



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



In the matter of:

[NAME REDACTED]

Applicant for Security Clearance

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ISCR Case No. 18-00175

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Chauncey B. Johnson, Esq.

11/05/2018

Decision

MALONE, Matthew E., Administrative Judge:

The record did not support the allegations that Applicant was fired from a previous job. It also was not established that he misrepresented the circumstances surrounding the end of that employment in his security clearance application or during interviews with a government investigator. Applicant's 2016 arrest for driving while intoxicated, and his use of marijuana the same day, are not disqualifying under the guidelines for drug involvement, criminal conduct or alcohol use. Nonetheless, under the personal conduct guideline, his arrest and drug involvement raised a security concern about his judgment and reliability. That concern is mitigated because his conduct was isolated, infrequent, and unlikely to recur. Applicant's request for a security clearance is granted.

Statement of the Case

On January 12, 2016, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain eligibility for a security clearance required for

his employment with a defense contractor. Based on the results of the ensuing background investigation, Department of Defense (DOD) adjudicators could not determine that it is clearly consistent with the interests of national security for Applicant to have a security clearance.¹

On March 7, 2018, DOD issued a Statement of Reasons (SOR) alleging facts that raise security concerns under the adjudicative guidelines for drug involvement and substance misuse (Guideline H) and personal conduct (Guideline E). Applicant timely responded to the SOR (Answer) and requested a hearing.

I received the case on August 9, 2018, and convened the requested hearing on September 28, 2018. The parties appeared as scheduled. Department Counsel proffered Government's Exhibits (GX) 1 and 2. Applicant testified and proffered Applicant's Exhibits (AX) A and B. All exhibits were admitted without objection.² Additionally, Applicant testified on his own behalf and presented a witness. I received a transcript (Tr.) of the hearing on October 9, 2018.

Findings of Fact

Under Guideline H, the Government alleged that between August 1992 and December 2016, Applicant used marijuana "with varying frequency," his last drug use occurring after he had submitted his e-QIP and as he held an interim security clearance (SOR 1.a).

Under Guideline E, the Government cross-alleged the illegal drug use addressed in SOR 1.a (SOR 2.e). It was also alleged that Applicant was arrested in December 2016 for driving while intoxicated (DWI) (SOR 2.a). Additionally, the Government alleged that in October 2015, he was fired from a previous employer for violating the employer's rules and/or policies (SOR 2.b). Additionally, the Government alleged that Applicant deliberately provided false or misleading answers to an e-QIP question about the circumstances under which Applicant left the job referenced in SOR 2.b (SOR 2.c). Finally, it was alleged that he deliberately tried to mislead a government investigator about those circumstances during a personal subject interview in June 2017 (SOR 2.d).

In response to the SOR, Applicant admitted SOR 1.a, 2.a and 2.e. He denied the remaining allegations. (Answer; Tr. 7 – 8) Applicant's admissions in response to the SOR establish those allegations as facts. Additionally, I make the following findings of fact.

Applicant is 44 years old and has worked for a defense contractor since January 2016. After submitting his e-QIP around the time he was hired, he was granted an interim security clearance pending the outcome of a background investigation. Applicant was interviewed or contacted for information by government investigators five times between

¹ Required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive), as amended.

² Tr. 10 – 17, 21.

June 7 and November 11, 2017. This is his first application for a security clearance. (GX 1 and 2; Tr. 40 – 41)

In response to questions in e-QIP Section 13A (Employment Activities), Applicant provided his employment history between January 2006 and January 2016, as required. Before being hired for his current job in January 2016, Applicant was unemployed from October 2015 through December 2015. Before that period of unemployment, he had worked at a law firm from April 2014 until leaving that job in October 2015. His stated reason for leaving was “Contract expired in October.” (GX 1)

During his background investigation, Applicant was first interviewed by a government investigator on June 7, 2017. During that interview, he confirmed his answers in Section 13A. On July 26, 2017, Applicant completed a follow-up interview with a government investigator. According to the summary of that interview, which Applicant reviewed and adopted with only one inconsequential change, he was presented with information showing he was actually fired from his law firm job in October 2015, and that he had received a written reprimand for misuse of his employer’s email system for personal purposes. The interview summary also shows he told the investigator that he had inadvertently (the investigator used the word “oversight”) failed to disclose the written reprimand. The summary goes on to state that Applicant “was confronted with information he was fired from the [law firm] and was not eligible for rehire.” No employment record or other documentation of the circumstances surrounding the end of Applicant’s employment at the law firm was presented at hearing. (GX 2; Tr. 50 – 51)

