



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



In the matter of:)
)
) ISCR Case No. 17-01467
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Susan Patrick, Personal Representative

09/28/2018

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant mitigated the personal conduct security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On July 21, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E (personal conduct). The action was taken under Executive Order (Exec. Or.) 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) implemented by DOD on June 8, 2017.¹

Applicant responded to the SOR on August 17, 2017 and August 28, 2017, and requested a hearing. The case was assigned to me on March 15, 2018. The Defense

¹ However, I also considered this case under the previous AG implemented on September 1, 2006, and my conclusions are the same using either set of AG.

Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 29, 2018, scheduling the hearing for May 2, 2018. I convened the hearing as scheduled.

I marked the Government's discovery letter and exhibit list as Hearing Exhibits (HE) I and II. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. Applicant testified, called one witness, and submitted Applicant's Exhibits (AE) A through C, which were admitted in evidence without objection. I *sua sponte* amended the SOR to correct a minor error in ¶ 1.e by replacing Section "23" with Section "27." Applicant's personal representative indicated that she understood the amendment and agreed that additional time to respond was unnecessary.² DOHA received the hearing transcript (Tr.) on May 10, 2018.

Findings of Fact

Applicant admitted the allegation in SOR ¶ 1.b. He admitted in part and denied in part SOR ¶ 1.a, and he denied SOR ¶¶ 1.c, 1.d, and 1.e. He is 24 years old. As of the date of the hearing, he had never been married and he did not have any children.³

Applicant graduated from high school in 2012. He earned a bachelor's degree in 2016 and, through an accelerated program, a master's degree in 2017; both degrees are in computer engineering. He has worked as a computer engineer for a defense contractor since July 2017. In college, he worked as a summer intern for the federal government and several defense contractors. He has never held a security clearance. His interim clearance from 2016 was terminated when the SOR was issued.⁴

During his first and second years of high school between 2009 and 2010, Applicant burglarized a convenience store on one occasion and shoplifted from multiple stores on various occasions (SOR ¶ 1.b). He stole cigarettes and a bottle of liquor from a store that was closed but unlocked. He also stole candy, toys, beer, and liquor from various stores. He was never arrested or criminally charged for any theft-related offenses. He was charged with three alcohol-related offenses in 2010, when he was a minor. Two of the offenses were dropped and he paid a fine for the third. He received court-ordered alcohol counseling in 2011 and was determined to not have an alcohol problem. He has not since been arrested or charged with any criminal-related offenses. He testified that he was a different person then, he regrets his juvenile behavior, and he matured in his latter two years of high school. He became active on a sports team and was its team captain in 2012. He became the president of his senior class. He graduated with a 3.5 grade point average.⁵

² Tr. at 79.

³ Response to the SOR; Tr. at 9, 42, 56; GE 1, 3; AE A.

⁴ Tr. at 5, 41-45; GE 1, 2, 3.

⁵ Tr. at 25, 41-45, 55-56, 61, 65; GE 1, 2, 3; AE A.

When Applicant was in college, he applied for a job with another government agency (AGA) in 2014. He was required to complete a security clearance application (SCA) and take a polygraph examination for a security clearance. This was the first time he underwent the security clearance process. He completed an SCA in around October 2014 and underwent four polygraphs from December 2014 to March 2015. He testified that he was given a conditional offer pending a clearance, but he did not meet the requirements for the job because he was unable to obtain a clearance in time.⁶

Applicant's first polygraph occurred in December 2014. Prior to the polygraph, he was provided with information about the date of the polygraph and the nature of the questions that would be asked of him. He had an idea that he would be asked drug-related questions, and he was unsure whether he would be asked questions concerning illegal downloading. He testified that he underestimated the polygraph and did not spend much time thinking about his illegal drug use. He was unprepared and overwhelmed. During the polygraph, he disclosed that he used marijuana socially with friends 35 times from 2008 to 2010. He disclosed that he paid \$20 for marijuana two to three times. He also disclosed that he used two of his father's prescription Percocet pills in two days. The polygraph report reflects that Applicant disclosed such drug use on his 2014 SCA.⁷

Applicant's second polygraph occurred on January 21, 2015. Prior to the polygraph, he was again provided with information about the date of the polygraph. He could not recall whether he was also told beforehand what would be discussed during the polygraph, but he testified that "it was the same thing as before, so I knew more what to expect." The report indicates that Applicant clarified that his past usage of marijuana was between 35 and 80 times, from 2008 to possibly early 2011, and that Applicant could not provide a more accurate estimate because his usage of marijuana varied. He disclosed that he sold marijuana to another individual once in 2009 for \$5. He disclosed that he once attempted to grow marijuana in his closet for his personal use in 2009, but was discovered by his parents who made him throw it out. He indicated that he stopped smoking marijuana because he began to not like it and he started to socialize with different friends.⁸

Applicant also disclosed during his second polygraph that he used one to two Zoloft pills approximately two times weekly from 2010 to 2011, for a total of 30 times. He indicated that the Zoloft was prescribed to his mother, and he took it without her knowledge when he started to feel depressed and stressed. He disclosed that once in 2010, he took four or five blood pressure pills prescribed to his father without his father's knowledge, because he wanted to see how it made him feel. He disclosed that he took his friend's Vicodin medication with his friend by crushing two pills and snorting it through his nose, and he later felt bad that he did this. He disclosed that he bought one psychotropic mushroom from a friend in 2008 for \$20, stored it at home for a later time,

⁶ Tr. at 27-36, 39-40, 45; GE 1, 2, 3. Applicant's 2014 SCA was not a part of the record.

⁷ Tr. at 27-36, 46-47, 63-65; GE 1, 2.

⁸ Tr. at 27-35, 47-48, 63-64; GE 1, 2; AE A.

but discarded it after it melted. He testified that though he knew the various prescription medications were not his, the illegality of using prescription drugs not prescribed to him did not concern him at the time. He testified that he does not intend to misuse any prescription drugs in the future.⁹

While Applicant denied intentionally failing to disclose his misuse of Zoloft during his December 2014 polygraph (SOR ¶ 1.c), the polygraph report reflects that Applicant did not list this additional drug usage on his 2014 SCA or discuss it during his first polygraph because he was not being as thorough as he should have been and he was withholding information. The report specifically indicates:

[Subject's] previous Report of Polygraph Examination was reviewed with [Subject], and all information contained therein was deemed complete and accurate. [Subject] believes he did not successfully complete his previous polygraph examination because he was not forthright with information and was not confident with his answers. [Subject] entered the polygraph interview with a written list of issues or concerns that he had since his first polygraph. . . .

Applicant testified that he did not recall some of his drug usage during his first polygraph. He testified that he realized that he needed to be more prepared and more thorough, and he also had more time to think about his past drug usage. But he also acknowledged that he intentionally withheld information about the full extent of his drug usage during his first polygraph. He testified that while he did not begin his first polygraph with the intent to withhold such information, he reacted in such a manner out of fear and shame for his past drug usage.¹⁰

Applicant denied intentionally failing to disclose his misuse of Zoloft in response to Section 23 of his March 2016 SCA (SOR ¶ 1.d), which inquired whether in the seven years prior, he had intentionally engaged in the misuse of prescription drugs regardless of whether or not the drugs were prescribed to him or someone else. He maintained at hearing that he did his best to disclose all that he could recall on his 2016 SCA, and he simply forgot to list his misuse of Zoloft. He testified that he did not recall his misuse of Zoloft until his 2016 background interview, though he did not recall whether he brought it up voluntarily during the interview or after he was confronted about it. He provided the same details about his Zoloft misuse during his background interview that he provided during his second polygraph.¹¹

Though he failed to list his Zoloft misuse on his 2016 SCA, he disclosed the same details about his marijuana usage, his one-time attempt to grow marijuana, and his one-time sale of marijuana, that he provided during his second polygraph. He also disclosed his misuse of his father's blood pressure medication in 2009, and his misuse

⁹ Tr. at 27-39, 47-53, 58-64; GE 1, 2; AE A.

¹⁰ Tr. at 27-35, 47-48, 63-64; GE 1, 2, 3; AE A.

