



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 12-06463
)
 Applicant for Security Clearance)

Appearances

For Government: Candace L. Garcia, Esq., Department Counsel
For Applicant: *Pro se*

01/27/2016

Decision

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 on August 11, 2011. On June 6, 2015, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline E. The DOD acted under Executive Order 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) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on July 6, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 8, 2015, and the case was assigned to me on October 2, 2015. On October 20, 2015, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for November 10, 2015. I convened the hearing as scheduled. Government

Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified but did not call any witnesses or present any documents. I kept the record open until November 30, 2015, to enable him to present documentary evidence. He timely submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. DOHA received the transcript (Tr.) on November 18, 2015.

Amendment of SOR

On my own motion and without objection from either party, I amended the last sentence of SOR ¶ 1.a to conform to the evidence by inserting "oxide" after "nitrous." (Tr. 79.)

Findings of Fact

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

Applicant is a 30-year-old senior engineer employed by a federal contractor since June 2015. (Tr. 23.) He has worked for federal contractors since May 2009. He submitted a security clearance application (SCA) in June 2010, and he received a clearance in August 2010. He applied for a higher-level clearance in September 2010, and his application was denied in June 2011. (GX 5.)

Applicant attended various universities and colleges from 2003 to 2009 and received a bachelor's degree in December 2009. He received his master's degree in information assurance in 2011. (Tr. 27.) He married in May 2015. (Tr. 22.)

When Applicant submitted his June 2010 SCA, he responded "Yes" to the question whether, in the last seven years, he had had illegally used any controlled substance. He disclosed that he used marijuana from May 2008 to September 2009, mushrooms in June and July 2008, and cocaine in May 2008.

The denial of Applicant's application for a higher-level clearance in June 2011 was based on his admissions during a polygraph examination in November 2010. He admitted that visited a massage parlor twice in September-October 2010, paid \$70 for a full-body massage, and then paid an additional \$100 for a sexual "happy ending" on each occasion. When questioned about his drug use, he admitted that he purchased, used, and sold marijuana from June to September 2009; purchased and used cocaine in June 2009; purchased and used mushrooms in April and June 2009; purchased and used opium three times in April and May 2009; purchased and used hashish three times in April and May 2009; purchased and used Oxycontin twice in April 2009; used methadone once in April 2009; used whippets (small metal containers of nitrous oxide) twice in March 2009; and used two balloons containing nitrous oxide once in April 2009. (GX 5.)

When Applicant submitted another SCA in August 2011, he again disclosed his use of marijuana, mushrooms, and cocaine. He did not disclose that he had also used opium, hashish, Oxycontin, methadone, and nitrous oxide from March to May 2009.

During a personal subject interview (PSI) conducted in February 2012, Applicant admitted his use of marijuana, mushrooms, and cocaine as listed in his two SCAs. He told the investigator that he had not used any other drugs. (GX 3 at 13.)

In November 2013, Applicant responded to DOHA interrogatories about his drug use by listing marijuana, mushrooms, and cocaine. He did not disclose his use of opium, hashish, Oxycontin, methadone, and nitrous oxide.¹ (GX 3 at 5.)

At the hearing, Applicant testified that his drug use was while he was in college, and when he submitted his first SCA he did not appreciate the implications of applying for a clearance. (Tr. 20-21.) He testified that there were only three spaces on the SCAs for listing the drugs he had used, and he listed the three drugs he had used most frequently. He denied intentionally concealing adverse information. He stated that he was unfamiliar with the form and did not realize that he could add additional information about his drug use in the space for comments at the end of the questionnaire. (Tr. 28-31.) However, he used the space for comments on both SCAs to declare that he would never use drugs again. He was not concerned with space constraints when he responded to DOHA interrogatories in November 2013, because he disclosed only his use of marijuana, mushrooms, and cocaine even though the DOHA interrogatories provided spaces for five drugs.

When questioned about his February 2012 PSI, Applicant testified that he had already admitted using drugs other than marijuana, mushroom, and cocaine during the November 2010 interview. Regarding his answer to the investigator's question about other drug use not listed on his SCA, he testified that he must have overlooked the summary of his response when he reviewed the PSI summary. (Tr. 42-43.) He also testified that he believed that every agency processing his clearance applications had access to what he had told other agencies. (Tr. 48-49.)

In his answer to the SOR, Applicant admitted that he solicited prostitution twice at a massage parlor in September-October 2010, while holding a security clearance and being considered for a higher-level clearance. It occurred when he was lonely and depressed after a romantic breakup. (GX 3 at 13.) He has not engaged in similar behavior since October 2010 and does not intend to do so in the future. (Tr. 25.)

¹ The SOR does not allege that Applicant intentionally omitted material facts from his response to DOHA interrogatories. Conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered Applicant's omissions from his response to DOHA interrogatories for these limited purposes.

