



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



In the matter of:)
)
) ISCR Case No. 14-02965
)
Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: *Pro se*

12/17/2014

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E, personal conduct. Clearance is denied.

Statement of the Case

On September 2, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) detailing security concerns under Guideline E. DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOD CAF could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's security clearance. On September 12, 2014, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. On October 6, 2014, the Government compiled its File of Relevant Material (FORM) that contained documents identified as Items 1 through 5.

On October 8, 2014, the Defense Office of Hearings and Appeals (DOHA) forwarded to Applicant a copy of the FORM with instructions to submit any additional information and objections within 30 days of its receipt. On October 15, 2014, Applicant received the FORM. He timely submitted additional matters that he marked as Items 6 and 7. Department Counsel had no objection to the additional matters. The case was assigned to me on December 5, 2014. Items 1 through 7 are entered into the record.

Findings of Fact

Applicant is a 25-year-old employee of a defense contractor. He has worked for that employer since March 2013. He earned a bachelor's degree in 2011 and a master's degree in 2012. He has never been married and has no children. He may have held a security clearance as an intern at a Navy command from May 2010 to August 2010 and from June 2011 to August 2011.¹

The SOR listed two falsification allegations under Guideline E. The first alleged that Applicant falsified his Electronic Questionnaire for Investigation Processing (e-QIP) dated March 26, 2013, by deliberately failing to disclose his marijuana use between June 2007 and September 2011. The second alleged that he submitted a false response about his marijuana use during an interview with a DOD investigator. In his Answer, Applicant admitted the e-QIP falsification, but denied the interview falsification.²

On March 26, 2013, Applicant submitted an e-QIP. In Section 23 of the e-QIP, he was asked whether, in the last seven years, he illegally used any drugs or controlled substances. He responded "No" to that question.³

On August 26, 2013, an Office of Personnel Management (OPM) investigator interviewed Applicant. During that interview, Applicant reportedly stated:

[Applicant] was asked during subject interview if he had ever used marijuana. [He] stated no. [He] was then confronted with the following information: Sources state in previous investigation that [Applicant] used marijuana. [Applicant] used marijuana in college (discrepant). [He] first began using marijuana in the summer of 2007. [He] last used marijuana in the summer of 2011. [He] was unable to provide exact months of usage. Between summer of 2007 and summer 2011, [he] used marijuana (est) 5-6 times. [He] used marijuana with [a friend]. [Applicant] would use a marijuana cigarette or a bowl to smoke loose-leaf marijuana. The marijuana was obtained by [the friend]. The setting of use was [the friend's] apartment. [Applicant] used marijuana 5-6 times from summer of 2007 – summer of 2011. [He] did not experience any financial difficulties

¹ Item 4.

² Items 1 and 3.

³ Item 4.

from obtaining the drug. [He] is not dependent on marijuana. [His] drug use ended because [he] did not like the effect of marijuana, and was leaving school and wished to gain employment. [He] stated “it was time to grow up.” [He] has no intent of using marijuana in the future. The effect of marijuana caused [him] to mellow out and become lazy. [He] has never sold, supplied, grown or cultivated drugs. [He] never tested positive for drugs. Marijuana has no impact on [his] personality, judgment, reliability, or ability to hold a confidence. Marijuana has no impact on [his] work, school, home, family, or friends. [He] has never been arrested, charged, or cited. [The friend] is aware of [Applicant’s] drug usage.

[Applicant] has never been ordered or voluntarily sought treatment for drug use. [He] has no association with drug culture as a result of this usage. [He] failed to list this drug usage on case papers because [he] had a prior investigation with [a Navy command], in which he did not list drug use, and wanted to ensure the current investigation’s papers were consistent with the prior investigation. [He] failed to provide initial background with drug use information because subject wanted current case papers to be consistent with prior case papers.⁴

In interrogatories signed on July 31, 2014, Applicant indicated that the results of the OPM interview accurately reflected information that he provided to the investigator, but he also stated, “To my knowledge, during the interview between 8/22-9/6 (8/26), I did not initially deny using marijuana. I had a strong feeling as to why I was being interviewed again and volunteered the information when asked the first time.” Under Paragraph E3.1.20 of the Directive, an authenticating witness is required for DOD reports of background investigations to be received and considered by an administrative judge. In this case, Applicant did not authenticate that portion of the OPM interview indicating that he initially denied using marijuana during the interview of August 26, 2013. No other evidence was presented to authenticate that portion of the interview. Consequently, that portion of the results of interview is unauthenticated and is excluded from consideration in this proceeding.⁵

In his Answer to the SOR, Applicant stated,

To subparagraph a, I admit that I falsified information on the e-QIP form. I cannot think of anything now that could possibly justify my reasoning at the time and I understand lying about it is much worse than my actual use. I am an honest person and what I did was irresponsible.⁶

⁴ Item 5.

⁵ Item 5. In Applicant’s Response to the FORM, he claimed the OPM investigator made false statements. Based upon the above determination about the application of Paragraph E3.1.20 of the Directive to his report of interview, his challenges to the OPM investigator are no longer an issue.

⁶ Item 3.

In his response to the FORM, Applicant stated that he “has acknowledged his misbehavior, recognizes the mistake of lying, and hopes to be given a ‘second chance’”. Furthermore, he provided letters of reference that describe him as trustworthy, reliable, and honest.⁷

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AGs. In addition to brief introductory explanations for each guideline, the AGs list potentially disqualifying conditions and mitigating conditions, which are to be 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, administrative judges apply the guidelines 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 access to classified information will be resolved in favor of 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

⁷ Item 6; Applicant’s Response to the FORM. On page 6 of his Response to the FORM, Applicant indicated he lied on two occasions, which were apparently lies in the e-QIP and during the prior investigation.

Section 7 of EO 10865 provides that adverse 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

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 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. The following disqualifying conditions are 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant admitted he falsified his e-QIP of March 26, 2013, by failing to disclose his illegal drug use. AG ¶ 16(a) applies. The portion of Applicant’s OPM report of interview indicating that he initially denied using marijuana was not authenticated. Because that unauthenticated portion of the interview was excluded from consideration, insufficient evidence exists to conclude that Applicant made a false statement during his OPM interview. The Government failed to establish SOR ¶ 1.b. AG ¶ 16(b) does not apply.⁸

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

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

⁸ In the FORM, Department Counsel indicated that AG ¶¶ 16(c) and 16(d) also applied. However, the SOR only alleged falsifications, which are adequately addressed in AG ¶¶ 16(a) and 16(b).

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of unauthorized personnel or legal counsel advising or instructing the individual specifically concerning security clearance process. Upon being made aware of the requirement to cooperate or provide 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 caused 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.

Applicant deliberately falsified his e-QIP in March 2013. He did not promptly correct that falsification, but waited until he was confronted by an investigator about his marijuana use. He subsequently accepted responsibility by admitting that he submitted a false statement, but such action is insufficient to eliminate the serious security concerns in this case. His falsification is recent and undermines the security clearance process. None of the above mitigating conditions fully apply.

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. The 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.

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 relevant facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a young man. His friends and colleagues indicated that he is an honest individual; however, the evidence established that he is not truthful. Besides the alleged falsification, Applicant also indicated that, during a prior investigation as an intern, he did not disclose his drug usage. Doubts about his truthfulness remain. He failed to meet the ultimate burden of persuasion to obtain a favorable security decision.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has failed to mitigate the personal conduct security concerns.

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:

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant

Conclusion

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

James F. Duffy
Administrative Judge