



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 10-05756
)	
Applicant for Security Clearance)	

Appearances

For Government: Raashid S. Williams, Esq., Department Counsel
For Applicant: *Pro se*

January 9, 2012

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on November 9, 2009. On August 16, 2011, the Defense Office of Hearings and Appeals (DOHA) preliminarily denied his application. DOHA set forth the basis for its decision in a Statement of Reasons (SOR), citing security concerns under Guideline E. 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) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on August 24, 2011; answered it on September 12, 2011; and requested a hearing before an administrative judge. DOHA received the request on September 13, 2011. Department Counsel was ready to proceed on October

18, 2011, and the case was assigned to me on October 24, 2011. DOHA issued a notice of hearing on November 28, 2011, scheduling it for December 5, 2011. At Applicant's request, I postponed the hearing until December 20, 2011. His request is attached to the record as Hearing Exhibit I. I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified but presented no witnesses or documentary evidence. DOHA received the transcript (Tr.) on December 28, 2011.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, and 1.d, but denied ¶ 1.c. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 38-year-old security officer employed by a federal contractor since November 2009. He graduated from college with a bachelor's degree in mass communications in June 1997. Before his current employment, he was a trolley operator, a bus driver, a truck driver, and a police officer. He was employed by a federal contractor as a security officer from January 2007 to October 2009.

Applicant married in August 2000 and separated in July 2008. He has lived with his current cohabitant since his separation. He and his cohabitant have a 10-year-old daughter. He has an 18-year-old son from a previous relationship.

In February 2007, Applicant submitted an SCA to another federal agency, seeking a top secret clearance. In his SCA, he stated that he did not use or have any involvement with illegal drugs. During a polygraph examination in May 2007, he admitted that he used marijuana twice in 1991 and once in 1992. After further questioning, he admitted that he used marijuana once a month from 1991 to March 2005. He then revised his admission, stating that he last used marijuana in November 2006. Finally, he admitted that he used marijuana two weekends a month since the summer of 1992, with his last use occurring shortly before the polygraph in May 2007. In April 2008, the other federal agency denied his application for a clearance because of his drug involvement and lack of candor during the security processing. (GX 4 at 10-11.)

In March 2008, Applicant submitted an SCA to the Department of Defense. He answered "No" to question 24, asking if he had illegally used any controlled substance during the past seven years. He did not disclose his prior marijuana use. He received a security clearance in July 2008.

In October 2009, Applicant's previous employment as a security officer was terminated because he did not have a top secret clearance. When Applicant was interviewed by a security investigator in January 2009, he told the investigator that his inability to obtain a top secret clearance was based on his bad credit. (GX 4 at 5.) He did not disclose that he was denied a top secret clearance because of his drug involvement and lack of candor. In response to DOHA interrogatories in March 2011, he

admitted that he was not truthful during the January 2009 interview. (GX 4 at 3.) He also declared that he last used marijuana in May 2007 and no longer uses it. (GX 3.)

When Applicant submitted another SCA to the Department of Defense in November 2009, he answered “No” to question 13, asking if during the past seven years he had been fired, quit after being told he would be fired, left my mutual agreement following charges or allegations of misconduct, left by mutual agreement following notice of unsatisfactory performance, left a job for other reasons under unfavorable circumstances, or was laid off from a job. He did not disclose that he had been terminated in October 2009 because of his inability to obtain a top secret clearance. He also answered “No” to question 23, asking if during the past seven years he had illegally used any controlled substances.

At the hearing, Applicant admitted that he intentionally failed to disclose his marijuana use in his November 2009 SCA. He testified that he “didn’t want to lose the opportunity of getting the job.” (Tr. 37.) He explained that he was embarrassed and did not realize the importance of candor when dealing with the intelligence community. (Tr. 41.)

Applicant denied falsifying question 13, regarding the circumstances under which his employment was terminated in October 2009. He testified that he was “let go” because he did not have a top secret clearance, but he answered “No” to question 13 because he was unsure whether the circumstances of his termination amounted to being fired. (Tr. 30-31, 39.)

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, 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 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 E, Personal Conduct

The SOR alleges Applicant falsified his March 2008 SCA by intentionally failing to disclose his marijuana use (SOR ¶ 1.a); was denied access to classified information by another Government agency in April 2008 due to his drug involvement and personal conduct (SOR ¶ 1.b); falsified his November 2009 SCA by intentionally failing to disclose his termination from employment in October 2009 (SOR ¶ 1.c); and falsified his November 2009 SCA by failing to disclose his marijuana use (SOR ¶ 1.d). 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 disqualifying condition relevant to Applicant's omissions of relevant information from his SCAs is "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire" AG ¶ 16(a). Applicant admitted intentionally failing to disclose his drug involvement in his March 2008 SCA, being denied access by another Government agency for his drug involvement and lack of candor, and intentionally failing to disclose his drug involvement in his November 2009 SCA. However, he denied intentionally failing to disclose his termination from employment in his November 2009 SCA.

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). I found Applicant's explanation that he did not know how to characterize his termination for lack of a top secret clearance plausible and credible. Accordingly, I have resolved SOR ¶ 1.c in his favor. However, AG ¶ 16(a) is established by his admitted falsifications as alleged in SOR ¶¶ 1.a. and 1.d, and his admission, corroborated by the record of the other Government agency's adverse security determination, that the denial of his application for a top secret clearance in April 2008 was based in part on his lack of candor on his February 2007 SCA. Although falsification of his February 2007 was not specifically alleged in the SOR, it was encompassed by the allegation in SOR ¶ 1.b that he was denied a clearance because of lack of candor during the security clearance process.

Applicant's history of marijuana use was not alleged under Guideline G (Drug Involvement). However, SOR ¶ 1.b alleged and Applicant admitted that the adverse security determination by another Government agency was based in part on his drug involvement. His history of marijuana use is cognizable under Guideline E, because it "continues the longstanding tenet that specific behavior can have security significance under more than one guideline and . . . by focusing on the concepts of questionable judgment and irresponsibility, it contemplates that behavior will have independent security significance under Guideline E in a broad range of cases." ISCR Case No. 06-20964, 2008 WL 2002589 at *5 (App. Bd. Apr. 10, 2008). Applicant's admission, corroborated by the records of the other Government agency, establishes the following disqualifying conditions under Guideline E:

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.

Security concerns raised by false or misleading answers on a security clearance application or during a security interview may be mitigated by showing that “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” AG ¶ 17(a). Applicant did not correct his omission from his February 2007 SCA until he was subjected to a polygraph examination in May 2007. He did not correct the omissions from his March 2008 SCA and his November 2009 SCA until he responded to DOHA interrogatories in March 2011, after he was confronted with evidence of the other Government agency’s investigation. I conclude that AG ¶ 17(a) not established.

Security concerns raised by personal conduct may be mitigated if “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(c). Applicant’s falsifications were not “minor” because they undermined the integrity of the security clearance process. Applicant’s drug use ended in May 2007, but his falsifications were recent, continuing up to and including his most recent SCA. He has a history of falsifying SCAs. None of his falsifications occurred under unique circumstances. I conclude that AG ¶ 17(c) is not established.

Security concerns raised by personal conduct also may be mitigated if “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.” AG ¶ 17(d) Applicant has acknowledged his history of marijuana use, but there is no evidence of counseling or other “positive steps” to prevent recurrence. I conclude that AG ¶ 17(d) is not fully established.

Finally, security concerns raised by personal conduct may be mitigated if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). This mitigating condition is established because Applicant has disclosed his history of marijuana use and his unsuccessful attempts to conceal it.

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 Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a mature, well-educated adult. He appears to have terminated his drug involvement. However, his falsifications have security significance independent of his marijuana use. See ISCR Case No. 01-19278 at 7-8 (App. Bd. Apr. 22, 2003). The mitigation of the underlying conduct has little bearing on the security significance of the falsifications, especially because there have been multiple falsifications. See ISCR Case No. 08-11944 at 3 (App. Bd. Aug 15, 2011). He admitted his multiple falsifications and expressed remorse at the hearing. Nevertheless, his persistent lack of candor leaves me with grave doubts about his truthfulness, reliability, and good judgment.

After weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on his personal conduct. 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 E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against 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