Applicant's former employer, who has known him all his life, describes him as very intelligent, personable, and trustworthy, and a "good and decent person." He knows that Applicant has a strong family network, a "solid core" of good friends, and a wonderful wife. He states, "I can confirm he is a man of integrity, dedicated to his family, friends and career and [I] am proud to consider him a dear friend." (AX A.)

A former colleague, who has known Applicant since 2011, states that Applicant is truthful and has never been secretive about his past drug use. He corroborated Applicant's belief that the intelligence community shares information with the DOD. (AX B.)

A current colleague, who has known Applicant since 2008, states that Applicant is "one of the most straightforward, kind, and generous human beings I have ever met." He believes that Applicant has abstained from any drug use and has been very forthright about his past. He considers Applicant trustworthy, honest, and dedicated. (AX C.)

A former supervisor describes Applicant as one of his best workers, who always performed above expectations. The former supervisor states that, after he leaves his current job, he will find Applicant and recruit him to be a coworker. (AX D.)

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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.” See 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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; see AG ¶ 2(b).

Analysis

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified his SCAs in June 2010 and August 2011 by intentionally failing to disclose the full extent of his drug use (SOR ¶ 1.a), and that he falsified material facts during his February 2012 PSI by stating that he had not used any drugs other than those disclosed in his SCAs (SOR ¶ 1.b). It also alleges that he solicited prostitution on two occasions in September and October 2010 (SOR ¶ 1.c).

The 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 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.

The relevant disqualifying condition for the falsifications alleged SOR ¶¶ 1.a and 1.b are:

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

AG ¶ 16(b): deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

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 education and experience 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).

AG ¶ 16(a) is established for the June 2010 and August 2011 SCAs. Applicant is intelligent and well educated. He knew that he was not limited to the three spaces for responding, because he took advantage of the space for additional comments to emphasize his intention not to use drugs again. Furthermore, in Applicant's response to DOHA interrogatories in November 2013, he listed only the same three drugs even though five spaces were provided on the form. (GX 3 at 5.) His testimony that he believed that information given to one agency would be shared with other agencies does not excuse his omissions from his June 2010 SCA, because the additional information about other drug use was not divulged to any government agency until the November 2010 interview.

Applicant's explanation that he believed his disclosures in the November 2010 interview would be shared with other government agencies is plausible and not uncommon among applicants. However, it does not explain or mitigate his failure to disclose the extent of his drug use in his August 2011 SCA. To the contrary, it aggravates it, because he disclosed selected facts and intentionally omitted other material facts that he had disclosed in his November 2010 interview.

AG ¶ 16(b) is also established. Although Applicant claimed faulty memory when questioned about his statement in his PSI, he conceded that the investigator probably asked him if he had used any drugs other than those listed in his June 2010 SCA. He

had an opportunity to correct the summary of his PSI when he answered the DOHA interrogatories in November 2013, but did not avail himself of that opportunity.

Applicant's admissions during his various interviews and at the hearing are sufficient to establish the solicitation of prostitution alleged in SOR ¶ 1.c and the following additional disqualifying conditions:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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 person may not properly safeguard protected information;

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 person may not properly safeguard protected information. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The following mitigating conditions are potentially relevant:

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

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(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(a) is not established for Applicant's falsifications. He made no effort to correct the omissions in his June 2010 SCA until he was subjected to a polygraph examination in November 2010. Even after admitting the full extent of his drug use during the polygraph examination, he persisted in his omissions in his August 2011 SCA, during his February 2012 PSI, and in his answers to DOHA interrogatories in November 2013.

AG ¶ 17(c) is not established for Applicant's falsifications of his June 2010 and August 2011 SCAs and responses to questioning during his February 2012 PSI. Applicant repeated his omissions in his November 2013 responses to DOHA interrogatories. His omissions were not "minor," because 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.) His intentional omissions did not occur under unique circumstances making them unlikely to recur.

AG ¶ 17(c) is established for Applicant's solicitation of sexual activity in September and October 2010. His conduct occurred twice during a short time span, and during a time when he was emotionally recovering from a failed relationship. More than five years have elapsed without recurrence.

AG ¶ 17(d) is not established for Applicant's falsifications. He has continued to deny his intentional falsifications. However, he has acknowledged his sexual conduct at the massage parlor.

AG ¶ 17(e) is established. Applicant made full disclosure of his drug use and sexual behavior during his November 2010 interview. He has disclosed his prior drug use to several coworkers and friends.

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(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.

I have incorporated my comments under Guideline E in my whole-person analysis, and I have considered the factors in AG ¶ 2(a). 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 intentional omissions of material facts in his June 2010 SCA, August 2011 SCA, and February 2012 PSI. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

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-1.b:	Against Applicant
Subparagraph 1.c:	For Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge