



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



In the matter of:)
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SSN: -----) ISCR Case No. 08-07803
)
Applicant for Security Clearance)

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: James L. DelSordo, Esquire

June 15, 2009

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on January 9, 2009. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The issues in this case fall under Guideline F for financial considerations, Guideline J for criminal

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition to the Executive Order and Directive, this case is adjudicated under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter. The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

conduct, Guideline G for alcohol consumption, and Guideline E for personal conduct (falsification).

Applicant's Answer to the SOR was received on February 6, 2009, and he requested a hearing. The hearing took place as scheduled on May 5, 2009. The transcript (Tr.) was received on May 13, 2009. For the reasons discussed below, this case is decided for Applicant.

Findings of Fact

Applicant replied to the SOR allegations as follows: (1) he denied the financial considerations allegations because the five debts in question had been paid; (2) he admitted the eight allegations of criminal conduct; (3) his answers to the alcohol consumption allegations were mixed; and (4) he denied the two falsification allegations and attributed the matter to accidental oversight. Based on the record evidence as a whole, the following facts are established by substantial evidence.²

Applicant is a 29-year-old employee of a federal contractor. He is currently employed as a Java developer. He is seeking to obtain an industrial security clearance for the first time.

In May 2005, Applicant completed and signed a Questionnaire for Public Trust Positions (Standard Form (SF) 85P) as well as a Supplemental Questionnaire for Selected Positions (SF 85P-S) (Exhibit 1). The supplemental required him to provide information about his use of illegal drugs and drug activity. In response to Question 3a—which asked whether since age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance or prescription drugs—Applicant responded in the affirmative. He then listed that he had used marijuana most every day from October 1997 to June 1998, and had used ecstasy from December 1998 to May 2002.

Two years later in September 2007, Applicant completed a security clearance application (Exhibit 2). It also required him to provide information about his use of illegal drugs and drug activity. In response to Question 24a—which asked whether since age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance or prescription drugs—Applicant responded in the affirmative. He then listed a single use of marijuana in June 2004 and a single use of ecstasy in November 2004. In addition, he provided the following comments about his illegal drug use:

This is past the 7 year mark but I used to smoke marijuana every day for about 5-6 months my senior year in high school. I have tried ecstasy 6 or 7 times *but only once in the last seven years*. I have also tried acid twice

² Because I am deciding this case against Applicant based on Guideline E, the findings of fact are limited to those allegations.

and shrooms once longer than 7 years ago. This is the extent of all the drug experimentation I have done (Exhibit 2 at 35, emphasis added).

An interview was conducted in October 2007 to discuss Applicant's financial, criminal, drug, and alcohol-related issues (Exhibit 3). For drugs, the report of the interview is limited to his ecstasy use and it does not discuss marijuana. In the interview, Applicant admitted using ecstasy about six times during the period of September 2002 to November 2004, when he was a college student.

In March 2008, Applicant replied to the agency's interrogatories concerning alcohol consumption, drugs, criminal conduct, and finances (Exhibit 3). In response to a broad-based question about his use of drugs, Applicant replied as follows: (1) he used ecstasy a total of six times from September 2002 to November 2004; (2) he used marijuana most every day from October 1997 to April 1998; and (3) he used acid and mushrooms three times from October 1997 to April 1998.

In his hearing testimony, he admitted that he used ecstasy about six times from September 2002 to November 2004 (Tr. 51, 54). And he admitted using marijuana in June 2004 (Tr. 51–52).

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, no one has a right to a security clearance.³ As noted by the Supreme Court in 1988 in the case of *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁴ A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁵ An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level.⁶ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

³ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (“It is likewise plain that there is no ‘right’ to a security clearance, so that full-scale due process standards do not apply to cases such as Duane’s.”).

⁴ *Egan*, 484 U.S. at 531.

⁵ Directive, ¶ 3.2.

⁶ Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁷ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁸ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁰ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹¹ The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹²

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.¹³ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

Analysis

Personal conduct under Guideline E¹⁴ includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. In particular, a security concern may arise due to:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] raise

⁷ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁸ Directive, Enclosure 3, ¶ E3.1.14.

⁹ Directive, Enclosure 3, ¶ E3.1.15.

¹⁰ Directive, Enclosure 3, ¶ E3.1.15.

¹¹ *Egan*, 484 U.S. at 531.

¹² ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹³ Executive Order 10865, § 7.

¹⁴ Revised Guidelines at 10–12 (setting forth the security concern and the disqualifying and mitigating conditions).

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.¹⁵

A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

The issues here are the truthfulness of Applicant's answers to questions about his illegal drug use on the supplemental and the security-clearance application. For the 2005 supplemental, the allegation is that his answer is false because he omitted his marijuana use in June 2004 and his use of ecstasy until November 2004. For the 2007 security-clearance application, the allegation is that his answer is false because he omitted his ecstasy use on six occasions between September 2002 and November 2004. He contends his incorrect answers were due to accident or oversight.

His contentions and explanations are not credible. It is too difficult to believe that his omission of September 2002 to November 2004 ecstasy use was due to accident or oversight when he completed and signed the supplement in May 2005. Instead, a reasonable conclusion is that Applicant deliberately omitted the information by understating his ecstasy use, because he had to know that the recent use of ecstasy could be a problem. The same goes for his marijuana use in June 2004. Concerning the 2007 security-clearance application, it is also too difficult to believe that his omission of the full extent of his ecstasy use was due to accident or oversight. Instead, a reasonable conclusion is that Applicant deliberately omitted the information by understating his ecstasy use when he reported a single use in November 2004. Indeed, in his additional comments in response to Question 24a, he pointed out that he had use ecstasy once in the last seven years. Yet one month later in the October 2007 interview he reported using ecstasy six times from September 2002 to November 2004. For these reasons, the record evidence supports a conclusion that he deliberately omitted, concealed, or falsified material facts about his use of illegal drugs.¹⁶

All of the MC under Guideline E have been reviewed and none apply in Applicant's favor. Making false statements to the federal government during the security-clearance or similar process is serious misconduct, and it is not easily explained away, extenuated, or mitigated. Applicant's attempts to reconcile his contradictory statements were not persuasive. Accordingly, Guideline E is decided against Applicant.

¹⁵ Revised Guidelines at 10.

¹⁶ DC 1 is the "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."

I did not discuss the allegations under Guidelines F, J, and G, because any favorable findings on those allegations will not change the ultimate outcome in light of my adverse findings under Guideline E. In this regard, the principle of judicial economy refers to the practice of a court declining to decide one or more claims in a case on the grounds that it has decided other claims that are sufficient to decide the case and satisfy the parties. Although this is an administrative proceeding and not a court of law, the same logic and reasoning should apply here because addressing the other allegations will not change the ultimate outcome, and the law, to include the DoD Directive, does not require a futile or pointless act.

To conclude, Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns under Guideline E. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept (to include his favorable character witnesses) was given due consideration and that analysis does not support a favorable decision. This case is decided against Applicant.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 4, Guideline E:	Against Applicant
Subparagraphs 4.a–4.b:	Against Applicant

Conclusion

In light of all of the circumstances, 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.

Michael H. Leonard
Administrative Judge