



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



In the matter of:)	
)	
)	ISCR Case No. 17-04057
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
 For Applicant: *Pro se*
 06/06/2019

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant failed to mitigate the drug involvement and substance abuse, sexual behavior, and personal conduct security concerns. National security eligibility for access to classified information is denied.

History of the Case

Applicant submitted a security clearance application (SCA) on April 11, 2017. On April 6, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H, Drug Involvement; Guideline D, Sexual Misconduct; and Guideline E, Personal Conduct. Applicant answered the SOR on June 15, 2018, and requested a hearing before an administrative judge.

I was assigned to the case on October 3, 2018, and on October 18, 2018, I issued an order to both parties to produce their documentary evidence by November 2, 2018. On October 23, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for November 14, 2018. I convened the hearing as scheduled. Government’s Exhibits (GE) 1 through 4 were admitted, without objection. Applicant testified, and Applicant’s Exhibits (AE) A through D were admitted, without objection. I received the complete transcript (Tr.) on November 26, 2018, and the record closed.

Findings of Fact

Applicant is 33 years old, unmarried, and has no children. He received a high school diploma in 2004 in Iraq. From 2005 until October 2009, Applicant worked for the U.S. military in Iraq as a security guard and as a local interpreter on U.S. military missions. He immigrated to the United States in November 2009 on a special immigrant visa (SVI), and he was naturalized in November 2015. He is attempting to get a job as a linguist for a defense contractor. This is his first security clearance application. He has worked as a truck driver for his current employer since 2006. (GE 1; AE C; Tr. 10, 16-21, 39)

Guideline H: Drug Involvement and Substance Misuse

Applicant disclosed in his 2017 SCA that he used marijuana between August 2012 and February 2016. In June 2012, while living in a state in which it was legal to use medical marijuana, Applicant broke his leg. Two months later, he obtained a medical marijuana card and started using marijuana as pain relief for the broken leg. He did not renew the card when it expired in August 2013, but continued to use marijuana once a month or every other month with friends and by himself for medical and personal reasons. In his SCA, Applicant disclosed that he used marijuana only three to five times after his leg healed. He told the government investigator during his May 1, 2017 interview that he used marijuana one to two times a week for three months in 2012 to help him sleep. (GE 1 at 59; GE 2 at 5; GE 3 at 2; Tr. 22-23, 25-26, 30-33)

In 2014, Applicant obtained a commercial driver's license (CDL) from the Department of Transportation (DOT) to be a commercial truck driver. Applicant started working for Company A as a commercial truck driver in August 2014. This company drug screened their drivers and marijuana use was not permitted. Applicant had a pre-employment urinalysis and one random urinalysis before he left Company A in May 2015. Applicant continued working as a commercial driver for two other companies. For these employments, he had pre-employment urinalyses tests.

In February 2016, Applicant was working as a truck driver for a company that prohibited the use of drugs. He acknowledged that he was aware of his employer's policy that employees remain drug-free, and he was subject to random urinalysis tests. However, Applicant thought the policy only applied to when he was working, not during off hours or "private time." That month, Applicant took a random-work-related urinalysis, which was positive for marijuana. At the hearing, Applicant testified that the last time he used marijuana was approximately one week before this positive urinalysis. (GE 1 at 61; Tr. 23-27)

Later during his testimony, Applicant claimed the positive urinalysis was the result of exposure to second-hand smoke at a concert or from innocent ingestion. (Tr. 24, 26) He also made this claim in his Answer to the SOR and in his May 1, 2017 background interview. He also testified that he did not knowingly use marijuana after he received a CDL in 2014, because he knew it was forbidden by the DOT to use drugs and hold a CDL. (Answer; GE 2 at 5; Tr. 26-29, 33-35)

The following colloquy occurred during the hearing:

Mr. Nagel: And you violated that rule?

Applicant: Well, not – I didn't use marijuana on the job.

Mr. Nagel: Right.

Applicant: I used it as like, in my time off. But, I didn't know that it stays in the body for that long. And in that case – and that won't actually – I didn't even use it. I think I had a second-hand smoke. I'm not sure about it, but....

(Tr. 24)

As a result of the positive urinalysis, Applicant was sent to drug treatment, but he was ultimately released by the employer. (GE 2 at 2-4; GE 3 at 1-2; AE B; Tr. 25, 35) According to Applicant, February 2016 was the last time he was around people who were using marijuana. (Tr. 23-25, 38) His last drug test was in January 2018, and it was negative. (Tr. 37)

Guideline D: Sexual Behavior

In September 2011 Applicant was arrested in State A and charged with forcible rape in the second degree, a felony. He was handcuffed and taken to the police station, fingerprinted, and photographed. He spent four days in jail; met the \$75,000 bail; and then consulted with an attorney. At the hearing, Applicant claimed the attorney told him he did not need to hire anyone to represent him. He testified that he knew he was arrested, but he thought he was just accused, not charged, which is why he did not disclose the arrest in his SCA. The case was closed, and the charges were ultimately dismissed. (GE 1 at 58-59; GE 2 at 4; GE 3 at 1-2; AE A; Tr. 44-50)

In August 2011 Applicant had sex with a woman he met through a dating application. She told the police that their first interaction began as consensual; however, she requested that Applicant wear a condom, he refused her request, their interaction then became non-consensual, and he forcibly had vaginal/penile intercourse with her. Applicant told the police interviewer in September 2011 that the woman asked him to use a condom, and he complied with her request. At the hearing, Applicant claimed he asked the woman for a condom, which was inconsistent with his earlier version of events. (GE 2 at 7; GE 4; GE 5 at 12; Tr. at 40-45)

Applicant testified that they had sex one time, and it was consensual. The woman told the police and gave a detailed description of how Applicant raped her a second time, in late August 2011. Applicant forced his way into her apartment and then forced himself on her again. The next day, she reported the rapes to the police. (GE 4; Tr. 45-46)

Applicant obtained copies of all of the police paperwork in 2014 before he applied for his U.S. citizenship. In his Answer to the SOR, he denied that this was a felony charge,

but the documentary evidence reflects that he was charged with a felony. (Answer; GE 5; AE A; Tr. 44, 50-51)

Guideline E: Personal Conduct

Despite obtaining a copy of the arrest record, as stated above, Applicant claimed at the hearing and in his Answer that he was unaware that he was charged with felony-level rape. In his April 2017 SCA, Applicant failed to disclose that he was arrested in September 2011, and charged with forcible rape, a felony. He did disclose that he used marijuana between August 2012 and February 2016 due to a broken leg. Applicant understood that when he signed the SCA, he certified that the information he provided was correct. (Answer; GE 1 at 59-61; Tr. 53)

At the hearing, Applicant claimed he did not know he was actually charged with a crime. When he was questioned as to why he did not list the arrest as required in his SCA, he claimed he disclosed the arrest in an earlier SCA. At the hearing, he provided a February 28, 2017 "review copy" of an SCA, which was unsigned. In the review copy, Applicant disclosed the rape arrest and derogatory gambling information. He did not disclose the gambling information and rape arrest in the April 2017 SCA.¹ There is no evidence that Applicant provided the review copy SCA to his employer or facility security officer. (GE 1; AE D at 36, 39; Tr. 47-50, 54-63, 69-70)

Applicant also asserted at the hearing that an employee of his sponsor may have modified his SCA before it was submitted to the government. Finally, Applicant admitted that he was concerned that if he disclosed the rape arrest in his SCA, it might prohibit him from being hired as an interpreter. (AE D; Tr. at 54-63, 69-70)

Applicant was interviewed by a government investigator on May 1, 2017 and by a U.S. Army investigator in late May 2017. He disclosed the arrest in both interviews. (GE 2 at 4-5; GE 3 at 1-2; Tr. 56) During his second interview, Applicant stated that he thought he disclosed the rape arrest in his SCA. (GE 3 at 10; Tr. 55-57, 64)

Applicant applied for a security clearance because he loved working with the U.S. Army in Iraq. (Tr. 52, 67) He provided several documents relating to his valued work with the U.S. Army in Iraq. (AE C)

¹ Applicant disclosed in the February 2017 review copy of a SCA that from November 2015 to present he had incurred \$17,000 in gambling losses. "As of now I have close to 35000 [sic] in debt , [sic] but its [sic] not all because of gambling. I still make payments on time each month , [sic] and I 100% on [sic] time payments. But if i [sic] did not gamble , [sic] I could have paid all my debt long time ago. I have take [sic] action to stop gambling such as not keeping cash with me all of the time , [sic] and I have told some friends about my gambling problem so they can keep me going on the right path of not gambling. And for now I do not gamble as much as before , [sic] and one of the reasons that I'm seeking overseas job is because I want to stay as far as I can from any gambling." (AE D at 39)

Policies

“[N]o one has a ‘right’ to a security clearance.”² 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.”³ The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”⁴

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, an administrative judge applies these guidelines 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 and 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 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.

Adverse clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”⁵ Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Security Executive Agent have established for issuing national security eligibility.

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.⁶ “Substantial evidence” is “more than a scintilla but less than a preponderance.”⁷ The guidelines presume a nexus or rational

² *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

³ *Egan* at 527.

⁴ EO 10865 § 2.

⁵ EO 10865 § 7.

⁶ Directive ¶ E3.1.14.

⁷ See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

connection between proven conduct under any of the criteria listed therein and an applicant's security suitability.⁸ Once the Government establishes a disqualifying condition, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.⁹ An applicant has the burden of proving a potential mitigating condition, and the burden of disproving it never shifts to the Government.¹⁰

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."¹¹ "[S]ecurity clearance determinations should err, if they must, on the side of denials."¹²

Analysis

Guideline H: Drug Involvement and Substance Misuse

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

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.

The record evidence established the following disqualifying condition under AG ¶ 25:

- (a) any substance misuse (see above definition); and
- (b) testing positive for an illegal drug.

⁸ ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

⁹ Directive ¶ E3.1.15.

¹⁰ ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

¹¹ ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive ¶ E3.1.15.

¹² *Egan*, 484 U.S. at 531; See also AG ¶ 2(b).

The burden shifted to Appellant to rebut or prove mitigation of the resulting security concerns. AG ¶ 26 provides conditions that could mitigate security concerns in this case:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

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

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

(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 made inconsistent statements in his SCA, interviews, Answer, and at the hearing regarding his history of drug use. He claimed he discontinued using marijuana in 2014 after he obtained a DOT driver's license; however, his testimony indicates he continued to use marijuana during his off time. Additionally, his speculations that the 2016 positive urinalysis was the result of innocent ingestion lack credibility. Overall, his claims regarding his drug usage are inconsistent, self-serving, and minimize his behavior.

Appellant's decision to use illegal drugs, while working for an employer with a zero-tolerance policy, cannot be considered a minor lapse in judgment, but rather a pattern of behavior that indicates his unwillingness to follow rules and regulations. Security clearance decisions are not limited to conduct during duty hours; off-duty conduct, especially where it reflects poor judgment, provides a rational basis for the government to question an appellant's security worthiness.¹³ Applicant's behavior showed a disregard for the law, regulations, and the fiduciary relationship he voluntarily entered into with his former employer and the DOT.

Applicant asserted at the hearing that he has not been exposed to drugs since February 2016. However, he failed to be forthright and consistent throughout the investigation and at his hearing regarding his drug use. Therefore, Applicant's assertions that he is drug free afforded little mitigation with respect to his drug use, and he did not establish mitigation under AG ¶¶ 26(a) and 26(b).

¹³ See, e.g., *Cole v. Young*, 351 U.S. 536, 550 n.13 (1956); *Croft v. Department of Air Force*, 40 M.S.P.R. 320, 321 n.1 (1989).

Guideline D: Sexual Behavior

¶ 12: The security concern relating to the guideline for sexual behavior is set out in AG

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress raises a security concern. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

13: The record evidence established the following disqualifying condition under AG ¶

(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted.

AG ¶ 14 provides conditions that could mitigate security concerns raised under this guideline. The following is potentially applicable:

(b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment.

Applicant was accused of raping a woman in 2011. She went to the police and made a detailed statement describing the two times she claimed he raped her. Although the charges were ultimately dismissed, the woman's statement raises serious concerns of a criminal nature, which reflects upon Applicant's judgment, reliability, and trustworthiness. Additionally, Applicant's explanations regarding his behavior are inconsistent.

Although these allegations stem from incidents that are alleged to have occurred over seven years ago, the seriousness of the conduct and Applicant's inconsistent testimony continue to cast doubt on his current reliability, trustworthiness, and judgment. Mitigation under AG ¶ 14 (b) does not apply in this case.

Guideline E: Personal Conduct

The concern under this guideline is set out 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 investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

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

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

AG ¶ 16 describes conditions that could raise a security concern and be disqualifying. The following is potentially applicable in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

When a falsification allegation is controverted, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission.¹⁴ An applicant's level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate.¹⁵

Given Applicant's age, experience, and professional background and his expressed concern about the negative consequences for potential employment if he disclosed the arrest, Applicant deliberately did not disclose the 2011 arrest in his SCA.

¹⁴ See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

¹⁵ ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

AG ¶ 17 describes conditions that could mitigate security concerns. Two are potentially applicable in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(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.

In this case, Applicant claimed: he disclosed the 2011 arrest in an earlier version of his SCA; he was unaware that he was charged with a crime; he was unaware he was charged with a felony; and the person he submitted that SCA to may have made changes to the package. Applicant acknowledged at the hearing that he was aware that when he signed the SCA, he certified that the information in the application was correct. He also admitted that he was concerned that the rape arrest may negatively affect his ability to be employed by the government. Applicant's inconsistent statements regarding why he did not list the 2011 rape arrest in his certified and signed SCA cast doubt on his credibility, trustworthiness, and reliability.

Although Applicant disclosed the arrest to government investigators in 2017, his self-serving and inconsistent statements at the hearing limited any potential mitigation. Additionally, his failure to disclose gambling issues in his SCA, further demonstrate his desire to hide derogatory information from the government.

The SOR cross-alleged Applicant's sexual behavior and drug use as concerns under Guideline E. As explained previously, his explanations and denials were inconsistent regarding both of these issues, raising questions regarding his judgment, reliability, and trustworthiness.

Applicant's arrest, drug use and deliberate choice to keep the government in the dark regarding his behavior, raising the concern that he is unreliable and untrustworthy. It also calls into question his judgment and willingness to comply with rules and regulations. This concern has not been mitigated by the passage of time. Neither of the mitigating conditions apply in this case.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the applicable guidelines, each of which is to be evaluated in the context of the whole person. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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.

I have incorporated my comments under the guidelines at issue in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under these guidelines, and evaluating all the evidence in the context of the whole person, Applicant has not mitigated the security concerns at issue. Overall, the evidence in the case raises serious concerns regarding Applicant's truthfulness, reliability, and trustworthiness.

Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the interests of national security of the United States to grant him eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline D:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a – 3.b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security of the United States to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

CAROLINE E. HEINTZELMAN
Administrative Judge