



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



In the matter of:)
)
-----) ISCR Case No. 09-06473
)
Applicant for Security Clearance)

Appearances

For Government: Francisco J. Mendez Jr., Esq., Department Counsel
For Applicant: *Pro se*

March 25, 2011

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for a security clearance to work in the defense industry. The evidence shows that, dating back to 1988 and continuing until about 2007, he made a series of deliberately false statements about his use of marijuana. In addition, he made deliberately false statements about his security clearance history. His explanation, that any such statements were not deliberately false and were inadvertent or due to inattention, is simply belied by the extensive documentary evidence. Accordingly, as explained below, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on June 29, 2010, the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) explaining it was unable to find that it was clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it sets forth the factual basis for the action under the security guidelines known as Guideline E for personal conduct and Guideline B for foreign influence. The SOR also recommended that the case be submitted to an administrative judge to decide whether to deny or revoke Applicant's security clearance.

On July 15, 2010, Applicant answered the SOR and requested a hearing. The case was assigned to me September 13, 2010. The hearing took place pursuant to written notice on October 15, 2010. The transcript (Tr.) was received October 22, 2010.

Procedural Matters

On September 28, 2010, Department Counsel withdrew the allegation in SOR ¶ 1.k.² Accordingly, a formal finding in Applicant's favor will be entered. In addition, Department Counsel amended the falsification allegation in SOR ¶ 1.d by alleging that Applicant falsified material facts in a 1999 security clearance application when he denied using marijuana in the preceding seven years.

Findings of Fact

Applicant is a 42-year-old self-employed consultant. His employment history includes active duty in the U.S. Navy from 1988 through 2002. In the Navy, he was trained as a cryptologist and worked in the field of intelligence. He then worked for a series of three federal contractors. He began consulting in 2004, and some of his consulting work has overlapped his employment with the federal contractors.

Concerning Applicant's past use of marijuana, which is the factual predicate for many of the falsification allegations, he used marijuana sporadically beginning in about 1983, when he was student, and ending in about October 1995, when he was serving in the Navy. In other words, his marijuana use occurred both before and after his enlistment in the Navy in 1988. Some of his marijuana use in the Navy took place in the early 1990s while he was serving as a cryptologist with a top-secret security clearance

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

² Appellate Exhibit I.

as well access to sensitive compartmented information (SCI). Additional details about his marijuana use are set forth below.

Applicant completed a security clearance application for the Navy in June 1988.³ He admitted a one-time use of marijuana in about May 1986. He also stated his intention of no future use. Subsequently, the Navy granted him a security clearance.

As part of a periodic reinvestigation, Applicant completed a security clearance about five years later in October 1993.⁴ In the application, he denied ever trying or using or possessing any narcotic, to include marijuana. Applicant was interviewed in May 1994 as part of his background investigation.⁵ During that interview, he stated that he had used marijuana once with friends when he was about 15 years old, and that he had no intention of using marijuana again.⁶ Also, he explained his failure to list his marijuana use in October 1993 security clearance application was due to oversight.

Another interview occurred in August 1994, when Applicant provided additional details about his marijuana use.⁷ In a signed and sworn statement, Applicant admitted using marijuana two to four times per month from 1983 to 1985, twice per month from 1985 to 1986, and on two or three occasions between 1986 and January 1988. He denied any use since January 1988, which was some months before his initial enlistment. He also admitted that he intentionally provided false information about his marijuana use to the Navy when he enlisted and to interviewing officials.

Applicant made another signed and sworn statement about his marijuana use in October 1994.⁸ He admitted being untruthful in his previous sworn statement because he had used marijuana twice after January 1988. He explained that he intentionally withheld that information because he was concerned about his security clearance and his Navy career. He reported that he smoked marijuana with friends during October–November 1992 while on leave, and in June 1994 while on leave as well. He also pledged to forgo using marijuana in the future:

I realize now that I cannot risk my chances of staying in the Navy and I made a conscious decision in June 1994 never to smoke marijuana again. My friends will have to understand that I cannot smoke marijuana with

³ Exhibits 1, 2, and A.

⁴ Exhibit 3.

⁵ Exhibits 4 and 5.

⁶ Exhibit 4.

⁷ Exhibit 6.

⁸ Exhibits 7 and 8.

them again. I can state with certainty and unequivocally that I do not intend to smoke marijuana or use any other illegal drug in the future.⁹

As part of a periodic reinvestigation, Applicant completed a security clearance application about five years later in September 1999.¹⁰ In the application, he answered all three drug-related questions in the negative. In particular, he answered “No” to Question 27, which asked if he had used any illegal drugs, including marijuana, within the last seven years. And he answered “No” to Question 28, which asked if he had ever illegally used a controlled substance while, in relevant part, possessing a security clearance. The September 1999 security clearance application reveals no information about his use of marijuana.

After his discharge from the Navy in 2002, Applicant was sponsored for SCI access with another governmental agency. It denied him SCI access in August 1996 under the personal conduct and sexual behavior security guidelines.¹¹ Notification of that clearance decision took place in September 2006, when he was advised of his eligibility to appeal the denial decision.¹² The decision became final in November 2006, when he chose not to appeal.¹³

Applicant completed a security clearance application a few months later in January 2007, in order to retain a security clearance to work in the defense industry.¹⁴ In the application, he answered “No” to Question 24b, which asked if he had ever illegally used a controlled substance while, in relevant part, possessing a security clearance. And he answered “No” to Question 26b, which asked, in relevant part, if, to his knowledge, he had ever had a clearance or access authorization denied, suspended, or revoked.

As his application was pending, the Defense Security Service took the unusual step of suspending Applicant’s security clearance.¹⁵ The action was taken in February 2007, and it was based upon notification of the decision to deny him SCI access in 2006. Applicant was advised of this action by letter in February 2007.

Applicant was interviewed as part of his background investigation about five months later in July 2007. The interview addressed multiple topics, including his security

⁹ Exhibit 8 at 1.

¹⁰ Exhibit 9.

¹¹ Exhibit 11.

¹² Exhibit 12.

¹³ Exhibit 13.

¹⁴ Exhibit 14.

¹⁵ Exhibit 15.

clearance history.¹⁶ He stated during the interview that he had been subject to an investigation every five years since about 1989. And he also stated that he had never had a clearance or access authorization denied, suspended, or revoked.¹⁷

In his hearing testimony, Applicant contended that he has not made deliberately false statements. Concerning the security clearance applications, he contended that the mistakes were due to inadvertence or not paying attention to detail. On these points, I found his testimony to be not worthy of belief.

Law and Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information. The Department of Defense takes the handling and safeguarding of classified information seriously because it affects our national security, the lives of our servicemembers, and our operations abroad.

It is well-established law that no one has a right to a security clearance.¹⁸ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁹ 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.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.²⁰ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²¹

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²² The Government has the burden of presenting

¹⁶ Exhibit 16.

¹⁷ Exhibit 16 at 13.

¹⁸ *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) (no right to a security clearance).

¹⁹ 484 U.S. at 531.

²⁰ Directive, ¶ 3.2.

²¹ Directive, ¶ 3.2.

²² ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

evidence to establish facts alleged in the SOR that have been controverted.²³ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁴ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁵ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁶ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²⁷

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant facts and circumstances, the pertinent criteria and adjudication factors, and the whole-person concept.

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.²⁸ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

Under Guideline E for personal conduct,²⁹ the suitability of an applicant may be questioned or put into doubt due to false statements and credible adverse information that may not be enough to support action under any other guideline. The overall concern under Guideline E is:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide

²³ Directive, Enclosure 3, ¶ E3.1.14.

²⁴ Directive, Enclosure 3, ¶ E3.1.15.

²⁵ Directive, Enclosure 3, ¶ E3.1.15.

²⁶ *Egan*, 484 U.S. at 531.

²⁷ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²⁸ Executive Order 10865, § 7.

