



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



In the matter of:)
)
-----) ISCR Case No. 14-05380
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

09/11/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant used marijuana and paid prostitutes for sex while holding a security clearance; he used marijuana and lysergic acid diethylamide (LSD) while on active duty in the Army; and he engaged in sexual activity with a 15-year-old child when he was in the Army. Personal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On February 13, 2013, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86). (GE 1) On April 20, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order (Exec. Or.) 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 Guideline E (personal conduct). (HE 2) The SOR detailed reasons why the DOD CAF was unable to find that it is clearly

consistent with the national interest to grant Applicant access to classified information and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (HE 2)

On May 15, 2015, Applicant responded to the SOR allegations and waived his right to a hearing. (HE 3) On June 10, 2015, Department Counsel requested a hearing. (Tr. 15) On June 18, 2015, Department Counsel was prepared to proceed. On July 23, 2015, Applicant's case was assigned to me. On August 6, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing setting the hearing for August 26, 2015. Department Counsel offered three exhibits into evidence, and Applicant did not offer any documents into evidence. (Tr. 13, 17, GE 1-3) There were no objections, and all exhibits were admitted into evidence. (Tr. 17; GE 1-3) On September 1, 2015, DOHA received the transcript of the hearing.

Findings of Fact¹

Applicant's SOR response admitted the SOR allegations in ¶¶ 1.e through 1.h. (HE 3) He denied the remaining SOR allegations, and he provided some extenuating and mitigating information.

Applicant is a 38-year-old quality assurance specialist employed by a defense contractor for the previous 13 years. (Tr. 6-7, 18-19) In 1995, he graduated from high school. (Tr. 8; GE 1) He served on active duty in the Army from 1995 to 1999, and in the Army National Guard from 1999 to 2003. (Tr. 7, 19) He received an Army Commendation Medal (ARCOM). (Tr. 68) When he was discharged, he was a specialist (E-4), and he received an honorable discharge. (Tr. 8) His military occupational specialty (MOS) was light-wheel vehicle mechanic (63B). (Tr. 8) In 2014, he was awarded a degree in engineering technology. (Tr. 9) He has never been married, and his two children are seven and five. (Tr. 7) His domestic partner has a 10-year-old child. (Tr. 7) Applicant has held a security clearance since 2003. (Tr. 58)

Personal Conduct

SOR ¶¶ 1.a and 1.b allege that from about 2000 to 2001, and from about 2007 to April 2011, Applicant falsified his timecards when he certified that he worked 40 hours in a one-week period. In April 2010, Applicant admitted that he arrived late for work, left early, and entered eight hours on his timecard. (GE 3 at 3) Applicant was paid by the hour, and he was supposed to enter the time he actually worked on a daily basis. (Tr. 51) At his hearing, he explained if he arrived for work late, he worked late or he skipped lunch. (Tr. 51-53) He denied that he entered incorrect information on his timecards. (Tr. 52-53) Sometimes he received compensatory time for working more than eight hours on a previous shift. (Tr. 53-54) He denied that he falsified his timecards. (Tr. 54)

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

SOR ¶ 1.c alleges that in about 2008, Applicant had non-consensual sexual intercourse with a woman (S), who was unconscious due to the prior consumption of alcohol. Applicant invited S to his apartment on several occasions, and he engaged in consensual sexual intercourse with S. (Tr. 35) On the occasion where S passed out during sexual intercourse, Applicant and S were both intoxicated. Applicant was engaging in sexual intercourse with S when she passed out. (Tr. 36-37, 63-64) Applicant continued to engage in sexual intercourse with S after she passed out. (Tr. 37-38) He acknowledged that he should have stopped sexual intercourse when S passed out. (Tr. 38-39) Applicant said that he and S subsequently engaged in consensual sexual intercourse. (Tr. 38-39)² His most recent contact with S was over the Internet in 2011. (Tr. 40, 61-62) Even though he maintained contact with S from 2008 to 2011, he claimed he could not recall her name. (Tr. 61-62) Applicant's domestic partner was unaware of his relationship with S. (Tr. 66)

SOR ¶ 1.d alleges that Applicant provided a false affidavit on July 22, 2013, when he stated the sexual intercourse described in the preceding paragraph was consensual. The affidavit described the same facts as in the preceding paragraph. He explained why he believed the sexual intercourse was consensual, and he acknowledged he continued to engage in sexual intercourse after S passed out.

SOR ¶ 1.e alleges that from about 2003 to about August 2009, on at least three occasions, Applicant used marijuana while holding a security clearance. Applicant began using marijuana in 1994, when he was a senior in high school. (Tr. 22) At his hearing, he said he used marijuana five or six times in high school, and a few times while in the Army, and once, while he worked for his current employer. (Tr. 23) He stopped using marijuana in August 2009. (Tr. 22) He said he used marijuana less than ten times in total. (Tr. 22) When he completed his November 2002 SF 86, he said he did not use illegal drugs in the previous seven years. (Tr. 25-26)

In 2010, Applicant told an interviewer from another agency about his illegal drug use stating: from 1995 to March 2003, he used marijuana about twice a month; from April 2003 to summer of 2008, he used marijuana no more than ten times in total; and in 1999, he used LSD or "acid" five times while he was in the Army. (Tr. 23, 28, 58; GE 3 at 6) He was not caught on a urinalysis test or punished for using marijuana. (Tr. 24) He said he stopped using illegal drugs in 2009. (Tr. 29) In his February 13, 2013 SF 86, Applicant said he used marijuana once in the previous seven years, and that was in August 2009, while holding a security clearance. (GE 1) He said he used marijuana three times in the past ten years. (GE 1)

SOR ¶ 1.f alleges that between 2009 and April 2010, Applicant drove an automobile while intoxicated by alcohol (DUI). Applicant admitted that he committed two or three DUIs from 2009 to April 2010. (Tr. 42-44; SOR response; GE 3) There is no evidence of arrests or convictions for DUI.

² In his July 22, 2013 sworn statement, Applicant said he did not have sexual contact with S after the occasion when they were both intoxicated, and she passed out. (GE 2 at 2-3)

SOR ¶ 1.g alleges that from about 1998 to about 2006, Applicant paid for sex with prostitutes on about five occasions while in the Army and while holding a security clearance. He admitted paying for prostitutes as alleged, and his most recent hiring of a prostitute was in 2006. (Tr. 29-35, 43; SOR response; GE 3 at 6-7) He engaged in sex with prostitutes while he was in the Army, and subsequently as a government contractor. Applicant's domestic partner is unaware of Applicant's involvement with prostitutes in 2006. (Tr. 40; GE 2; GE 3)

SOR ¶ 1.h alleges that in about 2000 or 2001, while at a party, when he was on active duty in the Army, he allowed a 15-year-old child to masturbate him. (Tr. 44) Applicant was about 21 or 22 years old when this offense occurred. (Tr. 44) At the time, he knew she was underage; however, he did not know she was 15. (Tr. 44-49, 67) At first, he said he had sexual contact with her "just once." (Tr. 45) After being confronted with an April 2010 summary of interview indicating they had a one-month relationship, and they engaged in sexual intercourse on one occasion and she masturbated him on another occasion, he admitted that he also engaged in sexual intercourse with her. (Tr. 47-49, 60; GE 3 at 8-9) Later, he said he did not remember what happened in regard to sexual activity with her. (Tr. 49) He ended his relationship with her after her father, a police officer, talked to him. (Tr. 45) Her father advised Applicant that the child has mental and emotional problems. (Tr. 59) Applicant's domestic partner is unaware that he engaged in sexual activity with a 15-year-old child. (Tr. 49)

Applicant told his co-workers that his security clearance hearing was about drug use, and he did not disclose the other allegations in the SOR because it was embarrassing information. (Tr. 55-56) Applicant said he received good evaluations from his employer, and there were no allegations of security violations. (Tr. 69)

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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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 overarching adjudicative goal is a fair, impartial, and commonsense 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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 applicant concerned.” See Exec. Or. 10865 § 7. 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 about 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 [or her] 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

Personal Conduct

AG ¶ 15 expresses 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 three conditions that could raise a security concern and may be disqualifying in this case:

(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 person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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 person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior . . . ; and (3) a pattern of dishonesty or rule violations . . . ; 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. . . .

AG ¶¶ 16(c), 16(d), and 16(e) apply. Applicant engaged in a sexual relationship with S; he used marijuana while in the Army and subsequently while holding a security clearance; he used LSD while in the Army; he drove an automobile while intoxicated on two or three occasions; he engaged in sexual activity with prostitutes; and he allowed a child to masturbate him while he was in the Army.

Under military law, use of marijuana and LSD and sexual contact with a 15-year-old child are serious crimes. Marijuana use while holding a security clearance is a significant rule violation. Paying for sex with a prostitute and DUI are criminal offenses. Criminal offenses are rule violations and show questionable judgment, untrustworthiness, and unreliability. AG ¶ 16(e)(1) applies because sexual activity with a child, sexual activity with prostitutes, and his relationship with S create a vulnerability to exploitation, manipulation, or duress. Such conduct adversely affects Applicant's professional standing as an employee of a DOD contractor. There is substantial evidence of these three disqualifying conditions, and further inquiry about the applicability of mitigating conditions is required.

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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶ 17(f) applies to SOR ¶¶ 1.a, 1.b, and 1.d. There is not enough evidence to establish that Applicant committed timecard fraud and that he lied about whether his sexual intercourse with S was consensual. AG ¶ 17(c) applies to Applicant's DUIs in SOR ¶ 1.f because they are not recent. Applicant denied commission of any DUIs in the previous five years.

None of the mitigating conditions apply to the conduct alleged in SOR ¶¶ 1.c, 1.e, 1.g, and 1.h. Applicant's sexual involvement with a 15-year-old child is particularly serious. He used illegal drugs and paid a prostitute for sex while holding a security clearance. He engaged in criminal conduct and committed rule violations. Applicant did not disclose his sexual relationships with S, the 15-year-old child, and prostitutes to his domestic partner or his coworkers. He is vulnerable to exploitation or duress. Personal conduct concerns are not mitigated.

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 Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline E, but some warrant additional comment.

There is some evidence supporting continuation of Applicant's clearance. Applicant is a 38-year-old quality assurance specialist employed by a defense contractor for the previous 13 years. He served on active duty in the Army from 1995 to 1999, and in the Army National Guard from 1999 to 2003. He received an ARCOM. When he was discharged, he was a specialist, and he received an honorable discharge. In 2014, he was awarded an associate's degree in engineering technology. Applicant has held a security clearance since 2003. Applicant had good evaluations from his employer. There are no allegations of security violations.

The weight of the evidence supports revocation of Applicant's security clearance. When Applicant was in the Army, he used marijuana and LSD; he paid a prostitute for sex; and he engaged in sexual activity with a 15-year-old child. Under military law, use of marijuana and LSD and sexual contact with a 15-year-old child are serious crimes. While holding a security clearance, he used marijuana and paid for sex with a prostitute. He engaged in a sexual relationship with S. He did not want the mother of his children and domestic partner to know about his sexual relationships. His criminal conduct and sexual relationships create a vulnerability to exploitation, manipulation, or duress. Such conduct adversely affects Applicant's professional standing as an employee of a DOD contractor.

Applicant was not truthful when he completed his November 2002 SF 86, in his July 22, 2013 sworn statement, and at his hearing.³ Applicant falsely denied using illegal drugs for the previous seven years in his November 2002 SF 86 when in fact, he used marijuana and LSD while he was in the Army. Applicant falsely said he did not have sexual contact with S after the occasion when they were both intoxicated, and she passed out during sexual intercourse. Applicant falsely stated at his hearing that he did not remember the number or types of sexual contact he had with the 15-year-old child. He falsely stated at his hearing that he only used marijuana once while working for his current employer.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Personal conduct concerns are not mitigated.

³The SOR did not include the allegations in this paragraph. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). I have considered the non-SOR misconduct in this paragraph under the whole-person concept and not for any other purpose.

Formal Findings

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

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraphs 1.g and 1.h:	Against Applicant

Conclusion

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

Mark Harvey
Administrative Judge