



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



In the matter of:

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ISCR Case No. 16-00258

Applicant for Security Clearance

Appearances

For Government: Alison O'Connell, Esq., Department Counsel

For Applicant: *Pro se*

11/14/2017

Decision

HARVEY, Mark, Administrative Judge:

Applicant frequently used marijuana from 1999 to 2003, and in May 2007, he used marijuana and was charged with possession of drug paraphernalia and driving while impaired. He completed March 15, 2004, and October 21, 2014 Questionnaires for National Security Positions (SF 86) or security clearance applications (SCA), and he did not disclose the negative information about marijuana involvement or his May 2007 arrest and charges. Personal conduct security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On March 15, 2004, and October 21, 2014, Applicant completed and signed SCAs. Government Exhibits (GE) 1, 2. On October 30, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, effective on September 1, 2006 (Sept. 1, 2006 AGs).

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine

whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under the personal conduct guideline.

On November 23, 2016, Applicant responded to the SOR and requested a hearing. Hearing Exhibit (HE) 3. On December 29, 2016, Department Counsel issued an amended SOR. HE 4. Applicant received the amended SOR and elected not to admit or deny the allegations in the amended SOR. Transcript (Tr.) 17. On January 4, 2017, Department Counsel was ready to proceed. On July 17, 2017, the case was assigned to me. On September 13, 2017, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for October 12, 2017. HE 1. Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered three exhibits; Applicant did not provide any documents; there were no objections; and all proffered exhibits were admitted into evidence. Tr. 10, 18-19; GE 1-3. On October 20, 2017, DOHA received a hearing transcript.

While this case was pending a decision, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. I have evaluated Applicant's security clearance eligibility under the new AGs.¹

Findings of Fact²

In Applicant's SOR response, he admitted the SOR allegation in SOR ¶ 1.b and he denied the other SOR allegations. He also made partial admissions of some SOR allegations, and he provided mitigating information. Applicant's admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is 37 years old, and the same DOD contractor has employed him for the previous 13 years. Tr. 6, 41. He is currently employed as a logistics analyst. Tr. 43. In 1998, he graduated from high school. Tr. 6, 21. In 2002, he received a bachelor's degree with majors in communications and theater arts. Tr. 7, 21. He has never married; his children are ages 6 and 13; and he has not served in the military. Tr. 7.

From 1999 to 2002, Applicant used marijuana once or twice a month while he was attending college. Tr. 21. He continued to use marijuana until he obtained employment with a DOD contractor in February 2004. Tr. 21.

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

² Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Question 27 of Applicant's March 15, 2004 SCA asked, "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana . . . ?" GE 2; SOR ¶ 1.c. Applicant answered, no, and he did not disclose his extensive marijuana use from 1999 to November or December 2003. Tr. 24; SOR ¶ 1.c. He said he did not disclose his marijuana use because he wanted "this particular job," and he had stopped using marijuana about three months before he completed the March 15, 2004 SCA. Tr. 23-24; SOR response. He needed the employment so that he could support his family. Tr. 24. In 2005, he received a security clearance. Tr. 25.

In regard to marijuana use after he received a security clearance, Applicant said he "may have—I can't remember totally. I may have smoked something once or maybe twice" Tr. 25-26. He conceded he used marijuana the day of his arrest in May 2007. Tr. 26. Then he said that the day of his arrest in May 2007 was the only time he used marijuana after receiving a security clearance. Tr. 26.

In May 2007, Applicant drank four beers and two shots of vodka at a party. GE 3. He also used marijuana. He stopped consuming alcohol about three hours before leaving the party. GE 3. The police stopped Applicant because his tail light was not working. Tr. 28. The police found drug paraphernalia and marijuana in his car. Tr. 29. Applicant said the drug paraphernalia was found under his passenger seat; he did not know it was there; and he did not know what it was. Tr. 29. In his interview, he "guessed" that they found his passenger's marijuana on his passenger and rolling papers under the passenger seat. Tr. 29-30. His passenger was not arrested. Tr. 30. Then Applicant said the marijuana was found under the passenger seat too. Tr. 30. His breathalyzer was below the threshold for driving while intoxicated. GE 3. He said he did not understand how the police decided he was driving while impaired. Tr. 30.

Applicant denied any knowledge that the marijuana or drug paraphernalia was in his car before the police discovery. Tr. 30. Applicant was facing five years in jail; his lawyer urged him to plead guilty; they dropped some of the charges; he pleaded guilty to possession of drug paraphernalia and driving while impaired; and he received two years of probation before judgment. Tr. 30-31, 38-39; SOR ¶ 1.a. While Applicant was on probation, he passed all drug tests, and after six months, he was released from supervised probation. Tr. 32. The court did not order, and he did not receive counseling for drug abuse. Tr. 52-53.

Section 22 of Applicant's October 21, 2014 SCA asked, "Have you **EVER** been charged with an offense involving alcohol or drugs?" GE 1 (emphasis in original); SOR ¶ 1.d. Section 23 of his October 21, 2014 SCA asked, Have you **EVER** illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance . . . ?" GE 1 (emphasis in original); SOR ¶ 1.e. Applicant answered, no, to both questions and did not explain his possession of marijuana in May 2007.

