March 18, 2013. The results were negative for five different drug types, including marijuana. Applicant also submitted his performance evaluation for his first year with his current employer. It was completed in February 2014. It notes he has succeeded at difficult challenges, and is a valued asset for the customer. His overall rating was 7.71 of a possible 8. The evaluation also states he "[h]as never required counseling or correction for any action in conflict with [company's] policies." Applicant also submitted a memorandum dated March 2013, which noted that a review of his current personnel records shows no adverse information. (AE A, B, C; Tr. 44-45, 56, 59)

Policies

Each security clearance decision must be a fair and commonsense determination based on examination of all available relevant and material information,

and consideration of the pertinent criteria and adjudication policy in the AG.⁵ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the “whole-person” concept. The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline E (personal conduct).

A security clearance decision is intended only to resolve the question of whether it is clearly consistent with the national interest⁶ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the Applicant to refute, extenuate or mitigate the Government’s case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁷ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as her or his own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.⁸

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern about 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

⁵ Directive. 6.3.

⁶ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; AG ¶ 2(b).

process or any other failure to cooperate with the security clearance process.

The Government alleges that Applicant tested positive for marijuana and knowingly falsified answers concerning his illegal drug use, employment, and security clearance history on his 2013 security clearance application. The following disqualifying conditions under AG ¶ 16 are relevant:

(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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing . . . ; and

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Applicant admits that on his 2013 security clearance application, he deliberately falsified answers to four questions concerning his illegal drug use, his use while holding a security clearance, his resignation for failing a drug test, and the suspension of his security clearance. Applicant stated in his security interview and at the hearing that between 2011 and 2013 he was “living a lie,” and did not tell most people because he was embarrassed by his conduct. Applicant was vulnerable to exploitation because he feared disclosure of his secret and the effect disclosure would have on his personal and professional standing. AG ¶¶ 16(a) and 16(e) apply.

Applicant testified that he violated his employer’s drug policy when he used an illegal drug in 2011, implicating AG ¶ 16(f). However, the disqualifying condition refers to a “written or recorded commitment made by the individual,” and the evidence does not include evidence of such a written agreement. AG ¶ 16(f) does not apply.

Guideline E contains factors that can mitigate disqualifying conditions. The following conditions under AG ¶ 17 are relevant:

(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 circumstances that it is

unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(e) The individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant did not make good-faith efforts to disclose his drug use and resignation on his 2013 security clearance application. Only after he was informed that his security clearance application was flagged in his DOD personnel record did he reveal his history to his supervisor and security officer. He did complete an SF 86-C to correct his application, but only because his security officer instructed him to do so. He testified that, had he not been tested it is unlikely he would have disclosed his marijuana use. Applicant's conduct did not show a good-faith desire to disclose his history. AG ¶ 17(a) does not apply.

Applicant's conduct is recent. He falsified his security clearance application approximately one year ago. He did not disclose the truth until nine months ago, when the flagged application forced him to reveal it. He testified that if his application had not been flagged, it is unlikely he would have revealed the truth. Deliberate falsification of information provided to the Government is not minor; it goes to the heart of the security clearance process. Moreover, although Applicant revealed his conduct, he stated as recently as March 2014, that he never intended to mislead the Government. Yet, he contradicted this assertion in September 2013 and at the hearing, by stating he deliberately concealed his history because it would negatively affect his clearance eligibility. Applicant's contradictory statements undermine a claim of rehabilitation, and reflect negatively on his trustworthiness and judgment. AG ¶ 17(c) cannot be applied.

Applicant has taken positive steps by revealing his conduct to his employer, family, and several friends and coworkers, who are now aware of his history of illegal drug use, positive drug test, and resignation. Applicant is no longer vulnerable to coercion, and AG ¶ 17(e) applies.

Whole-Person Analysis

Under the whole-person concept, an administrative judge must evaluate the applicant's security eligibility by considering the totality of an applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant's history includes positive factors that weigh in his favor, including his abstinence from marijuana use since 2011, and his positive performance evaluation from his supervisor.

However, the negative factors are more significant. When Applicant used marijuana, he had held a security clearance for three years. He was aware that marijuana use was illegal, and that he had jeopardized his security clearance by violating the law. He was aware of his duty to report security-significant behavior. Finally, when he completed the security clearance application in 2013, he was aware of his duty to provide frank and complete answers during clearance investigations. Despite his awareness, he knowingly chose to falsify his security clearance application by concealing his illegal drug use, his failed drug test, and his resulting clearance suspension and resignation. He also chose to conceal these facts from his supervisor, his security officer, and from DOD. He violated the security clearance holder's obligation to self-report, because he feared the consequences for his career and his personal standing.

Those who hold security clearances enter into a fiduciary relationship with the Government based on trust. Applicant's conduct demonstrates willingness to place his own desires above the Government's need for honesty and trustworthiness in those to whom it grants access to classified information.

A fair and commonsense assessment of the available information shows Applicant has not satisfied the doubts raised about his suitability for a security clearance. For these reasons, I conclude he has not mitigated the security concerns arising from the cited adjudicative guideline.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

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

Conclusion

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

RITA C. O'BRIEN
Administrative Judge