²⁹ AG ¶¶ 15, 16, and 17 (setting forth the security concern and the disqualifying and mitigating conditions).

truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.³⁰

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 gravamen of the SOR concerns the multiple allegations of Applicant making deliberately false statements during the security clearance process. Rather than analyzing each statement in a piecemeal fashion, it is proper to analyze them as a whole as the evidence shows they are factually interrelated. The evidence establishes that Applicant made at least eight deliberately false statements from 1988 to 2007. (SOR ¶¶ 1.a, 1.b, 1.c, 1.d, 1.e, 1.l, 1.m, and 1.n) While in the Navy, Applicant made false statements about his marijuana use when completing security clearance applications in 1988 and 1993; when completing a sworn statement in 1994; and when completing a security clearance application in 1999. (SOR ¶¶ 1.a–1.e) His statements were false because he intentionally failed to disclose the full extent of his pre- and post-enlistment marijuana use. But his false statements did not end with his discharge from the Navy in 2002. After he was denied SCI access in 2006, he made false statements when completing a security clearance application and during a background interview in 2007. (SOR ¶¶ 1.l–1.n) His statements were false because he intentionally failed to disclose his marijuana use while holding a security clearance as well as the 2006 denial of SCI access. His contentions of making honest mistakes due to inadvertence or inattention are simply belied by the extensive documentary evidence. Accordingly, on this basis, the following disqualifying conditions under Guideline E apply against Applicant:

¶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

¶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.

I have considered all the mitigating conditions under Guideline E, and conclude that none apply.³¹ Making false statements to the federal government during the security clearance process is serious misconduct,³² and it is not easily explained away,

³⁰ AG ¶ 15.

³¹ AG ¶¶ 17(a)–(g).

³² See 18 U.S.C. § 1001 (making a false statement within the jurisdiction of a federal agency is a felony).

extenuated, or mitigated. Most troubling is the apparent pattern of Applicant making deliberately false statements beginning in 1988, when he first applied for a security clearance, and then continuing over a period of years despite being confronted with and acknowledging his actions. But his false statements did not end in 2007, when his security clearance was suspended. He continued to make false statements when trying to reconcile his various statements during his hearing testimony. His mendacity militates against a conclusion of reform and rehabilitation.

To conclude, individuals seeking to obtain or retain a security clearance are required to give full, frank, and truthful answers to relevant questions about their background.³³ The evidence here shows Applicant fell far short of that standard. The facts and circumstances surrounding Applicant's pattern of behavior and questionable judgment justify current doubts about his suitability for a security clearance. Following *Egan* and the clearly-consistent standard, I resolve these doubts in favor of protecting national security. In reaching this conclusion, I gave due consideration to the whole-person concept³⁴ and Applicant's favorable evidence. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline E:	Against Applicant
Subparagraphs 1.a–1.e:	Against Applicant
Subparagraphs 1.f–1.g:	For Applicant ³⁵
Subparagraph 1.h:	For Applicant ³⁶
Subparagraph 1.i:	For Applicant ³⁷
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	Withdrawn
Subparagraphs 1.l–1.n:	Against Applicant

³³ Directive, ¶ 6.2.

³⁴ AG ¶ 2(a)(1)–(9).

³⁵ The matters of personal conduct alleged here are mitigated by the passage of time without recurrence. These matters are not discussed further in this decision.

³⁶ In his Answer, Applicant denied the allegation of inappropriate sexual behavior, describing it as “totally inaccurate.” Department Counsel did not cross-examine Applicant on this allegation (Tr. 79–82), and did not present witness testimony in support of this allegation. This matter is not discussed further in this decision.

³⁷ The matter of personal conduct alleged here is decided for Applicant because the evidence fails to show Applicant had a duty or requirement to disclose the information in SOR ¶ 1.h. This matter is not discussed further in this decision.

Paragraph 2, Guideline B: For Applicant³⁸

Subparagraph 2.a: For Applicant

Conclusion

In light of the record as a whole, 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

³⁸ The foreign influence matter alleged here is mitigated by Applicant's good-faith efforts to have his wife immigrate to the United States from Columbia, where she is a citizen resident. This matter is not discussed further in this decision.