



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



In the matter of:)
)
 REDACTED) ISCR Case No. 17-03451
)
 Applicant for Security Clearance)

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

08/10/2018

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant was arrested in March 2012, March 2014, and June 2014 for felony drug sales; in December 2012 for operating under the influence (OUI); and in July 2013 for assault, disorderly conduct, and risk of injury to a child. In March 2015, he was placed on probation to September 2016 for the OUI and to March 2018 for the 2012 sale of a controlled substance. More time is needed to demonstrate reform of the criminal conduct and personal conduct concerns. Clearance is denied.

Statement of the Case

On October 20, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline J (criminal conduct), Guideline H (drug involvement and substance misuse), Guideline G (alcohol consumption), and Guideline E (personal conduct). The SOR explained why the DOD CAF was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6,

Defense Industrial Personnel Security Clearance Review Program (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DOD on June 8, 2017.

Applicant responded to the SOR on November 24, 2017, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On February 9, 2018, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On February 26, 2018, I scheduled a hearing for March 20, 2018.

At the hearing, four Government exhibits (GEs 1-4) were admitted in evidence. A December 14, 2017 letter forwarding the proposed GEs to Applicant and a list of the GEs were marked as hearing exhibits (HEs I-II) for the record but not admitted in evidence. On the Government's motion and without objection from Applicant, the Guideline G allegation was withdrawn. Three Applicant exhibits (AEs A-C) were admitted in evidence. Applicant testified, as reflected in a transcript (Tr.) received on March 28, 2018.

I held the record open for three weeks after the hearing for additional documents from Applicant. No documents were received by the deadline and so the record closed on April 10, 2018.

Summary of SOR Allegations

The SOR, as amended, alleges under Guideline J and cross-alleges under Guideline E (SOR 4.a), that Applicant was arrested for possession of marijuana with intent to sell in approximately March 2012 (SOR ¶ 1.a), March 2014 (SOR ¶ 1.d), and June 2014 (SOR ¶ 1.e); for driving under the influence in approximately December 2012 (SOR ¶ 1.b); and for assault in approximately July 2013 (SOR ¶ 1.c); and that in return for Applicant's guilty pleas in March 2015 to felony sale of a controlled substance and OUI, all other charges were dropped (SOR ¶ 1.f). The drug charges are cross-alleged under Guideline H (SOR ¶ 2.a). Applicant is also alleged under Guideline H (SOR ¶ 2.b), and cross-alleged under Guideline E (SOR ¶ 4.b), to have used marijuana with varying frequency from approximately June 2010 to June 2014. Moreover, under Guideline E, Applicant is alleged to have been terminated for cause from at least two jobs since 2012 (SOR ¶ 4.c). When Applicant responded to the SOR, he admitted the allegations without explanation.

Findings of Fact

After considering the pleadings, exhibits, and transcript, I find that SOR ¶ 1.f does not allege additional conduct of security concern, but rather reflects the disposition for the offenses covered in SOR ¶¶ 1.a-1.e. My findings of fact are as follows:

Applicant is a 24-year-old high school graduate, who completed certificate programs to be a nurse's aide in late 2013 and an automotive technician in July 2016. He is not married but is in a cohabitant relationship with his fiancée. They have a two-year-old

daughter. (GEs 1-2; AE A; Tr. 20, 26-27, 32.) Applicant is employed in automobile sales, but he has an offer of defense-contractor employment contingent on him obtaining a security clearance. (Tr. 27-28.)

Applicant began using mood-altering substances as a teenager. He was influenced by friends in his environment and used marijuana on a daily basis with two friends from June 2010 to June 2014. He purchased the drug from those friends, and he sold marijuana to his friends. The date when he started drinking alcohol is not in the record, although he volunteered that he drank alcohol in quantity of five drinks or more to intoxication until early 2015, when he then moderated his consumption. (GE 4; Tr. 30, 70.)

