



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 14-03863
)	
Applicant for Security Clearance)	

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: Eric Leckie, Esq.

06/24/2016

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement) and E (Personal Conduct). The security concerns under Guideline H are mitigated, but the security concerns under Guideline E are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on December 5, 2013. On November 9, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The DOD CAF 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. The adjudicative guidelines are codified in 32 C.F.R. § 154, Appendix H (2006), and they replace the guidelines in Enclosure 2 to the Directive.

Applicant answered the SOR on December 17, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on February 17, 2016, and the case was assigned to me on March 22, 2016. On March 24, 2016, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for April 20, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. DOHA received the transcript (Tr.) on April 29, 2016.

Amendment of SOR

SOR ¶ 1.a alleged that Applicant was "charged with Article 15 -- Controlled Substance Violation, Marijuana Possession, and Failure to Obey General Order -- Paraphernalia." On my own motion, without objection from either party, I amended the SOR to conform to the evidence by alleging that Applicant "received nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), for violations of Article 112a, UCMJ, possession and use of marijuana, and Article 92, UCMJ, violation of a regulation by possessing drug paraphernalia." (Tr. 15-16.)

Findings of Fact¹

In his answer to the SOR, Applicant admitted all the allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 46-year-old information technology (IT) consultant employed by a defense contractor since November 2013. He served on active duty in the U.S. Army from June 2010 to July 2013. He served in Afghanistan for one year, and he received an Army Commendation Medal and Army Achievement Medal for his service in Afghanistan. (AX C; Tr. 66-67.) He held a security clearance while on active duty and retained it when he was hired by his current employer. (Tr. 70.)

Applicant married in 1995 and divorced in 2000. He married his current spouse in 2005. He and his wife have two daughters, ages nine and seven. (GX 2 at 7.)

During an investigation of drug use by multiple occupants of military family housing in February 2013, Applicant's wife told the police that she smoked marijuana with friends in their residence. She also told the police that she had watched Applicant smoke marijuana, using a glass pipe, on the evening before she was interviewed. Applicant was interviewed by the police on February 13, 2013, and in a sworn statement he admitted a one-time use of marijuana in the presence of his wife on the previous evening. He told the police that he smoked the marijuana to get closer to his wife due to ongoing marital issues. He had enlisted late in life, at age 39. He was separated from his family during basic training and deployed to Afghanistan for a year. At the time of the

¹ Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

investigation, he was assigned to a sensitive military installation in a remote area in the United States, where family living conditions were Spartan and limited. He suspected his wife of infidelity and using marijuana with her friends. (GX 3 at 7; Tr. 25-32.)

On February 14, 2013, about 36 hours after Applicant was interviewed by the police, he was required to provide a urine sample. The sample tested negative for marijuana. (AX B; Tr. 34.) In March 2013, based on his admission of marijuana use and notwithstanding the negative urinalysis, Applicant received nonjudicial punishment from the installation commander under Article 15, UCMJ (10 U.S.C. § 815), for possession and use of marijuana in violation of Article 112a, UCMJ (10 U.S.C. § 912a), and violation of a regulation by possessing drug paraphernalia in violation of Article 92, UCMJ, 10 U.S.C. § 892. (GX 3; AX C.) He was reduced to the lowest enlisted rank, restricted to the military base for 45 days, and ordered to perform extra duties for 45 days. In July 2013, Applicant was discharged for drug abuse and received a general discharge under honorable conditions. (AX C.)

During a personal subject interview (PSI) in January 2014, Applicant told an investigator that in February 2013 his wife smoked marijuana from a glass pipe and passed it to him, but that he did not smoke from it. He told the investigator that he confessed to smoking marijuana on that occasion to protect his wife from criminal charges. (GX 2 at 5.)

At the hearing, Applicant testified that he smoked marijuana when he was 18 years old but has never smoked marijuana as an adult. He believed that he was protecting his wife by confessing to using marijuana. On cross-examination, he was unable to cogently explain how his confession to using marijuana protected his wife. (Tr. 46-50.)

