



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



In the matter of:)	
)	
)	ISCR Case No. 11-08706
)	
Applicant for Security Clearance)	

Appearances

For Government: Stephanie Hess, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

11/05/2013

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Security concerns about Applicant’s alleged lack of candor during a July 2008 interview for employment with the United States Government were not fully established. Applicant has demonstrated that he can abide by his security responsibilities. Clearance granted.

Statement of the Case

On January 3, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline E, Personal Conduct, and explained why it was unable to find that it is clearly consistent with the national interest to grant or continue his security clearance. The DOD CAF took action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

On January 21, 2013, Applicant answered the SOR allegation, and he requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. On January 25, 2013, counsel for Applicant entered his appearance. On August 15, 2013, the Government was ready to proceed to a hearing. The case was assigned to me on August 22, 2013, to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On August 28, 2013, I issued a notice scheduling a hearing for September 25, 2013.

I convened the hearing as scheduled. Before the introduction of any evidence, the Government provided me with an amendment to the SOR dated April 2, 2013, adding a new allegation under Guideline E. Applicant denied the allegation in April 2013. During its case, the Government offered five exhibits (GEs 1-5). GEs 1-4 were admitted without objection. The amendment and proposed exhibit GE 5, on which the amendment was based, were withdrawn by the Government in response to valid concerns raised by Applicant's counsel. Eighteen Applicant exhibits (AEs A-R) were admitted without objection, and Applicant testified, as reflected in a transcript (Tr.) received by DOHA on October 4, 2013.

Findings of Fact

The SOR alleged under Guideline E that Applicant was not candid during a July 22, 2008 interview to determine his employment suitability with another government agency in that he refused to answer questions about his association and involvement with individuals that may have used, possessed, and/or distributed marijuana (SOR 1.a). Applicant denied the allegation in his SOR response. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is 40 years old, married, and the father of two young daughters. (GE 1; AE R; Tr. 21.) Applicant holds a Bachelor of Science degree in mechanical engineering awarded in May 1996 (AEs F, O.) and a Master of Business Administration degree awarded in December 2003 (AE G.). He has been employed by a defense contractor since June 1996, when he was hired as a full-time mechanical engineer. (AE O.) Applicant held engineering or program management positions in several divisions of the company as his career progressed. Around January 2013, Applicant was promoted to his current position. (AE A; Tr. 21.) He held a Secret security clearance throughout most of his employment, which was granted in January 1997 (Tr. 22.), and he currently holds an interim Top Secret clearance. (GE 1; Tr. 21, 27.)

As a college undergraduate from August 1991 to May 1996, Applicant attended several parties where he knew illegal drugs would be used. With the intent of becoming "high" without having to smoke marijuana, Applicant placed himself in the presence of others while they were smoking the drug at college parties. In addition, on several occasions in college and during the first three to four months after he graduated when he returned to visit college friends and acquaintances, he was around large quantities of marijuana, which he knew was for distribution. Applicant was not personally involved in drug use, sales, or distribution. (GEs 3, 4; Tr. 30.)

In June 1996, Applicant began his professional career. By November 1998, his work was garnering formal recognition from his employer. Annually between 2002 and 2005, and again in 2007, Applicant received achievement awards for his performance on teams that made exceptional efforts above and beyond job requirements. Applicant's project was one of five selected from 56 projects evaluated for an excellence in operations award in 2005. (AE H.)

Into his eighth year as a mechanical engineering manager with his present employer, Applicant applied for a position with a federal agency. On July 22, 2008, Applicant underwent a polygraph examination to determine his employment suitability. During a pretest interview, Applicant denied that he had ever used any illegal drugs. (GE 3.) During the post-test phase, Applicant submitted a supplement to his security clearance application in which he stated, in part:

As a student in college, I went into an enclosed room where people were smoking with the intention to get high. While in the room, I inhaled the smoke to get high and stayed as long as possible while people were smoking. They were smoking marijuana and I did know that it was an illegal drug I was inhaling.

Applicant also indicated that he had been around large quantities of drugs, as much as five large garbage bags full, on several occasions in college and after he graduated. (GE 4.) Applicant was then questioned by the government agent about the specific time frames; his role, if any, in drug distribution; and the role of others in possessing and distributing marijuana. Applicant indicated only that he knew the marijuana was for distribution. The government agent concluded Applicant was uncooperative because he would not answer specific questions about location, his companions, or time frames. (GE 3.) Applicant was not offered the job. (Tr. 28.)

Applicant was given an overall rating of far exceeds requirements for his work performance with his employer in 2008, which was a challenging year for his department. (AE E.) In 2009, Applicant transferred to a program engineer position in another division of the company, where he was required to build and develop teams to meet program commitments. (GE 1; Tr. 22.) As a senior principal systems engineer, Applicant made an immediate and positive impact on his program. He provided effective leadership for his team and worked exceptionally well with their customer. Applicant's overall work performance for 2009 was rated as far exceeds requirements. (AE D.)

In 2010, Applicant transitioned to program engineer position. He had no previous development experience and little familiarity with the technology. He struggled early, but he provided solid leadership and had success in obtaining the technical resources needed to complete his program. Applicant's performance was rated as exceeds requirements. (AE C.)

On January 13, 2011, Applicant executed an Electronic Questionnaire for Investigations Processing (e-QIP) for a clearance upgrade to Top Secret. He reported no

illegal drug involvement in the preceding seven years or any use of illegal drugs while possessing a security clearance. He disclosed the pre-employment background investigation in July 2008. (GE 1.) When asked about that investigation during a February 8, 2011 subject interview with an Office of Personnel Management (OPM) authorized investigator, Applicant indicated that it was in application for a position with a federal agency. He indicated that he was unsure of why he was not offered the position and that he was never notified of any problems with the investigation. (GE 2.)

In April 2011, Applicant was given a monetary award in recognition of his individual contributions toward meeting his employer's goals. (AE G.) He led his engineering services team as major development activities on his program slowed down. He was successful in convincing their customer to keep a number of technical directives funded, which allowed the team to remain intact for future opportunities. He assumed a program lead opportunity after obtaining his program leadership certification. (AE B.)

By June 2012, Applicant's security clearance eligibility had been referred for adjudication to the DOD because of his admitted association with drug users in the past. In his June 12, 2012 response to interrogatories, Applicant denied that he had ever illegally used any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP) or any cannabis (to include marijuana and hashish). Applicant also responded negatively to whether he currently associates with persons who use illegal substances or frequents places where he has reason to believe illegal drugs are being used or are used in his presence. Regarding his future intentions, Applicant stated that he had never used any illegal drugs, and he did not intend to start using them. (GE 2.)

Into his fourth year as a program engineer, Applicant had earned the respect of his peers, company executive management, and their government customers. He handled classified information and managed large program budgets appropriately while maintaining the highest ethical standards. (AEs I-L, N, P.) Throughout 2012, he led the engineering activity on his program to completion of the production contract. He also led several successful proposals, which brought in lucrative contracts for his division. (AE Q.) Effective January 2013, he was promoted to a position at an annual salary of \$165,000. (Tr. 22.)

On January 3, 2013, the DOD CAF issued an SOR to Applicant alleging that he had not been candid during his July 2008 interview to determine his employment suitability with a non-DOD government agency in that he refused to answer inquiries of the government agent about his association and involvement with individuals who may have used, possessed, or distributed marijuana. Applicant was not removed from his position or his clearance suspended pending final adjudication of his security eligibility for a Top Secret clearance. (Tr. 24.)

Applicant denies that he intentionally concealed any information during his 2008 interview for a federal position. He explained that he was asked about events 12-15 years earlier, while he was in college, and he gave the best answers that he could at the time. (Tr. 23, 27-28.) Applicant testified, with no evidence to the contrary, that he has not been around any illegal drugs in the last 17 years. (Tr. 30.)

A friend of Applicant's, from their childhood and college days together, had direct knowledge that Applicant placed himself in "ill-advised situations and environments" in college. He regards Applicant's acts as indicative of carelessness but not of illegal drug activity. Knowing Applicant's character and upbringing, he does not believe that Applicant was actively involved with illegal drugs. On numerous occasions in the last 17 years, Applicant has told his friend about the importance of his security clearance to him, but he has not discussed matters of a sensitive nature. Applicant has given this friend no reason to distrust him. (AE M.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall 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, the 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 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 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. 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

The security concern for personal conduct 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. 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 Government alleges, and Applicant denies, that he was not candid during an interview for a pre-employment screening in July 2008 in that he refused to answer specific questions about his association and involvement with individuals engaged in illegal drug activities. Under AG ¶ 15, the refusal to cooperate or to provide truthful answers to lawful questions will normally result in an unfavorable clearance action under the following circumstances:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; or
- (b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

A pre-employment screening is not a personnel security determination. However, a suitability assessment for a sensitive federal position is a trustworthiness determination. Furthermore, two disqualifying conditions under AG 16 cover lack of candor in employment eligibility or suitability situations, as follows:

- (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

(b) deliberately providing false or misleading information concerning relevant facts to an employer; investigator; security official; competent medical authority, or other official government representative.

The evidence shows that Applicant was interviewed after a pre-employment polygraph examination in July 2008. He executed a supplement to his SF-86 application in which he admitted that when he was in college, he deliberately placed himself in situations where he inhaled marijuana from others smoking around him. He also indicated that he had been around large quantities of drugs, including as much as five large garbage bags of drugs, on several occasions in college and after he had graduated. Applicant was asked about the time frame when he was around large quantities of marijuana, and about his role, if any, and that of others, in possessing and distributing marijuana. The government agent, who presumably acted within the scope of his duties in the absence of proof to the contrary, concluded that Applicant was uncooperative because he “would not give a specific location, who he was with, or the time frame for these instances,” other than to indicate that it was several times after he graduated and that he knew the marijuana was for distribution. The investigator ended the interview because Applicant reportedly would not answer the specific questions posed to him. Applicant denies that he refused to cooperate or that he intentionally concealed information. Instead, he did the best that he could do when asked about circumstances that occurred some 12 to 15 years before his pre-employment interview. He was asked “very specific and direct questions about things that happened during college and immediately after college, and [he] couldn’t give him the answers he was looking for.” (Tr. 28.)

Concerning his post-college association with the persons who possessed large quantities of marijuana for distribution, Applicant testified that for three to four months after he graduated, he went between his new job and his former school environment. He was around large quantities of drugs in the latter setting, when he “was still with some of [his] friends, some of [his] associates that [he] knew throughout college.” (Tr. 30.) This suggests that Applicant had a close enough relationship with persons involved in illegal drug activity to have known their names and to perhaps provide a reasonable estimate of the circumstances and the time frame of their association. Even so, one wonders what Applicant would have stood to gain by volunteering that he associated with persons involved in suspected criminal drug activity after college and then concealing details about this association. The government agent is not a source of questionable reliability, but the report of the interview is not specific enough to establish the refusal to cooperate under AG ¶ 15(b) or the intent to deceive under AG ¶ 16(b). It is possible that Applicant could not recall the detail wanted by the interviewer, considering that he asked about self-reported circumstances that occurred 12-15 years ago. A transcript of the interview, which could have shed light of the questions and Applicant’s responses, is not in evidence. AG ¶ 17(f), “the information was unsubstantiated or from a source of questionable reliability,” applies.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of his conduct and

all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).¹ As an immature college student, Applicant exercised very poor judgment by intentionally socializing with others while they smoked marijuana and by associating with persons in possession of large quantities of marijuana for distribution. There is no evidence of other drug involvement on his part, or of any association with drug users since the fall of 1996. For the past 17 years, Applicant has been a law-abiding citizen, who has dedicated himself to his professional career and to establishing a stable family life. Several employment references attest to the high regard in which Applicant is held by his co-workers, government customers, and executive management for his work performance, including adherence to security regulations; for his leadership; and for his ethical behavior. Based on all the facts and circumstances, I conclude that it is clearly consistent with the national interest to continue Applicant's security clearance eligibility at this time.

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: FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Elizabeth M. Matchinski
Administrative Judge

¹The factors under AG ¶ 2(a) are as follows:

- (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.