Applicant insisted in his July 26, 2017, interview and at his hearing, that the end of his employment was mutual. As to his statement to the investigator that he was not eligible for rehire, Applicant assumed the fact he left abruptly would preclude any possibility he might be rehired, and he stated that he never had any intention of seeking additional work at that firm. Applicant stated he decided to leave that job because, a few months earlier, he had learned that a co-worker doing the same work was being paid twice the hourly wage Applicant was paid. Applicant abruptly left the firm after several unsuccessful requests for a raise to bring his pay in line with his co-worker. In contrast to this representation of what Applicant told the investigator about a written reprimand, Applicant testified at hearing that he was only verbally counseled about using the firm’s email; that he never received any written warning or reprimand; that he was never told that the firm decided to fire him or that the end of his employment was characterized by the firm as involuntary; or that it was connected to his use of the firm’s email. Applicant acknowledged at hearing that he used a poor choice of words in his e-QIP to describe why he left, and that he now understands that he was never under contract (as opposed to employment at will) for that job. (Answer; Tr. 33 – 35, 40 – 41, 52 – 63, 69 – 70)

In December 2016, while in possession of an interim security clearance, Applicant got into an argument with his girlfriend, with whom he had been living. It was near the holidays, and it became apparent to Applicant that the relationship was likely to end soon. After leaving his girlfriend’s house, Applicant went to a bar in the neighborhood where he

grew up. He had several drinks with an old friend, who later in the evening, invited Applicant outside to smoke marijuana. Applicant accepted and took a few puffs from a joint. At the end of the evening, Applicant attempted to drive home, but he was pulled over for a traffic violation. The officer determined Applicant had been drinking, and Applicant admitted also having smoked marijuana that evening. Applicant failed a field sobriety test, and his blood-alcohol content was found to be above the legal limit. Applicant was arrested for DWI and spent one night in jail before being released on his own recognizance. On January 19, 2017, he was adjudged guilty of DWI and assessed a fine and court costs. He also was ordered to complete 20 hours of community service, attend a one-day DWI school, and have a breathalyzer interlock device installed on his care for one year. Applicant timely and successfully completed all aspects of his sentence. He testified that he was evaluated by the DWI school and found to be nothing more than a social drinker. Applicant does not drink and drive, but drinks a few beers every week. Aside from a minor in possession of alcohol charge when he was 19 years old, Applicant has not had any adverse interactions with law enforcement. (GX 2; AX B; Tr. 24 – 30)

Applicant gain was interviewed by an investigator on November 17, 2017. The summary of that interview begins by stating that “[the record] reflects [Applicant] smoked marijuana once a month on weekends. The last use of marijuana was December 2.” The summary does not otherwise specify what the investigator’s source of that information was. Having reviewed all of the available information probative of Applicant’s use of marijuana, I find as fact that, before December 2016, Applicant had not smoked marijuana since 1992, when he experimented with it during his first year of college. The total number of times Applicant has used marijuana over that 24-year span is five or less. To imply from the statement about his use in the summary of interview, above, that Applicant used once a month over any period of time since 1992, would be untenable. Applicant insists that, aside from minor experimentation with marijuana was while he was in his first year of college, the only time he used marijuana was on the night he was arrested for DWI in 2016. There is no indication that he has used marijuana since that evening in December 2016. Nor has had any further contact with the old friend with whom he used marijuana that evening. Applicant does not interact with anyone who uses marijuana or any other illegal drugs. (Answer; GX 2; Tr. 25 – 26, 30 – 32, 39, 42 – 43, 45)

Applicant has a good performance record in his current job. The government program manager and his company supervisor hold him in high regard for his professionalism, reliability, work ethic, and overall integrity. A former co-worker, who still sees Applicant socially on occasion, testified she has never seen Applicant use drugs or become intoxicated. She believes Applicant is a good person. (AX A; Tr. 35 – 38, 71 – 78)

Policies

This case is governed by the adjudicative guidelines (AG) issued by the Director of National Intelligence on December 10, 2016, and made effective for all adjudications

on or after June 8, 2017. Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,³ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(d) of the guidelines. Commonly referred to as the “whole-person” concept, those factors are:

(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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁴ for an applicant to either receive or continue to have access to classified information.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁵ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁶

³ See Directive. 6.3.

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ See *Egan*, 484 U.S. at 528, 531.

⁶ See *Egan*; AG ¶ 2(b).

Analysis

Drug Involvement and Substance Misuse

The security concern about Applicant's involvement with illegal drugs is stated at AG ¶ 24:

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.

In addition to Applicant's admission of the allegation at SOR 1.a, available information shows he first used marijuana as a teenager in the first year of college, but that he did not use marijuana again until December 2016. When he used marijuana in 2016, he did so while holding a security clearance. The fact that it was an interim clearance does not matter. This information requires application of the disqualifying conditions at AG ¶¶ 25(a) (*any substance misuse (see above definition)*) and 25(f) (*any illegal drug use while granted access to classified information or holding a sensitive position*).

By contrast, the following AG ¶ 25 mitigating conditions apply:

(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; and

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

(1) disassociation from drug-using associates and contacts; and

(2) changing or avoiding the environment where drugs were used.

Applicant committed an egregious lapse in judgment in December 2016 when, while holding a security clearance, he got drunk one night and accepted an offer to smoke marijuana. He did so under circumstances – after an argument with his now former girlfriend – that are unlikely to recur. His marijuana use was infrequent, December 2016

being the first time in 24 years that he smoked marijuana. It also appears to have been the only instance of drug use that is relevant to the current assessment of his suitability for access to classified information. Applicant association with the old friend with whom he used drugs was isolated, and Applicant does not currently associate with anyone who uses illegal drugs. I conclude he is unlikely to use drugs again and that the security concern under this guideline is mitigated.

Personal Conduct

The security concern under this guideline is articulated at 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Applicant denied the allegations at SOR 2.b – 2.d. Therefore, the burden to prove those controverted issues of fact remained on the Government.⁷ As for the circumstances under which Applicant left his law firm job in October 2015, Applicant was unaware that his departure was characterized by employment records as involuntary. Applicant used his employer's email for improper purposes and was reprimanded for it. Whether the reprimand was written or verbal is largely irrelevant here. There is insufficient information, in response to Applicant's denials, which shows he was fired, whether it be for misusing email or for any other reason. The record evidence as a whole on this issue shows that Applicant left the law firm voluntarily. SOR 2.b is resolved for the Applicant.

In an interview on June 7, 2017, Applicant confirmed his answers in e-QIP Section 13A. In SOR 2.c and 2.d, it was alleged that those statements constituted deliberate

⁷ Directive, E3.1.14.

falsifications.⁸ Those allegations require consideration of the following AG ¶ 16 disqualifying conditions:

(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; and

(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.

In a follow-up interview on July 26, 2017, an investigator confronted Applicant with information that showed he had been fired from the law firm. The information with which Applicant was confronted is not available here. During that interview, Applicant stated he left the firm “by mutual agreement.” Because it was not established that Applicant’s departure was involuntary, and because his stated reasons for leaving that job are plausible, I conclude that his stated reason for leaving the job was not an intentionally false statement. The record evidence as a whole regarding Applicant’s intent at the time he submitted his e-QIP shows he did not intend to omit information or provide false information. The same conclusion extends to his statements in his subject interviews about the end of his law firm employment. Applicant understood that he left the job voluntarily. Because he characterized his departure differently in his e-QIP and his interviews does not mean he intended to be deceptive.⁹ AG ¶¶ 16(a) and 16(b) are not supported by this record, because it was not established that he intended to falsify or otherwise mislead about these matters. SOR 2.c and 2.d are resolved for the Applicant.

Applicant admitted the allegations at SOR 2.a and 2.e. Available information does, indeed, show that Applicant was arrested and convicted of DWI in December 2016. It also

⁸ The questions in e-QIP 13C (Employment Record) are intended to find out if, in the preceding seven years, the person completing the e-QIP was ever fired from a job, quit a job after being told he would be fired, left a job by mutual agreement following charges of misconduct, left a job by mutual agreement following notice of poor performance, had received a written warning, had been officially reprimanded, suspended, or disciplined for workplace misconduct. In response to those questions, Applicant answered “no.” The Government did not alleged that Applicant’s negative answers in Section 13C were also deliberate false statements.

⁹ See, e.g. Appeal Board Decision, ISCR Case 00-0201, dated April 23, 2001 (An intent to falsify can be proven by direct or circumstantial evidence. An applicant’s statements about his or her intent or state of mind are relevant evidence, but they are not binding or conclusive evidence. Rather, an applicant’s statements must be considered in light of the applicant’s credibility and the record evidence as a whole. (*citations omitted*)).

shows that he used an illegal drug the same night, at a time when he held an interim security clearance. The allegations at SOR 2.a and 2.e are established.

For the same reasons I concluded Applicant's drug use was mitigated under Guideline H, above, I conclude it would also be mitigated under the criminal conduct guideline. Likewise, Applicant's DWI on the same night, standing alone, would not be disqualifying under the guidelines pertaining to criminal conduct or alcohol consumption. Nonetheless, considering both events together under this guideline, the facts established in 2.a and 2.e require application of the disqualifying condition at AG ¶ 16(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.

Applicant had a security clearance when he went out drinking in December 2016. That evening, he decided to drive while intoxicated. He also decided to use illegal drugs with a friend he had not seen in a long time. Applicant was 42 years old at the time and knew, or should have known, that his conduct was not consistent with the requirements of a drug-free workplace; nor was his abuse of alcohol that evening exemplary of the sound judgment required of one whom the government asks to protect its sensitive information.

By contrast, I also considered the mitigating condition at AG ¶ 17(c) :

(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.

Available information supports application of this mitigating condition. Applicant's misconduct in December 2016 was not minor; however, his use of marijuana and abuse of alcohol are isolated. Applicant's misconduct also occurred nearly three years ago, and there is no other indication in this record that, before 2016, he had engaged in similar conduct since his early college days. Nor has he engaged in any misconduct since December 2016. The events at issue here also occurred under circumstances that are unlikely to recur. As required by AG ¶¶ 16(c) and 17(c), I also have evaluated this record in the context of the whole-person factors listed in AG ¶ 2(d). Applicant presented positive recommendations and testimony about his character, work performance, and current use of alcohol. On balance, the security concerns under this guideline are resolved for Applicant, and the record evidence as a whole supports a fair and commonsense conclusion that the security concerns raised by the Government are mitigated.

Formal Findings

Formal findings 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: For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraphs 2.a – 2.e: For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for a security clearance is granted.

MATTHEW E. MALONE
Administrative Judge