Applicant testified that, before receiving nonjudicial punishment, he told his military superiors that he did not use marijuana on February 13, 2013. However, the installation commander who imposed punishment apparently was unpersuaded by Applicant's recantation of his earlier confession.

Applicant's wife was charged by civil authorities and required to seek treatment. She has not used marijuana since February 2013. (Tr. 35-36, 61.)

Applicant and his wife received marriage counseling while he was still on active duty. They no longer live in a desolate, lonely location. Applicant testified that they have resolved their marital issues and have a happy marriage. (Tr. 36-39; AX A.)

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 H, Drug Involvement

The concern under this guideline is set out in AG ¶ 24: “Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.” Drugs are defined in AG ¶ 24(a)(1) as “[d]rugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens).”

Applicant's February 2013 confession to possession and use of marijuana establishes the following disqualifying conditions under this guideline:

AG ¶ 25(a): any drug abuse, defined in AG ¶ 24(b) as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction”;

AG ¶ 25(c): illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(g): any illegal drug use after being granted a security clearance.

The following mitigating conditions are potentially relevant:

AG ¶ 26(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; and

AG ¶ 26(b): a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.

AG ¶ 26(a) is established. If it occurred, Applicant's marijuana use was more than three years ago and would have been an isolated incident during a period of marital stress, which has since been resolved.

AG ¶ 26(b) is not fully established. The incident occurred more than three years ago, but the other elements of this mitigating condition are not established.

Guideline E, Personal Conduct

SOR ¶ 2.a alleges that Applicant made two contradictory statements, *i.e.*, that he confessed to using marijuana when interviewed in February 2013 and that he recanted his earlier confession to using marijuana during his January 2014 PSI, claiming that his earlier confession was false and intended to protect his wife. The SOR does not state which statement was false but merely sets out the contradiction. SOR ¶ 2.b cross-alleges the conduct alleged in SOR ¶ 1.a.

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 regarding Applicant's contradictory statements is 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." In his PSI and at the hearing, Applicant admitted that his confession to using marijuana on February 13, 2013 was false. AG ¶ 16(b) is established.

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; and

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(a) is not established. Applicant did not admit to his superiors that his confession was false until he was notified of the negative urinalysis results.

AG ¶ 17(c) is not established. Applicant's false confession was not minor. It was made under oath. It was intended to misdirect an ongoing investigation of drug abuse on a sensitive military installation. It was infrequent, but it did not occur under unique

circumstances making it unlikely to recur. To the contrary, it indicates Applicant's vulnerability to falsify information to protect family members.

Applicant's nonjudicial punishment for using marijuana establishes the following disqualifying conditions under this guideline for the drug involvement alleged in SOR ¶ 1.a and cross-alleged in SOR ¶ 2.b:

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; 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 relevant mitigating condition under this guideline is AG ¶ 17(c), discussed above. I conclude that AG 17(c) is established for the drug involvement cross-alleged under this guideline, but not for the falsification. An act of falsification has security significance independent of the underlying conduct. The mitigation of the underlying conduct has little bearing on the security significance of the falsification. See ISCR Case No. 08-11944 at 3 (App. Bd. Aug 15, 2011); ISCR Case No. 01-19278 at 7-8 (App. Bd. Apr. 22, 2003).

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 Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant served in Afghanistan and was decorated for his service. His security clearance was not revoked after he was punished for drug involvement. He was emotional and distraught at the hearing. He is devoted to his wife and daughters. On the other hand, he was a 42-year-old adult when he intentionally tried to misdirect a criminal investigation on a sensitive military installation. The record leaves me uncertain about his current reliability, trustworthiness, and good judgment.

After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns about drug involvement, but he has not mitigated the security concerns raised by his false confession, given under oath to criminal investigators. 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 H (Drug Involvement):	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	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