Applicant also began committing crimes as a teenager. At age 15 in July 2009, Applicant broke into some vehicles with a friend and stole loose change and a GPS unit. He was charged with felony burglary and placed on two years of probation. In approximately July 2011, Applicant was loitering at a local baseball field with three friends when the police arrived. Intoxicated from drinking at a party earlier that night, Applicant ran into a pharmacy and stole five packs of cigarettes. He was given accelerated rehabilitation for the theft. (GEs 1, 4.)

The month following his high school graduation, Applicant started the nurse's aide program at a local community college in July 2011. That September, he began working a part-time retail job. (GEs 1, 4.)

On March 20, 2012, Applicant was arrested for sale of a controlled substance, a felony.¹ He was a passenger in a vehicle with some friends when they were pulled over by the state police for a brake light issue. The police smelled marijuana because Applicant and his friends had been smoking the drug in the backseat, and Applicant had multiple bags of marijuana in his jacket. (GEs 1, 3-4; Tr. 52-53.) Applicant completed court-ordered treatment for his marijuana use from September 2012 to November 2012. (GE 1; Tr. 37.)

¹ During his subject interview, Applicant recalled the offense as occurring in May 2012, and that he was at a carnival with three bags of marijuana to sell and to smoke. He indicates that an unknown individual walked up to him and gave him a cell phone for the marijuana. Applicant was then arrested in a vehicle in the parking lot. (GE 4.) An FBI record shows that he was arrested in March 2012 for sale of a controlled substance. (GE 3.) The statute Applicant violated, Section 21a-277(b) provides in part:

(b) Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with intent to sell or dispense, possesses with intent to sell or dispense, offers, gives or administers to another person any controlled substance, except a narcotic substance, or a hallucinogenic substance other than marijuana, except as authorized in this chapter, may, for the first offense, be fined not more than twenty-five thousand dollars or be imprisoned not more than seven years or be both fined and imprisoned; and, for each subsequent offense, may be fined not more than one hundred thousand dollars or be imprisoned not more than fifteen years, or be both fined and imprisoned.

The FBI record does not indicate that he was arrested for possession with intent to sell as alleged in the SOR, although intent to sell would violate the same statute.

Applicant sold marijuana with some regularity, including at times once or twice a week, from 2012 to September 2014. He sold the drug usually to friends and “here and there” to friends of his friends. His profit from the marijuana sales was usually enough for him to purchase more for his personal consumption. (Tr. 35-37, 45.)

On April 7, 2012, Applicant was stopped for OUI and reckless driving, although formal charges were not filed against him until December 2012. Applicant had consumed alcohol at a party when his companion suggested that he drive because he appeared to be more sober. He drove her to another party, where Applicant became “totally drunk.” He then drove three friends to a store, but on returning to the party with his friends, he “blacked out” and crashed his vehicle into a house. Applicant was unconscious, and broke his neck and back in the accident. (GEs 1, 3-4; Tr. 56-61.) He was ordered into alcohol counseling following his arrest in December 2012, which he completed. (Tr. 38-39.)

Applicant was terminated from his part-time retail job in July 2012 after he failed to report for work. He failed to keep track of his work schedule and was often tardy. Applicant also speculates that his co-workers may have told his supervisor that he smelled of marijuana. He had rolled a “blunt” in the bathroom the day before his termination, although he claims it was for future use. (GEs 1, 4; Tr. 43-44.)

Applicant was unemployed from July 2012 to June 2013. He supported himself by selling marijuana. He also spent his time partying. (GEs 1, 4; Tr. 44.) On June 17, 2013, Applicant was sitting on his porch when a minor age 15 or 16 spat at him. It escalated into a physical altercation. A few weeks later, the police charged Applicant with risk of injury, a felony, and with assault, 3rd degree, and disorderly conduct, both misdemeanors. (GEs 1, 3-4; Tr. 62-64.) Applicant now asserts that he “just basically restrained” the minor by putting him in a headlock to calm him down.² He denies that he injured the youth in any way and attributes his arrest to the youth’s brother, who disliked Applicant. (Tr. 64.)

Applicant worked as a part-time cashier at a doughnut shop from June 2013 to August 2013. He was late for work several times because he was out too late partying and did not report for his 5:00 a.m. shift. He was issued written warnings three or four times before being fired for tardiness. Applicant was unemployed for the next year. He supported himself by selling marijuana. (GEs 1, 4; Tr. 45.)

On March 1, 2014, Applicant was arrested for felony sale of a controlled substance and for misdemeanor possession of marijuana. Applicant was stopped by the police in

² Applicant testified about the July 2013 assault of a minor, as follows:

They said that [the minor] was bleeding. And they said that he was hurt. But the only thing I did to him was I put him in a headlock and I had to calm him down. He kept trying to swing at me. But I already knew that he was young and underage. So I just basically restrained him. And even after the fact that he spit on me even after everything got broken up and all that stuff. (Tr. 64.)

route to a party after he threw something from his vehicle. He had three bags of marijuana on him to sell at a party, and he smelled of marijuana.³ (GEs 1, 3-4; Tr. 65-66.)

On June 26, 2014, Applicant was arrested for felony possession of marijuana, felony sale of a controlled substance, felony conspiracy to possess marijuana with intent to sell, and felony conspiracy to sell a controlled substance. A friend contacted him about purchasing some marijuana from him in a local parking lot. When Applicant arrived, the police arrested him for selling marijuana for financial profit. He had four ounces of marijuana in his possession. (GEs 1, 3-4; Tr. 66-67.) Applicant asserts that he ceased his marijuana use in June 2014 because it made him feel “demotivated.” (GE 4.) He continued to sell marijuana until September 2014 to pay for his lawyer. He possessed some marijuana after his arrest and he “wasn’t going to give it away.” (Tr. 45-46.)

With the aforesaid criminal charges still pending against him for offenses committed since March 2012, Applicant began working part time as a cashier at a sporting goods store in September 2014. He was terminated in November 2014 after he was caught stealing. He is ineligible for rehire. Applicant attempted to steal some food from the store because he did not have enough money to pay for lunch. He was making “wrong decision after wrong decision.” (GEs 1, 3-4; Tr. 46-47.) Applicant lived at home with his mother, and she supported him financially when he was unemployed from November 2014 to January 2015. (GE 4.)

In January 2015, Applicant began working as a part-time cook at a pizza restaurant. He left the job in March 2016. (GE 1; Tr. 46.) According to the employer, he is not eligible for rehire because he was slow and did not follow instructions. Applicant held a second part-time job at a fast-food establishment from February 2015 to February or March 2016, when he resigned to spend time with his child and focus on his training to become an automotive technician, which he had started in July 2015. (GEs 1, 4; Tr. 50.)

Pursuant to a plea deal, on March 9, 2015, Applicant pleaded guilty to the March 2012 felony sale of a controlled substance and the April 2012 misdemeanor OUI (arrested in December 2012). In exchange, the prosecutor entered nolle prosequi dispositions for the April 2012 reckless driving infraction and all of the criminal charges filed against him since July 2013.⁴ Applicant was sentenced for OUI to six months in jail (suspended); 18 months of supervised probation, to be served concurrent with his probation for the felony drug charge; a fine of \$500; and 100 hours of community service. For the felony sale of a controlled substance, he was sentenced to five years in jail, suspended; three years of supervised probation; and 50 hours of community service. (GEs 1, 3-4; Tr. 67-70.) In approximately May 2015, Applicant cut his ties with those friends involved with marijuana. (Tr. 33.)

³ During his subject interview in March 2017, Applicant inaccurately recalled the possession and drug sale charges as occurring in September 2013. (GE 4.)

⁴ A nolle prosequi (shortened as “nolle” in the FBI record) is a formal entry on the record by a prosecutor by which he or she declares that there will be no further prosecution.

Applicant was drug tested during his probation on a regular basis, and all of the tests were negative. (Tr. 70.) He was also required to complete counseling for his marijuana use and to complete an Ignition Interlock Device (IID) Program. Applicant had substance abuse counseling from April 2015 to July 2015, which he asserts “definitely started to drive [him], wake [him] up a little bit in the right direction.” (Tr. 40-41.) On his completion of the IID program on September 26, 2016, the interlock device was removed from his vehicle. He successfully completed his probations for the OUI on September 9, 2016, and for the felony sale of a controlled substance on March 9, 2018. (GEs 1, 3-4; AEs B-C.)

As part of his employment application to work for his defense-contractor employer, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) on October 29, 2015. He disclosed his arrest record; his use of marijuana (“Smoked a blunt once a day”) from June 2010 to June 2014; his sales of marijuana to his friends once or twice a week from May 2012 to June 2014 “due to the surroundings in which the substance brought upon [him];” and his completion of counseling for his marijuana use in 2012 and 2015. He denied any intention to use marijuana in the future for the following reason:

Marijuana has changed my life in a very negative way. Bad characteristics had been introduced and held onto, through this substance. Through me quitting this substance I’m more motivated and ready to pursue my career and maintain a happy standard of living. (GE 1.)

In July 2016, Applicant earned his automotive technician certificate. (GE 4; Tr. 20.) He has since worked in the automotive industry, primarily in sales, without any adverse incidents. (GEs 1, 4.)

On March 2, 2017, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Applicant discussed his criminal charges, his marijuana use, his alcohol use, and his involuntary termination from some previous jobs. He indicated that the date of his last use of marijuana was accurately reported on his SF 86 and that he was no longer associating with any known illegal drug users. About his alcohol use, he indicated that his drinking had decreased since early 2015 to once a month and not to intoxication. He admitted that he drank to intoxication once a week until early 2015. He denied any intention to use marijuana or any other illegal drug in the future. He did not expect his drinking habit to change in the future. (GE 4.)

On September 20, 2017, Applicant responded to interrogatories from the DOD CAF concerning his illegal drug use. He indicated that he had used cannabis a total of 20 times in 2011, 2012, and 2014. He responded affirmatively to an inquiry concerning whether he had ever purchased, sold, transported, or manufactured the drug. He also listed a one-time use of Xanax in 2015, which was apparently obtained from his mother-in-law who has a prescription. He was working and going to school and used it as a sleep aid. (Tr. 41-42.) He denied any use of marijuana since his arrest in March 2014.⁵ Applicant indicated that

⁵ Applicant disclosed discrepantly on his SF 86 that he used marijuana (“smoked a blunt once a day”) to June

he did not have any illegal drugs or paraphernalia in his possession and that he had no current association with any illegal drug users. He also responded “Yes” to whether he had ever participated in any drug or alcohol rehabilitation program and disclosed that he had inpatient therapeutic meetings from March 2015 to June 2015. (GE 2.)

At his hearing, Applicant testified that he has put his past behind him and wanted the opportunity to work for the defense contractor that is sponsoring him for a clearance. (Tr. 24-25.) He denies any marijuana use since June 2014 and any current association with illegal drug users. He spends his time outside of work with his fiancée and their daughter. He and his fiancée began dating around the time of his last arrest in 2014, and they are currently cohabitants. (Tr. 32, 73.) His fiancée works as a dental assistant. (Tr. 32-33.) He attributes his turnaround to his probation officer, who became a mentor to him. (Tr. 72.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant’s eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

2014. The FBI record indicates that he was arrested on two counts each of illegal possession of marijuana and sale of a controlled substance on June 26, 2014. Applicant was not confronted about the discrepancy between that information and his interrogatory responses that he used marijuana only 20 times and that he ceased his marijuana use in March 2014.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that 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. Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J: Criminal Conduct

The security concern about criminal conduct is articulated in AG ¶ 30:

Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.

The criminal conduct concerns are established by Applicant’s March 2012 felony sale of a controlled substance; his April 2012 misdemeanor OUI; his June 2013 misdemeanor assault; and his March 2014 and June 2014 felony sale of a controlled substance and felony marijuana possession offenses. Two disqualifying conditions under AG ¶ 31 apply because of his aforesaid criminal conduct between the ages of 18 and 20:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual’s judgment, reliability, or trustworthiness; and

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant has only two adult convictions on his record, which are for the 2012 felony drug sale and misdemeanor OUI offenses. The prosecutor’s decision to enter nolle and no longer pursue the remaining charges against Applicant does not preclude the administrative judge from considering the conduct for its security significance under AG ¶ 31(b). In that regard, Applicant had a physical altercation with a minor in June 2013. When he was arrested in March 2014, he had in his possession three bags of marijuana that he had intended to sell at a party. In June 2014, he went to a parking lot with marijuana to sell to his friend.

AG ¶ 31(c), “individual is currently on parole or probation,” was applicable as of the issuance of the SOR in October 2017 because Applicant was then on supervised probation for the March 2012 felony sale of a controlled substance offense. It no longer applies because he successfully completed his probation on March 9, 2018, 11 days before his security clearance hearing.

Applicant has the burden of establishing the applicability of one or more of the mitigating conditions under AG ¶ 32, which provide:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person’s life;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant has not been arrested since June 26, 2014. However, he admitted at his hearing that he continued to sell marijuana until September 2014 to pay for a lawyer and because he had some marijuana after his arrest and was not going to give it away. He was fired from a retail job in November 2014 after he was caught stealing some food. His employment termination was only alleged under Guideline E, but the reason for his firing has ramifications for his rehabilitation of his criminal conduct. The Appeal Board has recently affirmed in ISCR Case No. 16-00792, decided on May 14, 2018 (citing *e.g.*, ISCR Case No. 15-07369 (App. Bd. Aug. 16, 2017)), that “conduct not alleged or otherwise fairly embraced by the SOR may be relevant for other purposes: making a credibility determination; evaluating the applicant’s case for extenuation or mitigation; evaluating the extent to which the applicant has demonstrated rehabilitation; and in performing a whole-person analysis.” SOR ¶ 1.f alleges disposition of Applicant’s criminal offenses from March 2012 through June 2014. AG ¶ 32(c) applies to SOR ¶ 1.f in that it was not shown that Applicant committed any criminal conduct in March 2015.

Given the recidivist nature of Applicant’s criminal conduct, and the fact that he was on probation for a felony offense until March 9, 2018, it is difficult to apply AG ¶ 32(a) in mitigation. Applicant had every reason to ensure that he abided by the law during his probation in that any violation could have resulted in him being prosecuted for the charges that were nolle. He completed his probation only 11 days before his security clearance

hearing, which is not long enough to show law-abiding behavior without threat of further prosecution.

Applicant has demonstrated some reform under AG ¶ 32(d) by successfully completing his probations for the OUI and felony drug sale with no evidence of any violation over the three years; by finishing his schooling and obtaining his certification as an automotive technician in July 2016; and by working in the automotive sales industry, apparently without any problems. He asserts that, in May 2015, he terminated his associations with those now former friends involved in criminal activity. He expressed full confidence that his criminal conduct is behind him. Yet, he also exhibited an unacceptable tendency to minimize or even justify some of his criminal conduct. He testified about the July 2013 assault of a minor, as follows:

They said that [the minor] was bleeding. And they said that he was hurt. But the only thing I did to him was I put him in a headlock and I had to calm him down. He kept trying to swing at me. But I already knew that he was young and underage. So I just basically restrained him. And even after the fact that he spit on me even after everything got broken up and all that stuff. (Tr. 64.)

Applicant's response to why he continued to sell marijuana after June 2014 while he had felony drug sale charges pending against him, *i.e.*, that he had to pay his lawyer and also that he had "some [marijuana] just lingering around. So [he] wasn't going to give it away," was not accompanied by any expression of remorse for his disregard of the law. Applicant is credited with those steps he has taken to become a more mature, responsible, law-abiding person, but he has not yet fully mitigated the serious criminal conduct security concerns raised by his repeated felonious drug activity.

Guideline H: Drug Involvement and Substance Misuse

The security concerns about drug involvement and substance misuse are set forth in 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.

Applicant used marijuana on a daily basis between approximately June 2010 and June 2014. He purchased marijuana for his personal consumption and also for sales to friends and persons referred by friends. He sold marijuana, at times as often as once or

twice a week, between approximately March 2012 and September 2014. He was arrested three times for sale of a controlled substance (marijuana) in March 2012, March 2014, and June 2014. He supported himself financially by selling marijuana during his unemployment from August 2013 to September 2014.⁶ Disqualifying conditions AG ¶ 25(a), “any substance misuse (see above definition),” and AG ¶ 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” are well established.

AG ¶ 26(a) provides for mitigation when the drug involvement and substance misuse “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.” There is no evidence of any illegal drug activity by Applicant after September 2014. The passage of more than three years since then is noted, but the regularity of his use of the drug and his repeated sales of the drug, at times for profit, undermine his case for mitigation under AG ¶ 26(a).

AG ¶ 26(b) provides for mitigation when an individual acknowledges his or her drug involvement and has no intention of future drug activity:

(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;

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

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant had drug counseling from September 2012 to November 2012 following his March 2012 arrest for illegal drug sales, but he continued to use marijuana. He had treatment more recently for his marijuana use from approximately April 2015 to July 2015 as a condition of his plea agreement in March 2015. He gave discrepant dates for his last use of marijuana of June 2014 on his October 2015 SF 86 and of March 2014 on his September 2017 response to interrogatories. The discrepancy could possibly be attributed to inaccurate recall of the date of his last arrest. There is no evidence of any illegal drug activity by Applicant since summer 2015, when he used Xanax as a sleep aid while working and going to school.⁷ He presented documentation showing that he successfully completed

⁶ Applicant disclosed in September 2017 that he had used Xanax illegally one time in 2015. It was not alleged in the SOR so it is not being considered as a factor in disqualification.

⁷ Applicant testified that he used the Xanax when he was working two jobs and going to school. (Tr. 41-42.) He started his automotive technician program in July 2015, so his drug use would have occurred sometime that summer.

his probation for sale of a controlled substance. He testified that he had taken and passed drug screens during his probation. Applicant has been consistent in denying any intention of use marijuana in the future. Even though he did not provide a statement of intent to abstain with the acknowledgement that any future drug involvement would be grounds for revocation of national security eligibility, he responded negatively in his response to interrogatories about whether he intended to use cannabis or Xanax in the future. Applicant understands that he would be required to maintain a drug-free lifestyle if given the opportunity to work for a defense contractor. Applicant testified that he is currently in a cohabitant relationship with his fiancée and their daughter, which could serve as a significant deterrent to relapse.

Regarding Applicant's drug sales, which are cross-alleged under Guideline H in the SOR, the Appeal Board has long held that conduct may have security concern under more than one guideline. See, e.g., ISCR Case No. 06- 21537 (App. Bd. Feb. 21, 2008). Guideline H concerns are raised not only by the use of illegal drugs because of the physiological impairment, but by the disregard for laws exhibited by such drug activity as purchase and sale. Applicant sold marijuana, not only to cover the cost of marijuana for his personal consumption but also for profit to obtain some funds to live on when he was unemployed and to pay for an attorney. His felony drug sales raise considerable security concerns that are not yet fully mitigated for the reasons stated under Guideline J.

Guideline E: Personal Conduct

The security concern about personal conduct is articulated in 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 investigations or adjudicative processes.

Applicant unquestionably exercised poor judgment triggering AG ¶ 15 by using marijuana on a daily basis for approximately four years; by selling marijuana, including at times for profit and while facing felony criminal drug charges; by driving when he was so intoxicated that he blacked out in April 2012; and by assaulting a minor in July 2013. Regarding his termination for cause (SOR ¶ 4.a), Applicant was fired from three jobs for reasons not related to job performance: from a doughnut shop for excessive tardiness from partying the previous evening; from a retail position for being a no-show, although he also suspects that co-workers complained about him rolling a "blunt" of marijuana on the jobsite; and from a retail job for stealing. AG ¶ 16(d) is implicated because of his employment terminations, which are not otherwise covered under the guidelines. That disqualifying condition provides:

(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 individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(3) a pattern of dishonesty or rule violations.

AG ¶ 16(g), “association with persons involved in criminal activity,” could have applied in that friends sold him marijuana or facilitated his drug sales by purchasing marijuana from him or referring other buyers to him. However, his association with them was not alleged as a separate security concern.

Three mitigating conditions under AG ¶ 17 could potentially apply. They are:

(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(g) association with persons involved in criminal activities was unwilling, 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.

AG ¶ 17(c) is only minimally established. His employment termination from the doughnut shop in August 2013 is of minor security concern, even though he was apparently issued written warnings before his termination. The OUI and assault were isolated in nature. The same cannot be said about his regular use of marijuana over some four years or about his marijuana sales that persisted despite pending felony charges against him. Theft from an employer has serious security implications, even if it was only food of minimal value, because it is a violation of a trust relationship.

AG ¶ 17(d) is partially satisfied by Applicant’s efforts to become a productive, law-abiding citizen, as discussed under Guidelines J and H. Applicant has a record of consistent employment in the automotive industry since July 2016, which weighs in his favor with regard to the concerns raised by his previous terminations for cause. He denies any current association with those now former friends involved in illegal drug activities, so AG ¶ 17(g) seemingly is also established. It provides:

(g) association with persons involved in criminal activities was unwitting, 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.

However, in assessing whether Applicant possesses the requisite good judgment that must be demanded from persons in a national security sensitive position, I cannot ignore that Applicant may have significantly underreported his marijuana use when he responded to interrogatories in September 2017. Applicant inexplicably indicated that he had used cannabis only 20 times total when he had previously admitted to using marijuana on a daily basis for approximately four years. No falsification was alleged, but the unexplained discrepancy make it more difficult to find that his personal conduct is no longer of significant security concern. Separate from the issue of whether his marijuana use will recur, he showed extremely poor judgment by disregarding the drug laws for several years. While he is commended for those steps he has taken in reform, personal conduct concerns persist.

Whole-Person Concept

In the whole-person evaluation, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d).⁸ Some of the factors in AG ¶ 2(d) were addressed under Guidelines J, H, and E, but some warrant additional comment.

Likely due to his youth and immaturity, Applicant was unable or unwilling to comply with laws, rules, and regulations relating to assaultive behavior, illegal drug activity, and theft. He is to be commended for the steps he has taken with the help of his probation officer to turn his life around and become a productive young adult. He completed automotive technician school in July 2016, and completed the terms of his sentences for his felony OUI and felony sale of a controlled drug. Yet, it is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). In that regard, Applicant needs more time to show that he possesses the good judgment, reliability, and trustworthiness that national security eligibility requires and that he will not be negatively influenced by people not acting in his best interest. Based on all the information presented, I cannot find that it is clearly consistent with the national interest to grant Applicant security clearance eligibility at this time.

⁸ The factors under AG ¶ 2(d) are as follows:

- (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.

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:	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3, Guideline G:	WITHDRAWN
Subparagraph 3.a:	Withdrawn
Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraphs 4.a-4.c:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge