



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



In the matter of:)
)
) ISCR Case No. 10-02011
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: *Pro se*

February 28, 2011

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the case file, pleadings, testimony, and exhibits, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under the personal conduct adjudicative guideline. His eligibility for a security clearance is denied.

Applicant completed a Questionnaire for National Security Positions (SF-86) on April 23, 2004. He completed a second SF-86 on April 12, 2009. On September 17, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct. DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On October 7, 2010, Applicant answered the SOR in writing and requested a hearing before an administrative judge. The case was assigned to me on December 23,

2010. On January 6, 2011, a Notice of Hearing was issued, scheduling Applicant's hearing for January 24, 2010. On that date, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The Government called no witnesses and introduced three exhibits, which were marked Ex. 1 through 3 and admitted to the record without objection.¹ The Government also offered two documents for administrative notice. The first document consisted of a blank Questionnaire for National Security Positions (SF-86), with written instructions for completing the SF-86 form. I marked this document as Hearing Exhibit (HE) 1. Specifically, the Government requested that I take administrative notice of the language and instructions found in Section 24 on the SF-86 form identified as HE 1. The heading for Section 24 reads: "YOUR USE OF ILLEGAL DRUGS AND DRUG ACTIVITY." Applicant objected to administrative notice of HE 1 because he did not complete a paper SF-86 form when he submitted his security clearance application in 2004. Instead, he completed an electronic version of the SF-86. The Government acknowledged that it did not have a copy of the electronic SF-86 that Applicant completed in 2004. However, the Government argued that the language of and information sought in the paper version of Section 24 was essentially the same as the language of and information sought in the electronic version of Section 24. Acknowledging and recognizing the differences in the two formats, I nevertheless admitted HE 1 for administrative notice.

The Government's second document offered for administrative notice was a print-out of the instructions and format used for completing an electronic version of the SF-86 which Applicant completed in 2009. I marked this document as HE 2. Applicant did not object to administrative notice of HE 2, and I admitted HE 2 to the record.

Applicant testified and called one witness. He introduced one exhibit, which was marked as Ex. A and admitted to the record without objection. DOHA received the transcript of the hearing on February 1, 2011.

Findings of Fact

The SOR contains three allegations of disqualifying conduct under AG E, Personal Conduct (SOR ¶¶ 1.a., 1.b., and 1.c.). In his Answer to the SOR, Applicant denied the three allegations. (SOR; Answer to SOR.)

¹ Government Ex. 2 included a letter of denial of access to classified information, provided by Applicant in response to DOHA interrogatories, from an adjudicator in another government agency. The letter recites the answer Applicant provided in response to a question about illegal drug use on the SF-86 he completed in April 2004. The letter also summarized Applicant's discussion of his illegal drug use with an authorized investigator from the other government agency in May 2004. Applicant denied the facts recited by the adjudicator about the extent and duration of his illegal drug use. I considered the adjudicator's letter to be an official record compiled in the regular course of business. See Directive, Enclosure 3, Additional Procedural Guidance, E3.1.20.

SOR ¶ 1.a. alleges that Applicant deliberately withheld relevant and material information regarding past illegal drug use on an SF-86 that he completed in April 2004 and which was used by another government agency to process his request for access to classified information. SOR ¶ 1.b. alleges that Applicant deliberately withheld relevant and material information regarding his past illegal drug use during an interview conducted in about May 2004 with another government agency investigator. SOR ¶ 1.c. alleges that Applicant's request for access to classified information was denied by another government agency in about December 2004 as a result of his involvement with illegal drugs and his withholding of relevant and material information regarding past illegal drug use during his security clearance process, as set forth in the allegations at SOR ¶¶ 1.a. and 1.b. (SOR.)

Applicant is 31 years old, never married, and employed by a government contractor as a lead subcontracts representative. In September 1998, he matriculated at a university, where he lived and studied for approximately five years. In June 2003, he earned a bachelor's degree. He has worked for his present employer since February 2009. (Ex. 1.)

