



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 14-04797
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

01/19/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns pertaining to Guidelines H (drug involvement) and E (personal conduct). Clearance is granted.

Statement of the Case

On April 10, 2014, Applicant submitted a Questionnaire for National Security Positions (SF-86). On January 24, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guidelines H and E. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued.

On March 3, 2015, Applicant responded to the SOR. On May 20, 2015, Department Counsel was ready to proceed. On June 1, 2015, DOHA assigned Applicant's case to me. On June 11, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for July 8, 2015. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through GE 3, which were received into evidence without objection. Applicant testified, called four witnesses, and offered Applicant Exhibits (AE) A through AE Q, which were received into evidence without objection. On July 17, 2015, DOHA received the hearing transcript (Tr.).

Findings of Fact

Applicant denied all of the SOR allegations with explanations. Applicant's answers are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 34-year-old mechanical engineer employed by a defense contractor since November 2005. He seeks to retain his security clearance as a requirement of his continued employment. Applicant has held a security clearance since 2006. (GE 1; Tr. 34-37, 43, 45, 52)

Applicant graduated from high school in spring 2000. He was awarded a bachelor of science degree in mechanical engineering in December 2004, and a master's degree in business administration in May 2008. (Tr. 36-37; GE 1, GE 2; AE B, AE C, AE H, AE I) He married in April 2010, and does not have any children. His wife is employed full time as a certified public accountant (CPA) tax account manager. Applicant has not served in the U.S. armed forces. (GE 1; AE B, AE C; Tr. 37, 55, 58)

Drug Involvement/Personal Conduct

When Applicant completed his initial SF-86 in January 2006, he denied having used illegal drugs to include marijuana, which was not accurate. He was subsequently granted a security clearance. At the time he completed his 2006 SF-86, he was 25 years old. He was "worried about having used marijuana in the past" and that his past use "would automatically disqualify [him] from being able to obtain a security clearance." (SOR ¶¶ 2.a - 2.b; SOR answer; Tr. 35, 44-46) Throughout this process, Applicant acknowledged that his January 2006 behavior was wrong. (Tr. 40, 44)

The basis of Applicant's past drug involvement and personal conduct concerns are derived from his self-disclosure during his periodic renewal for a security clearance in 2014. When Applicant completed his second SF-86 in April 2014, he was 32 years old, married, and established in his career. (GE 1, GE 2) Applicant stated, "I was not provided any guidance with regards to filling out my [SF-86]. Additionally, when filling out my application for my [security] clearance, I voluntarily disclosed my

drug use on my [SF-86] and to the investigator in order to correct my previous mistake.” (SOR answer) Applicant testified, “I wanted to correct a wrong that I had made in 2006 and put everything out on the table.” (Tr. 36) He added, “I would never do anything to hurt my country. I have my family here. My life is here.” (Tr. 38, 51-52)

Applicant described his past drug use as “sporadic” or “extremely infrequent and it occurred on less than ten occasions” during the time of 1998 to 2013. Applicant further admitted to using marijuana “sporadically” on a “few occasions” after he was granted a security clearance in May 2006. (SOR ¶¶ 1.a - 1.b; SOR answer; Tr. 35, 40, 45-46)

In October 2013, Applicant recognized that he was putting himself and his career in jeopardy and made the decision that he would no longer use marijuana. From that point forward, he disassociated himself from individuals who smoked marijuana. Applicant realizes his behavior was reckless and expressed sincere regret for his behavior. (SOR answer; Tr. 41) Applicant’s wife was not involved in any of his drug activity and was very upset with him for putting their family’s future in jeopardy. (Tr. 49, 52-53)

Applicant submitted a substance abuse evaluation completed in February 2015 by a licensed mental health therapist and certified addiction specialist. The specialist stated that Applicant’s past motivation to use marijuana was to “fit in,” adding that Applicant ceased marijuana use since October 2013. The specialist concluded by stating that Applicant does not have an addiction issue that needs to be resolved. (Tr. 38-39, 48-49; AE D)

Applicant also submitted a notarized statement of intent to never use illegal drugs again with automatic revocation of clearance for any violation. (Tr. 39; AE E) He also submitted five negative random drug tests collected on February 17, 2015, February 23, 2015, February 27, 2015, June 19, 2015, and June 22, 2015. (Tr. 39, 41; AE G, AE Q)

Character Evidence

In addition to testifying on his own behalf, Applicant called four witnesses: (1) the vice-president and director of operations for a commercial real estate company and long-time family friend (RE); (2) a retired elementary school principal and a long-time family friend (SP); a senior manager and mentor from his employer (SM); and (4) Applicant’s wife of five years employed as a CPA tax account manager (W).

RE testified that she never saw Applicant manifest behavior during the time she has known him to suggest that he was abusing or using drugs, that he was very honest, and had matured over the years since she has known him. (Tr. 19-24) SP testified that she has never seen Applicant exhibit behavior indicative of drug use and that he is very honest. (Tr. 25-29)

SM testified that he has held a security clearance for 30 years, is familiar with security clearance requirements, and knows Applicant as an employee and mentor. SM has no reservations about recommending Applicant for a security clearance knowing about his past marijuana use and failure to disclose past marijuana use on his 2006 SF-86. SM stated that Applicant was young at the time he completed his SF-86, that he has matured a tremendous amount over the past six years, and that he “stepp[ed] up” to correct his mistakes. SM further testified that Applicant is very reliable and “is the kind of guy that you put in charge of things and he . . . gets them done.” (Tr. 29-34)

W testified that Applicant informed her about his 2006 SF-86 omission when he filled out his second SF-86 in 2014. She described her response to that revelation as “pretty livid” and she was “very upset.” Applicant does not use marijuana today and she made him promise he was done with marijuana. If he violated that promise, she would “have to consider . . . a separation or divorce. [Violating a promise is] very serious to me.” W corroborated Applicant’s testimony that he no longer associates with individuals who use marijuana. (Tr. 54-60)

Applicant submitted ten reference letters from a range of individuals to include senior company managers, co-workers, and long-time friends. The collective sense of these letters conveys that Applicant is an individual who has significantly matured, is reliable, is trustworthy, a family man, and is an overall “standup guy.” All reference letters strongly endorse continuation of Applicant’s security clearance. (AE A)

Applicant submitted work performance reviews for the years 2006 to 2014. These reviews document above average performance and clearly show that Applicant is an employee who is making a significant contribution to his company and the national defense. (AE J – AE P) He is also the recipient of 16 company awards from 2007 to 2013. (AE J)

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 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines (AG). 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 over-arching adjudicative goal is a fair, impartial and common sense 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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 [A]pplicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 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

Drug Involvement

AG ¶ 24 articulates the security concern pertaining to drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

The Government established its case under Guideline H through the evidence presented. He fully disclosed the circumstances surrounding his marijuana use in his SOR response, in his OPM PSI, and during his hearing.

A review of the evidence supports application of three drug involvement disqualifying conditions. AG ¶ 25(a): "any drug abuse (see above definition);"¹ AG ¶ 25(c) "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia;" and AG ¶ 25(g) "any illegal drug use after being granted a security clearance."

Considering the totality of the circumstances in this case, I find application of drug involvement mitigating conditions AG ¶ 26(a) "the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;" and AG ¶ 26(b): "a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation."

Concerning AG ¶ 26(a), there are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the Directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation."²

¹ AG ¶ 24(b) defines drug abuse as the illegal use of a drug or use of a legal drug in a manner that deviates from approved medication direction.

² ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on

AG ¶ 26(a) applies. Applicant's last drug use was in October 2013, approximately 21 months before his hearing. His drug use ended at that time when he realized that drug use was incompatible for someone in his position and was specifically prohibited while holding a security clearance. The absence of evidence of more recent or extensive drug use and his promise not to use illegal drugs in the future eliminate doubts about his current reliability, trustworthiness, or good judgment with respect to abstaining from illegal drug use.³

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. He disassociated from drug-using associates and submitted a signed statement of intent with automatic revocation of clearance for any violation. Applicant has abstained from drug use for about 21 months and has had no difficulties in doing so. AG ¶ 26(b) applies.

Applicant's work performance evaluations show his work behavior has not been indicative of his having a drug problem. He is viewed as a valuable employee, who is reliable, dependable, and professional. His value to the defense industry is supported by senior company officials, who know him personally and professionally, by his witnesses, and by his own credible testimony and evidence presented. At his hearing, Applicant acknowledged that drug abuse is incompatible with his future career. He expressed a steadfast commitment to continue lifestyle changes consistent with total abstinence of marijuana or any other illegal drugs.

the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle change and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

³In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

Personal Conduct

AG ¶ 15 articulate the security concern pertaining to 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes one condition 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, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant's marijuana use, discussed above, was cross-alleged under this concern. No new or additional facts pertaining to his drug involvement were developed during the hearing. (SOR ¶ 2.a) Accordingly, the facts and analysis under drug involvement are incorporated under this concern. With regard to the remaining personal conduct allegation, the evidence supports application of AG ¶ 16(a) as a result of Applicant's failure to disclose his marijuana use when he completed his 2006 SF-86. (SOR ¶ 2.b)

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

(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 improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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 caused 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 activity 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.

It was particularly helpful to hear Applicant's testimony and the testimony of his witnesses, as well as reviewing the evidence he offered. This case came to light as a result of Applicant's self-reporting. Applicant came forward during his 2014 security clearance reapplication and disclosed his past marijuana use as well as his failure to report his past marijuana use on his 2006 SF-86. Throughout the process, Applicant showed considerable maturity and expressed remorse. He has completed a favorable drug and alcohol assessment, favorably completed five random urinalysis tests, and informed his employer of his SOR allegations. Applicant has disassociated himself from those individuals with whom he used marijuana and signed a statement of intent with automatic revocation of security clearance for any drug violation. Applicant enjoys the support of his wife, work associates, and friends. AG ¶¶ 17(c), 17(d), 17(e), and 17(g) are applicable.⁴

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

⁴The 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)).

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

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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.

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. AG ¶ 2(c). The discussion in the Analysis section under Guidelines H and E is incorporated in this whole-person section. However, additional comments are warranted.

Applicant has been and is willing to maintain conduct expected of one entrusted with a security clearance. His employment history to date is indicative of stability and a strong work ethic. This support and self-introspection should ensure his continued success. Applicant demonstrated the correct attitude and commitment to remaining drug-free. Considering his demeanor, testimony, and evidence presented, I believe Applicant has learned from his mistakes, and his questionable behavior is unlikely to recur. I find Applicant has presented sufficient evidence of rehabilitation.

In sum, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole-person factors"⁵ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is eligible for access to classified information.

⁵See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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 J:	FOR APPLICANT
Subparagraphs 1.a to 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a to 2.b:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is granted.

Robert J. Tuidor
Administrative Judge