



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



In the matter of:)	
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SSN: -----)	ISCR Case No. 08-07690
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)	
Applicant for Security Clearance)	

Appearances

For Government: Jennifer I. Goldstein, Esquire, Department Counsel
For Applicant: *Pro Se*

September 21, 2009

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings and exhibits, Applicant's request for eligibility for a security clearance is denied.

On August 28, 2008, Applicant submitted a security clearance application (SF 86) to obtain access to classified information as part of his job with a defense contractor. After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's access to classified information. On May 5, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

concerns addressed in the revised Adjudicative Guidelines (AG)² under Guideline E (personal conduct) and Guideline J (criminal conduct).

On May 12, 2009, Applicant responded to the SOR and requested a decision without a hearing. On June 17, 2009, Department Counsel prepared a File of Relevant Material (FORM)³ in support of the government's preliminary decision. The FORM included five documents (Exhibits 1 - 5) proffered in support of the government's case. Applicant received the FORM on June 23, 2009. He was advised that he had 30 days from receipt of the FORM to file a response and additional information.⁴ On July 18, 2009, Applicant submitted a two-page letter and one document attached thereto. (Applicant's Response) Department Counsel did not object to Applicant's responsive submission and the case was assigned to me on August 19, 2009.

Findings of Fact

Under Guideline E, the SOR listed allegations that Applicant deliberately falsified his July 3, 2007, security clearance application (SF 86) because he answered "no" to question 27 (illegal drug use in the previous seven years), when he had actually used marijuana between September 2005 and May 2007. (SOR ¶ 1.a); that Applicant deliberately withheld relevant information about his drug use when, during three separate subject interviews with government investigators in July and August 2007, he failed to disclose his use of marijuana (SOR ¶ 1.b); that on August 28, 2008, he deliberately falsified a Questionnaire for National Security Positions (SF 86) because, in response to question 24.a (illegal drug use in the previous seven years), he stated he had used marijuana between August 2005 and April 2006, when he had actually used marijuana until at least May 2007 (SOR ¶ 1.c); and that, because of the falsifications alleged in SOR ¶¶ 1.a and 1.b, Applicant's clearance was revoked by another government agency in December 2007 (SOR ¶ 1.d).

Under Guideline J, the SOR listed an allegation that Applicant's falsifications alleged in SOR ¶¶ 1.a, 1.b, and 1.c, if shown to be deliberate, constituted criminal conduct in violation of 18 U.S.C. § 1001. (SOR ¶ 2.a) Applicant admitted all but one (SOR ¶ 1.c) of the SOR allegations. In addition to the facts entered in the record through Applicant's admissions, I make the following findings of relevant fact.

Applicant is a 24-year-old technical staff member with a degree in Aerospace Engineering from a prestigious university. Since June 2007, when he graduated from college, he has worked for a defense contractor in a position that requires a security clearance. While Applicant was in college, he occasionally smoked marijuana with

² Adjudication of this case is controlled by the revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, the revised Adjudicative Guidelines replace the guidelines listed in Enclosure 2 to the Directive.

³ See Directive, Enclosure 3, Section E3.1.7.

⁴ *Id.*

friends. His use was moderate, and occurred between about September 2005 (the beginning of his third year in school) and May 2007. He has not used any other illegal drug, has never trafficked in illegal drugs for personal profit, has never had any adverse contact with law enforcement for drug-related conduct, and he has never been treated or counseled for a drug problem. (FORM, Exhibits 3 - 5; Applicant's Response to FORM)

In July 2007, Applicant submitted a security clearance application (SF 86) to obtain a clearance for work in support of an agency other than the Department of Defense. He deliberately omitted any mention of his marijuana use when he answered "no" to SF 86 question 27, which asked if he had used, possessed, or otherwise been involved with illegal drugs over the preceding seven years. In the subsequent background investigation, Applicant was interviewed by government investigators three times in July 2007 and August 2007, but he did not disclose his marijuana use during any of those interviews. (FORM, Exhibit 5) On December 19, 2007, his request for a security clearance was denied based on his drug use, and on his deliberate falsification of the SF 86 and his failure to disclose his drug use in any of the three subject interviews. (FORM, Exhibits 3 and 5)

On August 28, 2008, Applicant submitted another SF 86 to request a security clearance. In response to question 24.a, which asked if he had used or otherwise been involved with illegal drugs in the preceding seven years, Applicant answered "yes," but disclosed only that he had used marijuana about eight times between August 2005 and April 2006. (FORM, Gx. 4) In response to the SOR allegation that he deliberately falsified this answer, Applicant acknowledged the answer he gave was incorrect, but averred that he "had no intention of further lying" after his 2007 interviews about his drug use. He further characterized his answer as "an unintentional contradiction." (FORM, Gx. 3)

18 U.S.C. § 1001 makes it a crime to knowingly and willfully make a false statement or representation to any department or agency of the United States concerning a matter within its jurisdiction. Violation of this statute is punishable by five years in jail, a substantial fine, or both.

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the revised Adjudicative Guidelines (AG).⁵ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole person" concept, those factor are:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable

⁵ Directive. 6.3.

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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be 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 under AG ¶ 15 (Guideline E - personal conduct) and AG ¶ 30 (Guideline J - criminal conduct).

A security clearance decision is intended to resolve 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. Thus, the government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interest as his or her 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

Personal Conduct

The government presented sufficient information, along with Applicant's admissions, to support the allegations that he deliberately falsified his 2007 SF 86 (SOR ¶ 1.a); that he deliberately did not disclose his drug use during three interviews with government investigators in 2007 (SOR ¶ 1.b); and that his request for clearance for work with another agency was denied because of his drug use and falsifications in 2007 (SOR ¶ 1.d). Applicant denied deliberately falsifying his August 2008 SF 86 (SOR ¶ 1.c). However, all of the available information on this issue (his multiple previous

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*; Revised Adjudicative Guidelines, ¶ 2(b).

falsifications and the lack of a plausible explanation for why he did not disclose the true scope of his drug use) tends to show that, even after the 2007 denial of his first request for clearance, he again engaged in a deliberate falsification of information the government needs to make an informed decision about whether Applicant is suitable for access to sensitive information. The facts established raise security concerns about Applicant's personal conduct as addressed 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.

Applicants are required to provide truthful answers at all times during the investigative and adjudicative process. Withholding relevant information about one's background can potentially impede the government's ability to make an accurate decision about granting access to sensitive information. Applicant deliberately lied to the government about his drug use on at least five occasions through two security questionnaires and three subject interviews. These facts require application of the disqualifying conditions at 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 at 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 response, Applicant has not presented information that would support application of any of the pertinent mitigating factors listed under AG ¶ 17. He did not try to correct his omissions before being confronted with the facts (AG ¶ 17(a)), although there is no information in the FORM that shows he was interviewed after his second application for a clearance. Nor has Applicant established that his omissions resulted from mistake or improper advice, or that they were infrequent and not recent. (AG ¶ 17(b)) Moreover, Applicant did not establish that his falsifications no longer reflect adversely on his current judgment and reliability. On balance, he has failed to mitigate the security concerns about his personal conduct.

Criminal Conduct

Applicant admitted he knowingly and deliberately made at least four false statements to the government in 2007. Available information also shows, despite his apparent denial of SOR ¶ 1.c, that he made another intentionally false statement in 2008. The matters at issue (his use of illegal drugs) were within the jurisdiction of the government agencies to which the statements or representations were made. Accordingly, 18 U.S.C. § 1001 applies to make Applicant's falsifications potential violations of federal criminal law. The security concern raised by these circumstances is that such conduct "creates doubt about a person's judgment, reliability and

trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.” AG ¶ 30.

More specifically, Applicant’s conduct requires application of the disqualifying conditions at AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*). By contrast, Applicant’s information does not support application of any of the mitigating conditions listed under AG ¶ 32. His falsifications were deliberate, multiple and recent; and he has presented no information to show that his conduct, which is directly at odds with the most fundamental tenets of the industrial security program, does not cast doubt on his current judgment and reliability. Further, he has not presented sufficient information showing he has learned from his past conduct and is not likely to repeat it. Accordingly, neither AG ¶ 32(a) (*so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment*), nor AG ¶ 32(d) (*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*) apply.

The mitigating conditions at AG ¶ 32(b) (*the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life*) and AG ¶ 32(c) (*evidence that the person did not commit the offense*) do not apply. Applicant has admitted to all but one of the allegations of deliberate falsification, and he has not presented information showing he was pressured or coerced into doing so. In summary, Applicant has failed to mitigate the security concerns about his criminal conduct.

Whole Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E and J. I have also reviewed the record before me in the context of the whole person factors listed in AG ¶ 2(a). Applicant is 24 years old and holds a college degree in a demanding field of study from a prestigious university. Thus, it is reasonable to presume he is a mature, intelligent adult. However, the weight of the information presented shows he has a history of intentionally lying about adverse information in his background. He has repeatedly engaged in such conduct despite possible criminal sanctions and despite having already been denied a security clearance for making false statements. There is no information in this record about any other facet of his background that sufficiently counters the adverse information underlying the security concerns about his deliberate falsifications. A fair and commonsense assessment⁹ of all available information bearing on Applicant’s circumstances and background shows he has yet to establish a record of candor and trustworthiness the government requires before it can trust him to safeguard its sensitive information. Until he can demonstrate such traits, doubts will remain about his suitability for access to such information. Because protection of the national interest is

⁹ See footnote 5, *supra*.

paramount in these determinations, such doubts must be resolved in favor of the government.¹⁰

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
Subparagraphs 1.a - 1.d:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to grant Applicant's request for a security clearance. Eligibility for access to classified information is denied.

MATTHEW E. MALONE
Administrative Judge

¹⁰ See footnote 8, *supra*.