Applicant began to use marijuana in September 1998, when he was a freshman in college. He continued to use marijuana throughout his college career when socializing with his friends. When he used marijuana with his friends, he was the purchaser of the drug about 30% of the time. In March or April 2003, while in Jamaica on spring break, Applicant smoked marijuana several times with his friends. He also purchased and ate a brownie containing marijuana or some other drug which caused him to hallucinate and lose control of his body. He found the experience frightening, and when he recovered, resolved not to use drugs again. His last use of marijuana was in March or April 2003. (Ex. 1 at 12-13; Ex. 2 at 4; Ex. 3 at 1-2; Tr. 49-52.)

Approximately one year later, in April 2004, Applicant completed an SF-86 and requested access to classified information. He completed the SF-86 on a computer at his employer's place of business. He consulted with his security officer, who told him that the agency did not want applicants for a security clearance to be involved with illegal drugs for two years before applying for a security clearance. (Tr. 51-55, 61-65.)

A question on the SF-86 asked about illegal drug use. Applicant admitted illegal drug use. In response to a question on the form requesting specific information about his drug use, Applicant stated that he used marijuana one time, in September 1998. In May 2004, in an interview with an authorized investigator from the other government agency, Applicant stated that he used marijuana on September 22, 1998. He further stated that he did not enjoy the marijuana and never used it again. When he was interviewed again by an authorized investigator from the other government agency in August 2004, Applicant stated that he used marijuana once per month between September 1998 and December 1999 and ate a brownie spiked with marijuana in March 2003. Later in the discussion with the authorized investigator, Applicant admitted additional marijuana use while on a bus in Jamaica in 2003. He told the investigator that he had not provided the full extent of his involvement with marijuana during his previous

security processing because he feared that if he told the truth about his illegal involvement with drugs, he might not be hired by his employer. He stated that he could not remember the exact dates of his additional drug use. He admitted that he intended to mislead the Government about his involvement with illegal drugs. By letter dated December 3, 2004, the other government agency denied Applicant's request for access to classified information. (H.E. 2; Ex. 2, 1-4.)

Applicant completed a second SF-86 in April 2009. In response to a question on the SF-86 which asked about his illegal drug use, Applicant stated that he used marijuana from September 1998 to April 2003. He estimated that he used marijuana "about 1 time every 4-5 months during my five years in school. Socially smoked at college parties every now and then." (Ex. 1 at 11.)

In response to another question on the SF-86, Applicant admitted that he had previously been investigated for a security clearance and had been denied a clearance in December 2004. He then provided the following additional information:

Investigator did not believe my disclosure of information concerning history involving illegal drug use. I disclosed that I had smoked marijuana occasionally in school, but did not have exact dates, and the investigator felt that my intent was to mislead the Government, which was completely ridiculous in my opinion. At any rate, the investigator's opinion was that I was trying to hide information, which wouldn't make any sense if I admitted to the use in the first place. Lastly, I intended to appeal the decision based on the above logic and the fact that I did not lie or intend to mislead anyone, but was advised to take no action by security officer at [place of employment] at that time.

(Ex. 1 at 11-12.)

Applicant denied he intended to mislead the Government when he did not list his illegal drug use after September 1998. He stated: "Never, I never intended to withhold any information, or I could just not have admitted it. I could have avoided the entire thing and said I've never [used illegal drugs] in my life. You know, I think that's my . . . point." (Tr. 67.)

Applicant's direct supervisor appeared on his behalf. He stated that Applicant was very competent and performs his work well. (Tr. 75.)

Applicant provided a letter of character reference from his facility security officer. The facility security officer recommended Applicant for a security clearance. He stated that Applicant is very professional, possesses strong moral character, and is dependable. (Ex. A.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no 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.

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, the administrative judge applies these 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, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion in seeking 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 that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that 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

AG ¶ 15 explains why personal conduct is a security concern:

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.

In 2004, one year after experiencing a frightening reaction to an illegal drug, Applicant completed a security clearance application. He knew he had used marijuana from 1998 to 2003. He also knew from his security officer that the agency granting the security clearance would not look favorably on illegal drug use less than two years before the security clearance application was filed.

In responding to a question on an SF-86 to report any illegal drug use and the extent of that illegal use, Applicant elected to report only one incident of illegal drug use in 1998. He withheld information about his illegal drug use in 1999, 2000, 2001, 2002, and 2003. In defending this deliberate omission at his security clearance hearing, Applicant argued that concealing this information was better than denying any illegal drug use at all. Applicant’s argument lacked credibility.

Applicant also provided false and misleading information about his illegal drug use to an authorized investigator during his security investigation in May 2004. When first interviewed, he told the investigator that he used marijuana only once, on September 22, 1998, and never used the drug again. When he was interviewed again by an authorized investigator from the other government agency in August 2004, Applicant stated that he used marijuana once per month between September 1998 and December 1999 and ate a brownie spiked with marijuana in March 2003. Later in the discussion with the authorized investigator, Applicant admitted additional marijuana use while on a bus in Jamaica in 2003. He told the investigator that he had not provided the full extent of his involvement with marijuana during his previous security processing

because he feared that if he told the truth about his illegal involvement with drugs, he might not be hired by his employer. Applicant's failure to be truthful about his marijuana use resulted in the denial of his application for a security clearance by another Government agency.

The denial of Applicant's application for a security clearance was not *per se* disqualifying conduct by Applicant. Accordingly, I conclude SOR allegation 1.c. for Applicant.

However, Applicant's personal conduct as alleged under SOR ¶¶ 1.a. and 1.b. raises security concerns under AG ¶¶ 16(a), 16(b), and 16(e). AG ¶ 16(a) reads:

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.

AG ¶ 16(b) reads: "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative." AG ¶ 16(e) reads, in pertinent part: "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional or community standing"

AG ¶¶ 17(a), 17(b) and 17(e) provide conditions that could mitigate security concerns in this case. AG ¶ 17(a) reads: "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." AG ¶ 17(b) reads:

the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

AG ¶ 17(e) reads: "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress."

Nothing in the record establishes that Applicant's concealment of information was caused by improper or inadequate advice of authorized personnel or legal counsel instructing him concerning the security clearance process. Applicant's defense of his deceptive conduct at his hearing indicates he has not taken positive steps to reduce his vulnerability to exploitation, manipulation, or duress.

Applicant did not make prompt good-faith efforts to correct his concealment of relevant and material facts about his illegal drug use. Instead, he continued to conceal his illegal drug use during his security investigation, only revealing specific facts after continued questioning by the authorized investigator. Moreover, Applicant was not candid and forthright about these matters during his security clearance hearing, thereby perpetuating the falsification and raising concerns about his trustworthiness, reliability, and judgment. I conclude that neither AG ¶¶ 17(a), 17(b), nor 17(e) applies to the facts of Applicant's case.

Whole-Person Concept

Under 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. 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.

Applicant is a mature and well-educated individual. He was denied program access eligibility by another government agency because he had provided inaccurate and untruthful information about his past illegal drug use. In response to DOHA interrogatories, Applicant provided a letter, dated December 3, 2004, from the other Government Agency in which it denied him access eligibility based upon the conduct specified in SOR allegations 1.a. and 1.b. The letter corroborated the Government's allegations. Applicant denied he deliberately intended to mislead the Government by withholding relevant and material information regarding his past illegal drug use from his April 2004 SF-86 and from his security interview in May 2004. I reviewed the written record in this case thoroughly. I also observed Applicant at his security clearance hearing, and I listened carefully to his testimony. I conclude that his denials that he deliberately withheld relevant and material information from his security clearance application and in interviews with authorized investigators were not credible.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For these reasons, I

conclude Applicant failed to mitigate security concerns arising from his personal conduct.

Formal Findings

Formal findings for or against Applicant 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. and 1.b.:	Against Applicant
Subparagraph 1.c.:	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 allow Applicant access to classified information. Applicant's request for a security clearance is denied.

Joan Caton Anthony
Administrative Judge