¹¹ Response to the SOR; Tr. at 25, 36-39, 49-53, 58-64; GE 1, 2, 3; AE A.

of his friend's Vicodin medication once to twice in 2009. He noted that he did not intend to use marijuana in the future because it is illegal. He also noted that he did not plan to misuse prescription drugs that were not prescribed to him. He testified that he recalled these drugs when he completed his 2016 SCA because they were more notoriously abused. He reiterated that because he could not remember the exact number of times he used marijuana, he provided estimations during both his second polygraph and on his 2016 SCA. He also disclosed all of this information during his 2016 background interview.¹²

Applicant testified that he completed his 2016 SCA online. Though he did not believe that he was rushed to complete it, he testified that he "tried to just finish it all in one or two days. Get it over with." He knew that his responses would be assessed to determine his security-worthiness and they should be honest and truthful. He testified that he accessed some of his records to complete certain questions, but he also completed other questions, to include the drug-related questions, solely from memory. He testified that he did not receive any assistance when completing his SCA. He stated:

On every occasion I listed these from my own memory. I didn't put as much time into it. And what I should have done was have a record that I refer to each time. That way these mistakes didn't happen but again, it was just a mistake.

He continued, "I thought I'd disclosed everything to the best of my ability and wasn't concerned until the discrepancies came up later." He testified that he would disclose all relevant drug use in any future SCA.¹³

During his second polygraph, Applicant also disclosed that he illegally downloaded music, games, movies, software, and a college textbook onto his personal computer between around 2008 and late 2014 (SOR ¶ 1.a). He stated that he did so for his personal use and he had no future intent of engaging in illegal downloading. He further discussed his illegal downloading activities during his third and fourth polygraphs that occurred on January 22, 2015 and in March 2015. He testified that he was in college when he engaged in such activity and that it was common. He reiterated that he downloaded the materials onto his personal computer. He was unaware of any college rule that specifically prohibited such activity, though he recalled being warned against it. Since 2015, he has not engaged in illegally downloading because he was aware of its illegality and he understood that he should pay for media. He provided the same information about his illegal downloading activities during his October 2016 background interview.¹⁴

During his fourth polygraph, Applicant stated that he would discontinue his illegal downloading activities if he obtained the job for which he was applying, but he would

¹² Response to the SOR; Tr. at 25, 36-39, 49-53, 58-64; GE 1, 2, 3; AE A.

¹³ Tr. at 39-41, 49-51, 59.

¹⁴ Tr. at 25-35, 48, 53-55; GE 1, 2, 3; AE A.

continue if he did not (SOR ¶ 1.a). He testified that such a statement was a mistake, and he does not intend to engage in illegal downloading in the future. At the time he made such a statement, he testified that he felt he was being honest as he was in college and many of his peers were engaging in similar behavior. He wrongly reasoned that he could probably continue with illegal downloading on a semi-infrequent basis if he was not federally employed, as he had a gray understanding about the legality of his actions. Having graduated from college, he understood that he would not engage in such activity whether or not he was federally employed, because it is illegal.¹⁵

Applicant denied intentionally falsifying his response to a question in Section 27 of his 2016 SCA which inquired whether, in the seven years prior, he had “introduced, removed, or used hardware, software, or media in connection with any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines, or regulations or attempted any of the above” (SOR ¶ 1.e). He properly answered this question. His illegal downloading activities onto his personal computer does not fall within the scope of this question. As previously mentioned, he provided the same information about his illegal downloading activities during his 2016 background interview as he did during his latter three polygraphs.¹⁶

Applicant has not had any security violations. He testified that he was rated as exceeding expectations during his 2018 performance evaluation. His character references included his supervisor as well as his manager. They described Applicant as a hard worker who has demonstrated initiative and high potential. His supervisor stated that Applicant would be a “valuable resource” for classified projects. His manager stated that Applicant has admitted and accepted responsibility for his past mistakes. They both recommended him for a clearance.¹⁷

Applicant’s older sister testified as a character witness. As of the date of the hearing, she held a security clearance with AGA for eight years and worked for the U.S. Government. She testified that Applicant is a “thoughtful, well-intentioned, and intelligent young man” She stated that he did not have a direction when he began high school, but “he began becoming more aware that there was something beyond high school, beyond our small town” She testified that “he has proved to be quite an innovator with his engineering degree.” She testified that she was aware that he completed three SCAs, and she advised him that “the more forthright and open you are, the better they will be able to work with you in your application process.” She testified they “have a family lineage of at least one member of our family fighting in every war the United States has been in including the Alamo.” She also testified that their father retired from the U.S. Government after 25 years of service, their eldest brother achieved

¹⁵ Tr. at 25-35, 48-49; GE 1, 2, 3; AE A.

¹⁶ Tr. at 25-26, 39; GE 1, 2, 3; AE A.

¹⁷ Tr. at 56-58; AE B, C.

a high rank in the U.S. Navy, and they have another brother who is serving on active duty in the U.S. Navy.¹⁸

Policies

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 to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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 national security eligibility will be resolved in favor of the national security."

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 the 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Exec. Or. 10865 provides that adverse 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 Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

¹⁸ Tr. at 66-75; GE 1, 2, 3.

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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 conditions that could raise a security concern and may be disqualifying. I considered the following relevant:

(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 national security eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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;

(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 includes:

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

(2) while in another country, engaging in any activity that is illegal in that country;

(3) while in another country, engaging in any activity that, while legal there, is illegal in the United States; and

(g) association with persons involved in criminal activity.

Applicant burglarized one store and shoplifted from multiple stores between 2009 and 2010. He knowingly engaged in illegal downloading from around 2008 to 2015, and he indicated during his fourth polygraph in March 2015 that he intended to continue such activities. AG ¶¶ 16(c), 16(e), and 16(g) apply to SOR ¶¶ 1.a and 1.b. He also admitted that he intentionally withheld information about his 2010 to 2011 misuse of Zoloft during his first polygraph in December 2014. AG ¶ 16(b) applies to SOR ¶ 1.c.

Applicant credibly testified that he did not deliberately falsify his 2016 SCA when he forgot to list his 2010 to 2011 misuse of Zoloft in response to Section 23. His disclosure of detailed information concerning his marijuana involvement, as well as his disclosure of his misuse of blood pressure medication and Vicodin, lend credence to his testimony. In addition, by the time he completed his 2016 SCA, almost two years had passed since he disclosed his Zoloft misuse during his second polygraph on January 21, 2015, and six years had passed since his Zoloft misuse occurred. He also provided the same details about his Zoloft misuse during his 2016 background interview that he provided during his second polygraph. AG ¶ 16(a) is not established for SOR ¶ 1.d, and I find SOR ¶ 1.d in Applicant's favor.

Applicant properly answered the question in Section 27 of his 2016 SCA alleged in SOR ¶ 1.e. His illegal downloading activities onto his personal computer does not fall within the scope of this question. I find that AG ¶ 16(a) is not established for SOR ¶ 1.e, and I find SOR ¶ 1.e in Applicant's favor.

AG ¶ 17 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant:

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

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;

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

Applicant has not shoplifted, burglarized, or engaged in any similar criminal-related activities since 2010. He has also not engaged in any illegal downloading since 2015, when he was still in college. Though he stated during his fourth polygraph in March 2015 that he intended to continue such activities, he made such a statement when he was still in college and did not fully understand the illegality of his actions. He credibly testified that having graduated from college, he understood that he would not engage in such activities whether or not he was federally employed, because such activity is illegal. AG ¶¶ 17(c) and 17(g) are established for SOR ¶¶ 1.a and 1.b.

After his admitted intentional withholding of information concerning his drug usage, to include his Zoloft misuse, during his first polygraph in December 2014, Applicant fully disclosed such information during his second polygraph on January 21, 2015. Though he did not disclose his Zoloft misuse on his 2016 SCA, he credibly testified, as previously discussed, that he disclosed his drug usage to the best of his recollection. He disclosed information about all of his drug usage, to include his Zoloft misuse, during his 2016 background interview. As such, AG ¶¶ 17(a) and 17(e) are established for SOR ¶ 1.c.

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 relevant 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), 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. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis.

Applicant credibly testified at the hearing. He has taken responsibility for his past drug involvement, illegal downloading, and theft-related activities. He has also taken responsibility for his intentional failure to disclose his Zoloft misuse during his first polygraph in December 2014. He was candid, sincere, and remorseful. Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and

suitability for a security clearance. I conclude Applicant mitigated the personal conduct security concerns.

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
---------------------------	---------------

Subparagraphs 1.a - 1.e:	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 grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Candace Le'i Garcia
Administrative Judge