



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



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| In the matter of: |) | |
| |) | |
| [Redacted] |) | ISCR Case No. 11-00408 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines G (Alcohol Consumption), H (Drug Involvement), J (Criminal Conduct), and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his security clearance application (SCA) on September 16, 2009. On June 10, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines G, H, J, and 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 answered the SOR on July 8, 2011, and requested a determination on the record without a hearing. Department Counsel submitted the Government's written

case on October 14, 2011. On October 18, 2011, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on October 27, 2011, and did not respond. The case was assigned to me on December 22, 2011.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR. His admissions in his answer to the SOR are incorporated in my findings of fact.

Applicant is a 27-year-old proposal writer and marketing specialist employed by a federal contractor. He is unmarried. He graduated from college with a bachelor's degree in linguistics in December 2008. (Item 4 at 16; Item 5 at 31.) He has worked for his current employer since February 2009.

Applicant used marijuana regularly in high school and in college. He was arrested for possession of marijuana and marijuana paraphernalia in May 2002 and June 2002. He tested positive for marijuana during intake processing for a drug education program in May 2002. After graduating from college, he used marijuana once at a concert in December 2009 and once in July 2010 while traveling overseas. (Item 5 at 7-10.) He continues to associate with several friends who use marijuana; however, he asserted that they do not use it in his presence. (Item 5 at 8.)

In July 2006, Applicant was charged with furnishing alcohol to a minor. Applicant had purchased a keg of beer for a party, and about a week later the police were called when his younger sibling and some friends found the leftover beer. He received probation before judgment, was required to perform community service, and was fined. (Item 4 at 43.)

When Applicant submitted his SCA in September 2009, he answered "No" to question 23a, asking if he had illegally used any controlled substance such as marijuana in the last seven years or since the age of 16, whichever was shorter. He did not disclose his marijuana use during the preceding seven years. (Item 4 at 43.)

During an interview with a security investigator in July 2010, Applicant disclosed his marijuana use in high school and college. (Item 5 at 16.) In his March 2011 response to DOHA interrogatories, he explained that he failed to disclose his marijuana in his SCA because "the wording [of question 23a] was not clear as to the disclosure of past usage." In his responses to these interrogatories, he disclosed that he used marijuana regularly from 2000 to 2004. (Item 5 at 7-8, 10.) In his response to the SOR, he apologized for his lack of candor on his security clearance application. (Item 3 at 1.)

In March 2010, Applicant was charged with driving under the influence (DUI) after he ran a stop sign, was stopped by the police, and registered a .11 blood-alcohol content on the breathalyzer. During a search of his car, the police found a pill bottle

containing marijuana residue. (Item 5 at 15.) He pleaded guilty to driving while impaired by alcohol (DWI) and possession of paraphernalia. He was sentenced to probation before judgment. For the DWI, he was placed on unsupervised probation for six months and fined \$500, with \$300 suspended. For the paraphernalia offense, he was placed on unsupervised probation for six months and fined \$100. The terms of his probation required him to enroll in an alcohol education program. (Item 5 at 18.) He began the program in April 2010, attended six alcohol education classes and six Alcoholics Anonymous meetings, and completed the program in September 2010. During his intake assessment, he disclosed that he regularly consumed one to four beers once a week. (Item 5 at 25.) A certified alcohol and drug abuse counselor determined that he was not addicted to alcohol. (Item 5 at 22.)

The status of Applicant's security clearance at the time of his marijuana use in July 2010 is unclear. His SCA indicated that he had never been granted a clearance. There is nothing in the file reflecting that his application for a clearance had been granted as of July 2010. In his response to the SOR, he admitted the allegation that he used marijuana while holding a clearance, and he stated that he had been debriefed by his facility security officer after receiving the SOR and did not have any classified materials in his possession. It is possible that he was granted an interim clearance before July 2010, but nothing in the record reflects it.

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 G, Alcohol Consumption

The SOR alleges that Applicant was charged with DUI in March 2010 (SOR ¶ 1.a) and furnishing alcohol to a minor in July 2006 (SOR ¶ 1.b). The concern under this guideline is set out in AG ¶ 21: “Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness.”

Applicant’s arrest for DUI in March 2010 establishes two disqualifying conditions under this guideline: AG ¶ 22(a) (“alcohol-related incidents away from work, such as driving while under the influence, . . . regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent”) and AG ¶ 22(c) (“habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent”). While it is debatable whether consumption of four beers at a sitting constitutes binge drinking, Applicant’s stop-sign violation and DUI reflect impaired judgment.

Applicant's arrest in July 2006 for furnishing alcohol to a minor does not establish any disqualifying conditions under this guideline. The SOR does not allege excessive alcohol consumption by Applicant on this occasion, and his conduct is more appropriately analyzed as criminal conduct under Guideline J, discussed below.

Security concerns under this guideline may be mitigated if "so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." AG ¶ 23(a). Applicant's DUI arrest was recent, having occurred after he submitted his SCA. The record reflects only one incident related to Applicant's excessive alcohol consumption. Applicant regularly consumes up to four beers at a sitting, but there is no evidence that he has driven a car or engaged in any alcohol-related misconduct on any other occasion. However, his DUI did not occur under circumstances making it unlikely to recur. The fact that Applicant's DUI occurred recently, while he was awaiting a decision on his SCA, raises doubt about his good judgment. I conclude that this mitigating condition is not established. No other enumerated mitigating conditions under this guideline are relevant.

Guideline H, Drug Involvement

The SOR alleges that Applicant was charged with possession of drug paraphernalia in March 2010 (SOR ¶ 2.a), charged with possession of marijuana and paraphernalia in June 2002 (SOR ¶ 2.b), and charged with possession of marijuana and paraphernalia in May 2002 (SOR ¶ 2.c). It also alleges that he used marijuana with varying frequency from 2000 to at least 2004 (SOR ¶ 2.d), used marijuana once in December 2009 (SOR ¶ 2.e), and used marijuana once in July 2010 while in a foreign country and possessing a security clearance (SOR ¶ 2.f).

The concern under this guideline is set out in AG ¶ 24: "Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations." Guideline H encompasses "drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens)." AG ¶ 24(a)(1).

The evidence establishes three disqualifying conditions under this guideline: AG ¶ 25(a) ("any drug abuse," defined in AG ¶ 24(b) as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction"); AG ¶ 25(b) ("testing positive for illegal drug use"); and AG ¶ 25(c) ("illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia"). Rather than speculate on whether Applicant had an interim clearance when he used marijuana in July 2010, I conclude that AG ¶ 25(g) ("any illegal drug use after being granted a security clearance") is not fully established.

Security concerns under this guideline may be mitigated if “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.” AG ¶ 26(a). This mitigating condition is not established, because Applicant’s drug involvement was recent, frequent, and did not occur under circumstances making it unlikely to recur. While I am not satisfied that he held a security clearance when he used marijuana in July 2010, the fact that he used marijuana while awaiting a decision on his SCA casts doubt on his current reliability, trustworthiness, and good judgment.

Security concerns also may be mitigated by “a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.” AG ¶ 26(b). None of the circumstances enumerated in this mitigating condition are established. No other enumerating mitigating conditions under this guideline are established.

Guideline J, Criminal Conduct

The SOR cross-alleges Applicant’s alcohol-related conduct and drug involvement as criminal conduct under this guideline. The concern raised by criminal conduct is set out in AG ¶ 30: “Criminal activity 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.” Applicant’s admissions, corroborated by the documentary evidence of his criminal record, establish two disqualifying conditions under this guideline: 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”).

Security concerns under this guideline may be mitigated by evidence that “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” AG ¶ 32(a). This mitigating condition is not established because Applicant’s criminal conduct continued until recently and did not occur under unusual circumstances.

Security concerns raised by criminal conduct also may be mitigated if “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.” AG ¶ 32(d). Applicant has expressed remorse, but his criminal conduct is recent, and he presented no evidence of his employment record or community involvement. I conclude that this mitigating condition is not established. No other mitigating conditions under this guideline are established.

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified his SCA by failing to disclose his marijuana use from 2000 to at least 2004. 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 relevant disqualifying condition is “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . or similar form used to conduct investigations, [or] determine security clearance eligibility” AG ¶ 16(a). In his March 2011 responses to interrogatories, Applicant asserted that the question regarding drug use was unclear. I found his explanation implausible and unpersuasive in light of his college degree in linguistics and his current job, which involves use of written language. His level of education is relevant to determining whether his failure to disclose relevant information on a security clearance application was deliberate. See ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010). Applicant admitted his falsification in his response to the SOR and apologized for his lack of candor. I conclude that AG ¶ 16(a) is established.

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). This mitigating condition is not established because Applicant did not disclose his drug use until he was interviewed by a security investigator in July 2010, nine months after he submitted his SCA.

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). Deliberate falsifications on an SCA are not minor, because they undermine the integrity of the security clearance process.¹ While his one instance of falsification is arguably

¹ It is a felony to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are matters within the jurisdiction of the executive branch of the Government of the United States. Thus, a deliberately false answer on a security clearance application is a serious crime within the meaning of Guideline J. However, Applicant's falsification was not alleged under Guideline J.

“infrequent,” it did not happen under unique circumstances, and it casts doubt on his current reliability, trustworthiness, and good judgment. Thus, I conclude that AG ¶ 17(c) is not established. No other mitigating conditions under this guideline are established.

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 Guidelines G, H, J, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant expressed remorse in his answer to the SOR, and there are some indications that he is putting his college lifestyle behind him. However, he has recently exercised bad judgment with respect to alcohol use and drug abuse, and his lack of candor on his SCA raises grave doubts about his current reliability, trustworthiness, and good judgment. After weighing the disqualifying and mitigating conditions under Guidelines G, H, J, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on alcohol consumption, drug involvement, criminal conduct, and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

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| Paragraph 1, Guideline G (Alcohol Consumption): | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |
| Subparagraph 1.b: | For Applicant |

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| Paragraph 2, Guideline H (Drug Involvement): | AGAINST APPLICANT |
| Subparagraphs 2.a-2.f: | Against Applicant ² |
| Paragraph 3, Guideline J (Criminal Conduct): | AGAINST APPLICANT |
| Subparagraphs 3.a and 3.b: | Against Applicant |
| Paragraph 4, Guideline E (Personal Conduct): | AGAINST APPLICANT |
| Subparagraph 4.a: | Against Applicant |

Conclusion

I conclude that 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.

LeRoy F. Foreman
Administrative Judge

² I have resolved the allegation that Applicant possessed a security clearance when he used marijuana in July 2010 in his favor. However, the remainder of subparagraph 2.f, alleging marijuana use in July 2010, is resolved against him.