Applicant said he conferred with coworkers and his boss, and based on what they told him, he answered no because he believed he only had to disclose his involvement with marijuana if it occurred within seven years of completion of his SCA. Tr. 33-34. He

chose to interpret the word “EVER” to really mean seven years. Tr. 34. He said he took “responsibility for answering that, ‘No,’ and not being truthful on that.” Tr. 35.

On October 27, 2015, Applicant denied to an Office of Personnel Management investigator that he had ever been charged with an offense involving alcohol and drugs. Tr. 35; GE 3.³ When he was re-questioned, he denied that he had been charged with any offenses in the last seven years. GE 3. He was reminded that the investigator was seeking information involving drug offenses without any time limit. GE 3. Applicant then disclosed the above information about his May 2007 arrest and guilty plea. GE 3. He explained he was never charged with driving while impaired. Tr. 36. He was only charged with possession of drug paraphernalia. Tr. 36. He conceded he was charged with five or six charges; however, several were dropped due to lack of evidence. Tr. 36. He initially denied the charges to the investigator because it was a weak case and the charges do not represent what actually happened. Tr. 37.

Applicant avoids locations where marijuana is used, and he avoids people that use marijuana. Tr. 27-28. One of Applicant’s closest friends continues to smoke marijuana; however, he does not use marijuana in Applicant’s presence. Tr. 43. He does not receive urinalysis tests for drug use from his employer. Tr. 28, 51. Applicant is a skilled musician who goes on tours sponsored by government agencies. Tr. 42. He expressed remorse for making inaccurate statements. Tr. 42. He said, “I realize I have lied about things in regards to marijuana and alcohol. It’s not something I’m proud of, but it doesn’t represent the work I’ve done as a contractor and with the government over the past 13 years.” Tr. 49. He emphasized his overall career as demonstrating his reliability, dedication, honesty, and contributions to his employer and the DOD. Tr. 48-49.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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

³ Applicant’s SOR does not allege that he consumed an excessive amount of alcohol or that he initially lied to the Office of Personnel Management investigator about his arrest record. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). *See also* ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). These allegations will not be considered except for the five purposes listed above.

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 applicant’s 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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 “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, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes four conditions that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, . . . determine security clearance eligibility or trustworthiness. . . .⁴

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: (1) untrustworthy or unreliable behavior . . . ; (2) any disruptive, violent, or other inappropriate behavior; and (3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct

⁴ The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing. . . .

The record establishes AG ¶¶ 16(a), 16(d), and 16(e). Applicant frequently used marijuana from 1999 to 2003, and in May 2007, he used marijuana at a party. At the party, he drank four beers and two shots of vodka. The police stopped him after the party. He was charged with possession of drug paraphernalia, driving while impaired, and some other offenses. His breathalyzer was below the threshold for driving while intoxicated. He subsequently pleaded guilty to possession of drug paraphernalia and driving while impaired. On his March 15, 2004 SCA, he falsely denied using marijuana in the past seven years. On his October 21, 2014 SCA, he falsely denied EVER using marijuana while holding a security clearance, and he falsely denied that he was EVER arrested for a drug-related offense. His assertion that he thought the questions on his 2014 SCA only sought information for the previous seven years is not credible. He took the time to ask coworkers for their opinions about the question, showing he read the question carefully and considered whether he should lie. He intentionally and deliberately falsified his 2004 and 2014 SCAs.

AG ¶ 17 lists conditions that could mitigate security concerns under Guideline E:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions apply. While Applicant's marijuana possession and use, possession of drug paraphernalia, and driving while impaired offenses are not recent, Applicant's falsifications of his 2004 and 2014 SCAs are serious and not mitigated. Applicant cannot be trusted to admit embarrassing negative information even when that information is sought in a security context. Personal conduct security concerns are not mitigated.

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 the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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.

Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline E are

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

Applicant is 37 years old, and the same DOD contractor has employed him for the previous 13 years. He is currently employed as a logistics analyst. In 2002, Applicant received a bachelor's degree with majors in communications and theater arts. He is a skilled musician who goes on tours sponsored by government agencies. He expressed remorse for making inaccurate statements. He said, "I realize I have lied about things in regards to marijuana and alcohol. It's not something I'm proud of, but it doesn't represent the work I've done as a contractor and with the government over the past 13 years." He emphasized his overall career as demonstrating his reliability, dedication, honesty, and contributions to his employer and the DOD.

The evidence against mitigation of security concerns is more substantial. Applicant's falsification of his SCAs in 2004 and 2014 by intentionally failing to disclose information about his criminal record and marijuana possession and use was deliberate and improper. His falsification in a security context raises a serious security concern. The protection of national security relies on applicants to self-report conduct that jeopardizes security, even when that disclosure might damage the applicant's career. Applicant cannot be trusted to disclose potentially derogatory information. He did not establish his reliability, trustworthiness, and ability to protect classified information.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Personal conduct security concerns are not mitigated.

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:	AGAINST APPLICANT
Subparagraphs 1.a through 1.e:	Against Applicant

Conclusion

In light of all of the circumstances in this case, it is not clearly consistent with the interests of national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge