



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



In the matter of:)
)
) ISCR Case No. 17-02391
)
Applicant for Security Clearance)

Appearances

For Government: Andrew Henderson, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

04/20/2018

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the drug involvement and substance misuse concerns, but he did not mitigate the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On August 21, 2017, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H and Guideline E. DOD acted under Executive Order (EO) 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).

Applicant answered the SOR on September 15, 2017, and requested a hearing before an administrative judge. The case was assigned to me on October 31, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 11, 2017, and the hearing was convened as scheduled on January 16, 2018. The Government offered exhibits (GE) 1-5. I sustained objections to GE 4 and 5 and

they were not admitted. GE 1-3 were admitted into evidence without objection. The Government's exhibit index was marked as hearing exhibit (HE) I. Applicant testified, called two witnesses, and offered exhibits (AE) A-J, which were admitted without objection. Applicant's exhibit list was marked as HE II. DOHA received the hearing transcript (Tr.) on January 24, 2018.

Findings of Fact

Applicant admitted all the SOR allegations, with explanations in his answer. His admissions are incorporated as findings of fact. After a review of the pleadings and evidence, I make the following additional findings of fact.

Applicant is a 29-year-old employee of a defense contractor. He has worked in his current position since August 2016. He is pursuing a bachelor's degree. He is married, but has no children. He served in the Army from 2009 until 2013, after which he was honorably discharged. He deployed to Afghanistan on one occasion. He has held a security clearance since 2010.¹

The SOR alleges Applicant used marijuana in 2008 and in October 2013, while holding a security clearance. It also alleged he falsified information on his May 2009 and November 2009 security clearance applications (SCA) when he failed to disclose his 2008 marijuana use.

Applicant used marijuana in October 2008 before he joined the Army. He ate a marijuana-laced cookie provided by a friend. He knew the cookie contained marijuana at the time he used it. He felt ill after eating the cookie. He claimed he would not consume a marijuana-laced cookie in the future. In June 2013, Applicant had recently been discharged from the Army and as a celebration, a friend offered him a marijuana cigarette. He smoked the marijuana on that occasion. He claimed, again, that using marijuana made him ill. He believed he held a security clearance in October 2013. He claimed that was his last use of marijuana. He submitted three drugs tests from December 2017 and one from January 2018, showing negative results for all drugs tested. He provided a signed, sworn statement of intent not to use any illegal drugs in the future and consenting to an automatic revocation of his clearance should he fail to comply.²

When Applicant enlisted in the Army in 2009, he was required to complete a SCA. He did so in May 2009. He was specifically asked whether since age 16, or in the last 7 years, he ever used marijuana. He falsely answered, "No." He certified that his answers were "true, complete, and correct to the best of his knowledge and belief...." In November 2009, Applicant was again directed to complete a SCA. He did not recall why he needed to complete a second SCA after such a short time period. He was asked a similar question on the SCA about his past drug use and he again provided a false

¹ Tr. at 38-41; GE 1; AE B, H.

² Tr. at 41-42, 44, 50-51, 81-82; SOR Answer; GE 3; AE C-D.

answer claiming he did not use marijuana during the time specified. He served his entire four-year enlistment without disclosing his previous drug use. In February 2015, he completed another SCA in conjunction with seeking a security clearance for a civilian position. This time he disclosed both of his prior drug uses. In his SOR answer, Applicant referenced his May and November 2009 SCAs and stated, “I admit to consciously and willingly, attempting to hide the fact that I had consumed a marijuana-laced cookie in approximately October of 2008.” He went on to state that he knew if he answered yes he would not be allowed to enlist. He knew lying on the forms carried penalties, but he risked exposure to those penalties in order to enlist in the Army. His hearing testimony was consistent with his SOR answers on these points.³

Applicant now realizes it was wrong to lie on the 2009 SCAs. He claims he is a different man now than when he falsely completed the forms in 2009. He is older and more mature. He has a family, owns his own home, and has a positive credit record. His testifying coworkers described him as an outstanding performer who is honest and trustworthy. They were aware of his past actions that led him to this hearing. They support a continuation of his security clearance. He also provided letters of support from coworkers and certifications he has earned.⁴

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 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, these guidelines are applied 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

³ Tr. at 43-44; SOR Answer; GE 1-3.

⁴ Tr. at 19-23, 26-32, 43-45; SOR Answer; AE A, D, G, I-J.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 an 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 EO 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 H, Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern pertaining to drug involvement and substance abuse:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Controlled substance means any “controlled substance” as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

(a) any substance misuse; and

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant used marijuana in October 2008 and in June 2013, the later date while holding a security clearance. I find that both above disqualifying conditions apply.

AG ¶ 26 provides conditions that could mitigate security concerns. One potentially applies in this case:

(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.

Applicant's use of marijuana was infrequent and his last use occurred approximately five years ago. There is no evidence of more recent use. AG ¶ 26(a) applies.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security concern:

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 in this case. The following disqualifying conditions are potentially applicable:

(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.

Applicant admitted that he intentionally lied about his past marijuana when he completed two SCAs in 2009. He did so because he was afraid he would not be allowed to enlist in the Army if he disclosed his drug use. I conclude that he intentionally withheld this information when he completed his SCAs. AG ¶ 16(a) applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

(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; and

(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.

Honestly completing an SCA is the initial crucial step in gaining access to classified information. Applicant admitted lying on the two SCAs to gain a personal benefit, i.e., enlisting in the Army. He went on to serve his entire enlistment without notifying anyone of his falsification. The Government expects, and must rely on, the honesty of applicants during this process. Therefore, providing false information at this stage is not a minor offense. Such deliberate action casts doubt on Applicant's reliability, trustworthiness, and good judgment. AG ¶ 17(c) does not apply. His acknowledgment of his behavior came some six years after his falsifications. There is no evidence that he sought counseling for his behavior, and his other steps taken (changed attitude, family, and maturity) do not mitigate his untrustworthy behavior. AG ¶ 17(c) partially 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 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), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guideline and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's military service, including his deployment, his federal contractor service, the recommendations of his coworkers, his current level of maturity and family life, and his acknowledgement of his past falsifications. However, I also considered that he provided false information on two separate occasions and his lies were solely motivated by personal gain. He had numerous opportunities to come forward with the truthful information during his enlistment, but he failed to do so.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the drug involvement concerns, but he did not mitigate 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 H:	FOR APPLICANT
Subparagraphs: 1.a – 1.b:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs: 2.a – 2.b:	Against Applicant

Conclusion

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

Robert E. Coacher
Administrative Judge