



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 14-05084
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

04/15/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns pertaining to Guidelines H (drug involvement) and E (personal conduct). Clearance is denied.

Statement of the Case

On April 8, 2014, Applicant submitted a Questionnaire for National Security Positions (SF-86). On February 27, 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 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 granted, denied, continued, or revoked.

On April 1, 2015, Applicant responded to the SOR. On May 21, 2015, Department Counsel was ready to proceed. On August 20, 2015, DOHA assigned Applicant's case to me. On September 22, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for October 6, 2015. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through GE 4, which were received into evidence without objection. Applicant testified, did not call any witnesses, and offered Applicant Exhibits (AE) A through AE D, which were received into evidence without objection. On October 15, 2015, DOHA received the hearing transcript (Tr.).

Findings of Fact

Applicant admitted all 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 42-year-old desk top support technician employed by a defense contractor since December 2010. He seeks to retain his secret security clearance as a requirement of his continued employment. Applicant held a security clearance while he was in the U.S. Army, discussed below. (GE 1; Tr. 23, 29, 45, 52)

Applicant graduated from high school in June 1992. He attended college "on and off" from 1992 to 1998, earned "close to 90" credit hours, and was "let go [from] the institution." Applicant hopes to return to college and earn his degree. (GE 1; Tr. 23-25, 29) Applicant has never married and has no dependents. (GE 1; Tr. 13, 29)

Applicant served in the Army from April 2003 to April 2009 and was honorably discharged as a specialist 4 (pay grade E-4). His military occupational specialty was 25B10 (information technology specialist). He served in the inactive Army National Guard from August 2009 to April 2011. Applicant was granted an interim secret security clearance in March 2006 while in the Army. During his Army service, Applicant deployed to Kuwait from October 2004 to September 2005, and was later deployed to Iraq from April 2007 to May 2008. (GE 1; AE D; Tr. 15, 26-28, 46-48)

Drug Use/Personal Conduct

In January 2002, Applicant was arrested and charged with trafficking in methylenedioxy-methamphetamine (MDMA), commonly known as ecstasy, and possession of flunitrazepan, both felonies. This arrest occurred after Applicant attempted to sell ecstasy to undercover police officers in his apartment. In January 2002, Applicant pled not guilty to these charges. In February 2003, the case was dismissed and it was closed in March 2003. Applicant was allowed to participate in a diversion program and the charges were to be dismissed if he enlisted in the U.S.

military for at least four years, which he did. (SOR ¶ 2.b(1); GE 3, GE 4, Tr. 14-15, 37, 58)

Applicant testified that he disclosed his arrest to his recruiter, “but, according to my recruiter, in order for me to get, to be able to join the military, I had to lie about my arrest.” (Tr. 26, 31, 37) Applicant did not tell his defense counsel or the state’s attorney about the arrangement with his recruiter to lie about his drug-related arrest in order to get in the Army. (Tr. 38)

During cross-examination, Applicant testified that it was not really the profit that made him turn to drug dealing. “It was more of the supplying my friends, helping my friends out, that is how I saw it.” (Tr. 35) Initially, he estimated that he purchased drugs from his supplier about eight times over a two-year period and purchased “100 (ecstasy) pills” for “about 1,000 dollars.” (Tr. 35-36) However, during cross-examination, Department Counsel confronted Applicant with his May 2014 Office of Personnel Management Personal Subject Interview (OPM PSI) in which he stated that his purchase of ecstasy pills had reached the point where he was purchasing as many as 500 pills a month. Furthermore, Applicant was selling the drug and making at least a 50 percent profit. This contradicted his earlier testimony. (GE 2; Tr. 36)

During Applicant’s May 2014 OPM PSI, Applicant stated that he began experimenting with marijuana in approximately 1997. During cross-examination, Applicant testified that during the timeframe of 1998 to 2002 he smoked marijuana about 200 times. After he was “thrown out of college,” he started hanging around with the wrong crowd that led to drinking and drug use. After he left school, Applicant had a full-time job as a store manager for a sunglass store. (Tr. 32-35)

In June 2005, after Applicant had enlisted in the Army, the U.S. Army Central Personnel Security Clearance Facility (CCF) issued him a Letter of Intent to Deny Security Clearance and an SOR alleging personal conduct, drug involvement, and criminal conduct concerns. The SOR noted that Applicant acknowledged the arrests for drug trafficking and possession. The SOR also went into detail summarizing Applicant’s past statements pertaining to the circumstances leading up to his arrest and past drug use. (GE 4) According to his SOR, Applicant disclosed his felony drug arrests and case dismissal on his April 2003 SF-86. He answered, no, to questions pertaining to illegal drug usage. (GE 4; Tr. 38)

In Applicant’s July 2005 SOR response, he stated that his recruiter counseled him to deny his past drug use and drug involvement. He claimed, among other things, that he falsely accepted responsibility for drug trafficking to protect a friend. The charges for the January 2002 arrests were for incidents that occurred in November and December 2001 that he was not involved in with. However, he had purchased and sold drugs at other times. Applicant testified that his noncommissioned officer (NCO) collaborated with him to prepare his SOR response that included the false portion of his answer about helping a friend. (GE 4; Tr. 39, 41) At the time Applicant completed his July 2005 SOR response, he was serving in Iraq. Applicant’s commander wrote a

favorable endorsement strongly supporting him. In March 2005, the CCF granted Applicant's clearance with a warning that subsequent unfavorable information may result in the suspension of his security clearance. (GE 4)

Applicant admitted to using marijuana one time in June 2009 after being granted a security clearance in March 2006. He described his marijuana use as "just one time for old time's sake, so to speak." (SOR ¶ 1.a; Tr. 12, 57) Applicant testified that his marijuana use in June 2009 occurred during the interim period after he was discharged from the Army and before he joined the Army National Guard.¹ (Tr. 23, 44, 50-51, 57)

When Applicant completed his April 2014 SF-86, he was asked whether he had ever been charged with a felony offense or with any offense involving alcohol or drugs to which he answered, no. (SOR ¶ 2.b) Applicant was also asked whether he had illegally used any drugs or controlled substances in the last seven years, and whether he had ever illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance to which he answered, no. (SOR ¶ 2.c; Tr. 12-13) These answers were false.

Applicant testified that he made "an honest mistake" when he answered no to both questions. He claimed that he was trying to complete his SF-86 quickly, adding that "[m]aybe there was a part of me that was ashamed." (Tr. 41-42, 45, 50-51, 60-63)

Applicant stated that the Army gave him a chance to rehabilitate himself and change his life for the better. He was not happy about finding himself in this position and was embarrassed. The Army taught him responsibility and how to work hard. Applicant did not use drugs while he was in the Army and he does not use drugs now. Apart from the one time he smoked marijuana in June 2009, he has not used drugs since he was arrested in 2002. (Tr. 49-51) Applicant stated the hardest thing for him to do was inform his father about these events. His father was devastated having always taught him to do the right thing. (Tr. 54-56)

Character Evidence

In addition to testifying on his own behalf, Applicant submitted three reference letters from: (1) his program manager and supervisor (PM); (2) his chief, desktop services branch (CDS); and (3) his commander while he was in the Army from 2006 to 2009. (CDR). Both PM and CDS, who see Applicant on a daily basis, describe Applicant as a model employee – trustworthy, professional, hardworking, and support him for a security clearance. CDR was his former commander and is currently an active duty Army lieutenant colonel. CDR reiterated what PM and CDS said; however, he added the additional perspective of having observed Applicant while he was on active duty performing in a challenging environment while deployed. CDR described

¹ In light of Applicant's testimony, it became clear that the date of June 2010 alleged in SOR ¶ 1.a is incorrect. The date should be June 2009 and I made a pen and ink correction to the SOR to conform to the evidence. (Tr. 57-58)

Applicant as his “go-to soldier,” who would be the soldier any commander would want in his or her unit. (AE A – AE C; Tr. 53-54, 59-60)

Applicant’s Army awards include the Army Commendation Medal, Army Achievement Medal, Army Good Conduct Medal, National Defense Service Medal, Global War on Terrorism Expeditionary Medal, Global War on Terrorism Service Medal, Iraq Campaign Medal with Campaign Star, Army Service Ribbon, and Overseas Service Ribbon (2nd Award). (AE D)

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 *a/so* 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:

[u]se 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.

AG ¶ 25 provides three drug involvement-related conditions that could raise a security concern and may be disqualifying:

- (a) any drug abuse, defined as the illegal use of a drug or use of a legal drug in a manner that deviates from the approved medical direction;
- (b) illegal drug possession, including cultivation, processing, manufacture, purchase, or sale or distribution; or possession of drug paraphernalia;² and

²AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis,

(g) any illegal drug use after being granted a security clearance.

The Government established its case through Applicant's admissions and the evidence presented.

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

(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;

(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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of the drug involvement mitigating conditions are fully applicable. Applicant's marijuana use in June 2009 is particularly troubling given his extensive history of drug involvement to include a felony arrest for drug distribution and enlisting in the Army under false pretenses. Applicant's illegal drug use occurred after he was granted a security clearance that was based on his untruthful representations in 2006. Although Applicant's last used marijuana in August 2009, this period of abstinence, when weighed against other facts from the record, is not enough to ensure that he will not use drugs in the future.

depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

Personal Conduct

AG ¶ 15 articulates 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 provides two personal conduct concerns that could raise a security concern and may be disqualifying:

(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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing...."

The Government established these conditions through Applicant's admissions and the evidence presented.

AG ¶ 17 provides seven potential 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.

Applicant's use of marijuana while holding a security clearance is cross-alleged under Guideline E. None of the mitigating conditions under this concern are applicable for the reasons discussed under Guideline H. Additionally, Applicant's illegal drug use raise a separate and significant security concern about his judgment and willingness to comply with rules and the law that cannot be mitigated simply by his no longer claiming to use marijuana.

Applicant's concealment of relevant and material information demonstrates a lack of candor required of cleared personnel. The Government has an interest in examining all relevant and material adverse information about an applicant before making a clearance decision. The Government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when it is perceived to be prudent or convenient.

Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the Government relies on to perform damage assessments and limit the compromise of classified information. Having failed to provide an adequate explanation for his failure to list his previous drug use on his SF-86, his conduct suggests he is willing to put his personal needs ahead of legitimate Government interests.

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(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. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There are some facts supporting mitigation of security concerns under the whole-person concept; however, they are insufficient to fully mitigate security concerns. Applicant honorably served in the Army from 2003 to 2009 and deployed to Kuwait and Iraq. His service as a defense contractor and the statements of his witnesses also weigh in his favor. Applicant expressed remorse for his past conduct.

The evidence against approval of Applicant's clearance is more substantial. Applicant made false statements in his April 2014 SF-86 denying felony drug-related arrests and using drugs while holding a security clearance. This is particularly disconcerting in light of his history when he lied to get in the Army, he lied on his April 2003 SF-86, and he lied in his July 2005 SOR response. Security clearance holders are relied upon to provide accurate information especially in a security context. Accurate information is crucial to safeguarding national security. His false statements show lack of judgment and raise unresolved questions about Applicant's reliability, trustworthiness, and ability to protect classified information.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Drug involvement and personal conduct concerns are not mitigated.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.c:	Against Applicant

Conclusion

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

Robert J. Tuidor
Administrative Judge