



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 12-03267
)	
Applicant for Security Clearance)	

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: David P. Price, Esq.

03/22/2013

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement) and E (Personal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on November 8, 2011. On October 1, 2012, the Defense of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guidelines H and E. DOD 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 DOD on September 1, 2006.

Applicant received the SOR on October 22, 2012; answered it on October 29, 2012; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on January 18, 2013, and the case was assigned to me on

January 23, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 28, 2013, scheduling it for March 1, 2013. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified, presented the testimony of three witnesses, and submitted Applicant's Exhibits (AX) A through H, which were admitted without objection. DOHA received the transcript (Tr.) on March 14, 2013.

Administrative Notice

Applicant requested that I take administrative notice of information related to the use of Adderall and Ritalin by college students, based on a medical journal article, transcripts of two news broadcasts, and a list of web sites containing information about use by college students. Department Counsel objected, and I declined to take administrative notice, because the facts set out in the source materials for Applicant's request were not shown to be generally known and not subject to reasonable dispute. However, I admitted the source documents as Applicant's Exhibit H and advised the parties that I would determine what weight to give the source documents after reviewing all the evidence in the record.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR, with explanations for the conduct alleged under Guideline E. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 24-year-old employee of a federal contractor. He graduated from college in May 2011 with a bachelor's degree in telecommunications and immediately began his employment with a federal contractor. He began working for his current employer in September 2012.

Applicant grew up in a small rural town. He attended a public grade school through the third grade, and then was in a private church-affiliated grade school from the fourth through seventh grade. He completed middle school and high school in a public school. (Tr. 51-52.) He was an average student and had no disciplinary problems. He helped his father in his electronics business and his mother in her bridal shop. (Tr. 54-55.)

Applicant has two siblings, a 30-year-old sister and a 16-year-old brother. Applicant invited his younger brother to attend the hearing, because he believed his brother would learn a valuable lesson by seeing the adverse consequences of drug use and falsification. (Tr. 111.)

Applicant's mother was diagnosed with cancer the summer before his senior year in high school. (Tr. 86.) He learned that her cancer was terminal shortly before he started his freshman year in college. He came home on most weekends to visit his mother. (Tr. 87.) She passed away two months after classes started, in late October

2006. (Tr. 58-59.) Applicant attended two sessions of grief counseling but found it ineffective. (Tr. 92.)

Applicant first used marijuana during an orientation visit to his college in April 2006, when it was offered to him by a student who was his host. (Tr. 84-85.) He testified that the transition from the small-town atmosphere to life in college was “a major cultural shock.” He found that most of his fellow students were from the northeastern United States, many from big cities, and they had an attitude and “an edge” that he had not experienced before. During his freshman year, he was on academic probation and grieving the loss of his mother. He used marijuana in an effort to be accepted and to relieve stress. (Tr. 88-89.) He also began using Adderall and Ritalin as a “study aid.” He experimented once with hallucinogenic mushrooms in November 2010. (GX 2 at 43-44.)

In February 2007, Applicant enlisted in the Army National Guard (ARNG). (AX C.1.) He testified that he felt he needed the discipline and structure of military service. His father had served in the U.S. Air Force from September 1981 to December 1987, and was a navigator and electronic warfare officer on B-52 bombers. His grandfather also was a military veteran. (Tr. 50-51; 90-91; AX D.1.)

A Report of Medical Examination (DD Form 2808) dated February 24, 2007, reflects Applicant’s physical examination upon enlistment. Block 50 of this form, pertaining to testing for drugs, contains the handwritten letters, “THC” (tetrahydrocannabinol, the active ingredient in marijuana). (AX C.3.a at 2.) Applicant testified this entry was made on his DD Form 2808 because an interviewer at the Military Entrance Processing Station (MEPS) asked him if he had used drugs, and he answered “Yes.” (Tr. 105-06.)

Applicant submitted an SCA on February 25, 2007. He answered “No” to all the questions in Section 24, asking about drug involvement. (GX 1 at 22.) He did not disclose his use of marijuana, Adderall, and Ritalin.

Applicant testified that he did not realize that one of the forms he executed was a security clearance application. He testified that while he was filing out various forms, he told an ARNG recruiter that he had attended grief counseling after his mother’s death. According to Applicant, the recruiter told him not to disclose the grief counseling because it would complicate and delay his enlistment. He was scheduled to report for basic training in May so that he could return to college in the fall. Based on the recruiter’s advice about the risk of delaying his enlistment by disclosing potentially derogatory information, he decided to answer “No” to the drug-related questions. (Tr. 92-93.) Although Applicant denied knowing that he was submitting an application for a security clearance, he knew that he was submitting documents related to his enlistment, and he knew that his negative answer to the drug-related questions was false. (Tr. 129-30.) He was granted a security clearance in April 2007, but apparently was unaware of it. (GX 3; Tr. 93-94.)

Applicant testified that he received training on the Army's drug use policy during his basic training. He also received annual refresher training on the Army policy from his ARNG unit. He testified that he had no doubt that his drug use was prohibited by the Army. (Tr. 113-15.)

In September 2009, Applicant tested positive for THC at a random urinalysis while he was attending an ARNG drill. He was notified of the result in May 2010. (Tr. 96-97.) He was required by his ARNG commander to attend two eight-hour counseling sessions in July and August 2010, which he completed. (GX 2 at 45.) He testified that he received no diagnosis or prognosis when he completed the counseling. (Tr. 138.)

As a result of Applicant's positive urinalysis, he was placed in a "hold" status, required to turn in his field equipment, and notified that he was being considered for administrative separation. (Tr. 97.) He believed that his career in the ARNG was ended, and he continued to use marijuana. (Tr. 98.)

In February 2011, the Adjutant General of the state ARNG directed that he be discharged with a general discharge under honorable conditions, but his discharge was suspended for one year, subject to the requirements that he submit to urinalysis tests at the discretion of his commander, submit to a drug treatment program, remain drug free during the period of probation and exhibit the potential to remain drug free thereafter, refrain from unlawful or inappropriate conduct, and maintain suitable duty performance and attendance. (AX A.) He testified that he was unaware of his probationary status until August 2011, when he inquired about attending his unit's annual training. (Tr. 102-03.) In February 2013, he extended his enlistment in the ARNG for one year. (AX C.1.)

When Applicant submitted his most recent SCA in November 2011, he disclosed his drug involvement in great detail. He estimated that the frequency of his marijuana was as follows: three times between April and August 2006; about eight times a month from August 2006 to February 2007 and from August 2007 to July 2008; about twelve times a month from October 2008 to May 2009; about eight times a month from May 2009 to November 2010; and three times between November 2010 and March 2011. He stated that he did not use marijuana from February to August 2007 and July to October 2008. (GX 2 at 41.) He estimated that he used Adderall and Ritalin about 20 times during his five-year college career. (GX 2 at 44.)

Applicant testified that he purchased his marijuana from other students, but he never bought from drug dealers on the street. His suppliers were other students with whom he was acquainted. He obtained Adderall and Ritalin from classmates who had prescriptions for the drugs. He denied ever selling marijuana, Adderall, or Ritalin. (Tr. 120-21, 137.)

Applicant testified that he became concerned about his marijuana use around March 2010. He signed an apartment lease with two roommates who were not drug users, and he was disappointed when they started using marijuana after he moved in with them. (Tr. 99-100.) He stopped using marijuana regularly in November 2010, and

used it only three more times afterwards. He last used it after a long night of working on a thesis in March 2011.¹ He also stopped using Adderall and Ritalin at the same time. (GX 2 at 41.) He testified that he needed to make a break from his college behavior and prepare for life as an adult. At the hearing, Applicant submitted eight negative urinalysis tests conducted between November 6, 2012 and February 26, 2013. (AX B.)

Applicant's father was were unaware of his drug use while he was in college. (Tr. 60-61.) His father first learned about it when he saw the SOR. His father testified that Applicant has matured and is very serious about his employment and proud of his work. He described Applicant as committed and relentless when he decides to do something. (Tr. 62-64; AX D.1.)

Applicant's girlfriend testified that she met Applicant about four years ago, knew that he had used drugs, and "grilled" him about it because she does not use drugs and does not want to be around drug users. She testified that she would be "very upset" if he used drugs again, but she is confident that his drug use is behind him. (Tr. 72-75.) In a sworn statement, she stated that she and Applicant have lived together since September 2012 and intend to marry. She has watched him mature into a person that she deeply respects and trusts. (AX D.7.)

Applicant's current supervisor testified that he recruited Applicant to work for him in May or June of 2012, and Applicant came to work for him in September 2012. He has regular contact with Applicant two to four times a week. He testified that he was shocked when he read the SOR, because the person described in the SOR is not the person that he knows. He testified that Applicant is technically proficient and has progressed faster than they had expected. In his view, Applicant's integrity is "amongst the tops." He testified that Applicant was candid and forthright about his previous drug use, and he is confident that Applicant's drug use is behind him and will not recur. (Tr. 33-41; AX D.5.)

Applicant's former supervisor, a retired U.S. Navy captain, hired Applicant and had daily contract with him until January 2013. He found that Applicant "displayed a maturity and reliability far beyond his peers." He routinely observed that Applicant had the courage to tell him or other senior personnel unpleasant news. He believes that Applicant understands the mistakes of the past, has matured into a responsible adult, and can be trusted without qualification. (AX D.2.)

A professor emeritus in clinical psychology at Applicant's university, who is a former intelligence analyst, became acquainted with Applicant in the fall of 2007, and he hired him for a part-time job in web development. He became Applicant's friend and mentor. He learned that Applicant had a mild learning disability, and his lack of academic success led to lowered self-esteem and mild situational depression. He concluded that Applicant's marijuana use and one-time use of mushrooms were

¹ Applicant's thesis received a first place award in May 2011. (AX C.8.)

motivated by peer pressure, a desire to “belong,” and as a mood enhancer to treat his mild depression. He watched Applicant put his childish behavior behind him as he matured and became a very truthful and trustworthy individual. He believes that Applicant will remain “clean” for the rest of his life. (AX D.3.)

A coworker, who has worked with Applicant for about eight months after retiring from the Navy, submitted a statement attesting to his technical skills and dedication to his job. He described Applicant as very reliable and dependable. (AX D.4.) A lifelong friend described him as a person of integrity and discretion, strongly devoted to his family, and deeply remorseful over his previous drug involvement. (AX D.6.)

When Applicant answered the SOR, he stated that he had severed his relationships with his drug-abusing former roommates. He also included the following statement in his answer: “As part of my response to the Statement of Reasons I hereby make a statement of intent to never again abuse any illegal substance or misuse a legal medication, and accept an automatic revocation of my clearance for any violation of this statement of intent.”

Policies

“[N]o one has a ‘right’ to a security clearance.” 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 and 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 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.

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 H, Drug Involvement

The SOR alleges that Applicant used marijuana with varying frequency from at least April 2006 until at least March 2011 (SOR ¶ 1.a), used hallucinogenic mushrooms on at least one occasion in November 2010 (SOR ¶ 1.b), and used Adderall and Ritalin without a prescription on various occasions between December 2006 and March 2011 (SOR ¶ 1.c). It also alleges that he used these illegal drugs while holding a security clearance that he received in about April 2007 (SOR ¶ 1.d). Finally, it alleges that he tested positive for THC during a random urinalysis in September 2009 (SOR ¶ 1.e.)

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.” AG ¶ 24(a)(1) defines “drugs” as “mood and behavior altering substances,” including “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(b) defines “drug abuse” as “the

illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

Applicant’s admissions in his response to the SOR and at the hearing establish the following disqualifying conditions:

AG ¶ 25(a): any drug abuse;

AG ¶ 25(b): testing positive for illegal drug use;

AG ¶ 25(c): illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(g): any illegal drug use after being granted a security clearance.

The following mitigating conditions are potentially relevant:

AG ¶ 26(a): 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(b): 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; and

AG ¶ 26(d): satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant’s drug abuse was frequent and did not occur under circumstances making it unlikely to recur. Thus, my analysis is focused on the first prong of AG ¶ 26(a) (“happened so long ago”). There are no “bright line” rules for determining when conduct is recent. The determination must be based on a careful evaluation of the totality of the evidence. 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.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

I conclude that AG ¶ 26(a) is established. Two years of abstinence is a “significant period of time,” although the significance of that time period is diminished by

Applicant's frequent drug abuse for the preceding five years. However, his change of circumstances from college life to professional life, his deep affection for a young woman who strongly disapproves of drug use, his severing of relationships with drug-using former roommates, the support his family has shown after learning of his drug abuse, and the impressive testimonials from his supervisors have persuaded me that he is rehabilitated. AG ¶ 26(b) also is established by this evidence and the statement of intent that Applicant included in his answer to the SOR.

AG ¶ 26(d) is not fully established. Applicant was required by his ARNG unit to undergo two eight-hour substance abuse counseling sessions, and he completed the requirement in August 2010. However, he continued his drug abuse until March 2011. There is no evidence that he received a diagnosis or prognosis upon completion of the command-mandated counseling sessions. However, the clinical psychologist for whom he worked in college opined that his drug abuse is not likely to recur.

Guideline E, Personal Conduct

The SOR cross-alleges the Guideline H allegations under this guideline (SOR ¶ 2.a). It also alleges that Applicant deliberately failed to disclose his marijuana use when he submitted SCA on February 25, 2007 (SOR ¶ 2.b). 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 conditions relevant to Applicant's answer to Question 24e on his SCA are:

AG ¶ 16(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

AG ¶ 16(b): deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

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 testimony that he did not realize that he was applying for a security clearance plausible and credible. However, his ignorance of the specific purpose of the form he executed is of minimal security significance. He admitted that he deliberately and falsely answered "No" to the relevant question about drug use. He knew that the questionnaire was part of his enlistment process. Thus, AG ¶ 16(a) is established, because he knew that the form he executed would be used to "determine employment qualifications" and "award benefits or status." AG ¶ 16(b), which is broader in scope, is also established.

Three mitigating conditions are potentially relevant:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

AG ¶ 17(b): 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; and

AG ¶ 17(c): 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(a) is not fully established. Applicant's disclosure of his drug use during the MEPS interview on February 24, 2007, preceded his submission of his false SCA on February 25, 2007, and was not intended to correct an earlier omission of information. He made full disclosure of his drug abuse in his November 2011 SCA, but that disclosure was not "prompt." It was, however, made in good faith and before he was confronted with any evidence of his drug abuse. In fact, he was never confronted with any evidence, and his disclosure was the sole basis for the SOR.

AG ¶ 17(b) is established. I found Applicant's testimony about the bad advice from the ARNG recruiter plausible and credible. When Applicant submitted his next SCA, he was totally candid.

AG ¶ 17(c) is established. Applicant's falsification was not "minor" because it undermined the integrity of the security clearance process. See ISCR Case No. 01-03132 (App. Bd. Aug. 8, 2002). It did not happen under unique circumstances. However, it happened six years ago and was a one-time event. Applicant was an 18-

year-old, immature, naïve college student when he submitted his false SCA. He has since matured, expressed remorse, and gained a reputation for integrity and honesty.

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 H 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 was candid, sincere, and remorseful at the hearing. He is still young, but he has made a clean break from his college days. He is fortunate to have a close family and the love of a young woman who admires him but will not tolerate drug abuse. He was enthusiastic about his work, and his superiors were enthusiastic about having him as a member of their team.

Applicant's lack of candor on his first SCA and his serious breach of trust by abusing drugs while holding a clearance and serving in the ARNG placed a heavy burden on him to demonstrate that he has been rehabilitated. I am satisfied that he has carried that burden. By inserting the "statement of intent" in his response to the SOR, he put himself on indefinite probation, reinforcing the likelihood that his drug abuse will not recur.

After weighing the disqualifying and mitigating conditions under Guidelines H and E, evaluating all the evidence in the context of the whole person, and mindful of my obligation to resolve close cases in favor of national security. I conclude Applicant has mitigated the security concerns based on his drug involvement and personal conduct. Accordingly, I conclude he has 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:

Paragraph 1, Guideline H (Drug Involvement): FOR APPLICANT

 Subparagraphs 1.a-1.e: For Applicant

Paragraph 2, Guideline E (Personal Conduct): FOR APPLICANT

 Subparagraphs 2.a-2.b: For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge