



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 11-03050
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Tovah Minster, Esq., Department Counsel  
For Applicant: *Pro se*

February 14, 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 granted.

**Statement of the Case**

Applicant submitted a security clearance application on August 27, 2010. On October 26, 2011, the Defense Office of Hearings and Appeals notified him that it was unable to find that it is clearly consistent with the national interest to continue his access to classified information, and it recommended that his case be submitted to an administrative judge for a determination whether to revoke his clearance. DOHA set forth the basis for its action 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 answered the SOR on November 16, 2011, and requested a hearing before an administrative judge. DOHA received the request on November 25, 2011. Department Counsel was ready to proceed on December 8, 2011, and the case was assigned to me on December 21, 2011. DOHA issued a notice of hearing on January 5, 2012, scheduling it for January 20, 2012. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified, but presented no other evidence. I kept the record open until January 27, 2012, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. At his request, I extended the deadline for submitting documentary evidence until February 6, 2012. Department Counsel's comments regarding AX A and B are attached to the record as Hearing Exhibit (HX) I. Applicant's request for an extension of time is attached as HX II, and my response to his request is attached as HX III. He timely submitted AX C, which was admitted without objection. Department Counsel's comments regarding AX C are attached to the record as HX IV. DOHA received the transcript (Tr.) on January 27, 2012.

### **Findings of Fact**

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

Applicant is a 26-year-old systems engineer employed by a federal contractor. He attended a community college from August 2003 to December 2006 and received an associate's degree. He attended a university from January 2007 to May 2010 and received a bachelor's degree.

On June 24, 2008, Applicant submitted an application for a public trust position as part of his application for a summer internship program. He answered "No" to question 14, asking if he had used, possessed, supplied, or manufactured illegal drugs during the last year. He intentionally did not disclose that he used hallucinogenic mushrooms<sup>1</sup> in November 2007. Near the end of this internship, he was offered another internship for the following summer. He executed a security clearance application on November 24, 2008. On this application, he answered "No" to question 24, asking if, during the last seven years or since the age of 16, whichever is shorter, he had illegally used a controlled substance. He intentionally did not disclose that he used marijuana in April 2004 and hallucinogenic mushrooms in November 2007. (Tr. 41; GX 1; GX 2.) He was granted a security clearance in June 2009 and was an intern until September 2009. (GX 3 at 46.)

Applicant began his current job in June 2010. He submitted a security clearance application on August 27, 2010, seeking to continue his clearance. On this application, he answered "Yes" to question 24 and disclosed his use of marijuana and hallucinogenic mushrooms. (GX 3 at 44-45.) He was interviewed by security

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<sup>1</sup> Hallucinogenic mushrooms contain psilocybin or psilocin, which are listed as hallucinogenic drugs on Schedule I of the Controlled Substances Act of 1970, as amended.

investigators on September 14, 2010, and January 18, 2011, and he provided the details of his drug use. He told the investigators that he did not disclose his drug use because he was worried about keeping his job. (GX 4 at 5-7.) Prior to his disclosures on his August 2010 application, Applicant had not told his facility security officer or any government officials that he had falsified his two previous applications. As of the date of the hearing, he had not disclosed his drug use or falsifications to his employer. (Tr.34-36.)

Applicant testified that he decided to disclose his previous drug use in his August 2010 application because he was bothered by the morality of his previous falsifications, and he realized that his concealment of his previous drug use made him vulnerable to blackmail. He knew that his career would require future background checks and clearance applications, and the only way to correct his mistake was to disclose his prior drug use. (Tr. 40-41.)

Applicant's one-time marijuana use in 2004 was with a friend while he was in college. The friend supplied the marijuana. Applicant has not used marijuana since his one-time use in April 2004. ((GX 4 at 5-6; Tr. 30-31.)

Applicant's one-time use of hallucinogenic mushrooms in 2007 occurred with his live-in girlfriend. His girlfriend had used mushrooms before, and she provided them on this occasion. (Tr. 32.) He told the security investigators that he has not used mushrooms since that occasion because he was concerned about the legal ramifications of using illegal drugs, did not think it was worth the risk, and did not enjoy them. (GX 4 at 5-6.)

Applicant's girlfriend, with whom he used the mushrooms, has a security clearance. He and his girlfriend had several discussions about using illegal substances, and they both decided to not use them again. They have not used them since consuming the mushrooms in 2007. (Tr. 39.) They still live together. He testified that his girlfriend fully disclosed her drug use on her security clearance application. Her full disclosure and subsequent receipt of a clearance was a factor in his decision to disclose his drug use and falsifications. (Tr. 42-43.)

After the hearing, Applicant disclosed his falsifications and drug use to his supervisors and coworkers. His program security representative submitted a letter supporting his application for a security clearance. He described Applicant as quiet, mild mannered, respectful and work oriented. He concluded by stating that he has no doubt that Applicant can be trusted with sensitive information. (AX B.) A coworker submitted a letter describing Applicant as trustworthy and ethical. He stated, "The fact that [Applicant] volunteered this information on his most recent application, knowing that it would jeopardize his position, serves to underscore his honorable intentions." (AX A.) Another coworker, who has held a security clearance for almost 20 years, found it "quite commendable" that Applicant decided to disclose his drug use and falsifications. Notwithstanding Applicant's previous bad judgment, she believes that his growth in understanding, his ethical choices, and decision to voluntarily disclose his past bad

judgment demonstrate that he is trustworthy. She concludes by stating that she “would strongly recommend [Applicant] for a security clearance without hesitation.” (AX C.)

## 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**

The SOR alleges that Applicant falsified his June 2008 application for a public trust position and his November 2008 application for a security clearance by intentionally failing to disclose his prior drug use. The concern under this guideline is set out in AG ¶ 15 as follows:

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.

Applicant admitted his falsifications during two interviews with security investigators, in his response to the SOR, and at the hearing. The relevant disqualifying condition, established by his admissions, is “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(a).

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 receives partial credit under this mitigating condition, because he corrected the omissions before being confronted with evidence of his drug use, and his corrections were made in good faith. However, they were not prompt, because he lived with his initial falsification for more than two years before correcting it.

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

misconduct was not “minor,” because it undermined the integrity of the security clearance process. It was arguably “infrequent,” because it involved two falsifications during a relatively short time. It did not happen under “unique circumstances.”

The key question regarding this mitigating condition is whether “so much time has passed” without further misconduct to mitigate Applicant’s conduct. If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

When Applicant falsified his June 2008 and November 2008 applications, he was 23 years old and still in college. He had no experience with the security clearance process. After he gained experience working in a secure environment, he began to understand the implications of his falsification in terms of his security clearance, his job, and his vulnerability to coercion or blackmail. He also realized, based on his girlfriend’s experience, that her drug use and subsequent full disclosure did not disqualify her from obtaining a clearance. He voluntarily disclosed his drug use and his falsifications in his August 2010 application, knowing that his clearance and his job would be jeopardized by his disclosures. He was candid, sincere, and extremely remorseful at the hearing. Based on all the evidence, I am satisfied that Applicant has matured, reformed, and will not repeat his conduct. I conclude that AG ¶ 17(c) is established.

Security concerns raised by personal conduct also 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 fully disclosed his drug use and previous falsifications.

### **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.

