



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



In the matter of:)
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Applicant for Security Clearance)

ISCR Case No. 18-02469

Appearances

For Government: Kelly Folks, Esq., Department Counsel
For Applicant: Daniel P. Meyer, Esq.

11/01/2019

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guideline E, Personal Conduct. He mitigated the security concern under Guidelines H, Drug Involvement and Substance Misuse and J, Criminal Conduct. National security eligibility for access to classified information is denied.

Statement of the Case

On May 1, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H, Drug Involvement and Substance Abuse, J, Criminal Conduct, and E, Personal Conduct. The action was taken 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 adjudicative guidelines (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR in writing (Answer) on June 21, 2019. He requested a hearing before an administrative judge. The case was assigned to me on August 27, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on September 12, 2019, for a hearing on October 8, 2019, and I convened the hearing as scheduled. The Government offered Government Exhibits 1 through 8, which were admitted without objection. Applicant testified on his own behalf, presented three witnesses, and submitted Applicant Exhibits (AE) A through I, which were admitted. I kept the record open until October 22, 2019, and Applicant timely submitted one document, which was marked as AE J, and admitted into the record without objection. DOHA received the transcript of the hearing (Tr.) on October 1, 2019.

Findings of Fact

Applicant is 30 years old. He works as a geospatial analyst for a defense contractor. He is married and has one daughter. He graduated from high school in 2007, and obtained an associate's degree as well as an undergraduate in 2016-2017. (GE 2) He served on active duty in the U.S. Army from 2009 until 2014, receiving an honorable discharge. (GE 1) He has held a security clearance since about 2010. (GE 1) He has been employed with his current employer for about two years. (Tr. 16) Applicant acknowledged that he was briefed regarding the use of illegal drugs. (Tr. 18)

Drug Involvement

Applicant admitted that he used marijuana infrequently over the course of 2007 through 2014 while holding a security clearance. (SOR 1.a-b) He also admitted that he used marijuana from September 2012 to January 2014 while employed in a sensitive position on an active duty military base. (SOR 1.c) He was aware of the policy of zero tolerance for drug use. (Tr. 18) Applicant testified that he used the marijuana infrequently and when he was on leave from the military. He reports his last use was in 2014. (AE D) He described the circumstances involving the use of marijuana. When he visited his wife's cousins in 2013, he was offered a lit joint and he did not turn it down. (Tr. 27) He knows that he could have turned it down, but he did not. In 2014, he again used marijuana with his wife's cousin at a party.

Applicant does not associate with these family members anymore. He attended a drug abuse session and obtained an evaluation report in June 2019, which reflected that a clinical interview and an assessment tool combined with a urinalysis was conducted in 2019. The evaluator did a follow up in October 2019, and Applicant does not meet criteria for substance abuse disorder. (AE I, J) He has never tested positive in a drug test. He signed a letter of intent not to abuse any drug in the future on March 17, 2019. (AE E) He discussed the illegal use with his wife and recently with his supervisor. (Tr. 33)

Criminal Conduct

As to SOR 2.a, the SOR cross-alleged the information as set forth in SOR 1.a-1.c. He has not smoked marijuana or any illegal drug since 2014. He admits that his actions were wrong and illegal. He has been evaluated for drug abuse. He does not associate with the people with whom he used.

Personal Conduct

Applicant admitted in response to his SOR that he never disclosed his use of marijuana in any of his SCAs since 2011. This included when he was processing for a higher clearance with another agency in 2015. (GE 3) The agency denied his security clearance. (GE 6, 7, and 8) He appealed the decision but was denied. (GE 3) Nor did he voluntarily divulge the information during a 2017 investigative interview. (GE 2)

As to SOR 3.a, Applicant admitted that he falsified material facts during a personal subject interview on June 8, 2017, with an authorized investigator with OPM. He denied any drug use in response to all questions under Section 23. He explained that he was scared and knew that he had incidents from 2012 and 2013, and knew it would hurt his chances of seeking a higher clearance.

As to SOR 3.b, Applicant admitted that he falsified material facts on his August 17, 2016, SCA in response to Section 23- Illegal Use of Drugs or Drug Activity in the last seven years. He also answered "No" as to whether he intentionally engage in the misuse of prescription drugs.

As to SOR 3.c, Applicant admitted that in his August 17, 2016 SCA in Section 22 – Illegal Drug Use While Holding a Security Clearance, he did not disclose any of his marijuana use.

As to SOR 3.d, Applicant admitted that he intentionally falsified material facts on his December 19, 2011, SCA by answering "No" to all questions relating to illegal drug use in the past seven years.

Applicant reports that he is a mature man and not the young and stupid person he was before. He explained that he would never jeopardize the United States regarding classified information. He does not want to make any more mistakes. He emphasized that the events happened when he was on leave from the military. (Tr. 20)

Applicant submitted five letters of recommendation. Each letter attests to his honesty and trustworthiness. His wife, his sister-in-law, a college friend, and a colleague praise Applicant for his professionalism, work ethic and good judgment. The letters describe Applicant as a good father, worker and a good man. (AE H)

Three witnesses testified on behalf of Applicant at the hearing. His wife described him as very reliable and a good father. She explained that he does not use marijuana or any drug. She stated that he has always been a rule follower. (Tr.48)

Applicant's sister-in-law and co-worker testified that Applicant is very quiet and reserved, but task oriented. She believes he makes good choices for his family. She recommends him for a security clearance. The witness did not know of the issues of nondisclosure of his use of marijuana over the years on his SCAs. (Tr. 58-60)

Applicant's colleague testified that Applicant is trustworthy and reliable. When Applicant is abroad working, he is very professional. He works well under stress. He was not aware of the nondisclosures, but would still recommend him. (Tr. 64)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Finally, Section 7 of EO 10865 provides that adverse 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 E: Personal Conduct

The security concern relating to the guideline for Personal Conduct 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. One is potentially applicable in this case:

(a) deliberate omission, concealment or falsification of relevant facts from any personnel security questionnaire, personal history statement ... to

determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant admitted that he did not list any illegal drug use in any of his SCAs or investigative interviews due to fear of not gaining or retaining a security clearance. He quite candidly stated that he was scared. It was only when confronted that he stated that he has used marijuana and while holding a security clearance. This falsification lasted until 2017. SOR 16(a) applies.

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17 including:

(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

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant did not report specific use of marijuana, on any of his numerous SCAs or during various interviews. He admitted that he intentionally falsified his applications for fear of negative consequences. AG ¶¶ 17(c), 17(d), and 17(e) do not provide mitigation for the personal conduct concerns arising under these circumstances.

Guideline J: Criminal Conduct

AG ¶ 30 sets forth the security concerns pertaining to criminal conduct:

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.

AG ¶ 31 describes three conditions that could raise a security concern and may be disqualifying in this case:

(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;

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

(c) individual is currently on parole or probation.

Applicant used marijuana with varying frequency from 2007 until 2014. He obtained an evaluation and does not currently have a substance abuse problem. He has had no other incidents. The concerns under criminal conduct are cross alleged from the concerns under the drug guideline. Applicant's use at varying frequency satisfies AG 31(b) as marijuana remains illegal under Federal law.

AG ¶ 32 provides two conditions that could mitigate the above security concerns raised in this case:

(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; 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 mitigated the criminal conduct concerns due to the passage of time, his lack of association with the persons involved, and the fact that he has been drug free for several years. He signed a letter of intent in 2019. He has excellent work references and has seen a counselor. He has had no recurrence of incidents since 2014. AG 32(a) and 32(d) apply.

Guideline H: Drug Involvement and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Misuse is set forth at 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.

The guideline at AG ¶ 25 contains seven conditions that could raise a security concern and may be disqualifying. Three conditions are established:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant used marijuana with varying frequency from 2007 through 2014. From January 2012 to January 2014, Applicant used marijuana while holding a security clearance. He continued his use of marijuana while serving on active duty in the U.S. Army from 2012 until 2014. Therefore, AG ¶ 25 (a), (c), and (f) are established.

The guideline at AG ¶ 26 contains four conditions that could mitigate security concerns. Two conditions may be applicable:

- (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's last use of marijuana was in 2014. I find that sufficient time has transpired for mitigation in this case given the period of time in his life that he illegally used drugs.

He did seek help from a counselor and no longer associates with the persons with whom he smoked. He signed a Letter of Intent in 2019. I find mitigation under Guideline H.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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(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.

Under AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is respected by those that know him. He performs well at work. He was in the U.S. Army and was honorably discharged because they were unaware of his illegal drug use. He has worked at his current employment for several years. He has held a security clearance since 2010. He has excellent letters of recommendation. He has not had any criminal incidents since 2014. He admitted and obtained a clinical evaluation concerning the drug use and also had a follow up evaluation in October 2019. He acknowledged that he is not the same person as before. He never tested positive for drugs. He has removed himself from those persons associated with drug use. He signed a letter of intent. He is described as a good father by his wife.

Applicant did not report on at least four SCAs any involvement with drug use. This is troubling. In his interview in 2017, he did not volunteer any information concerning drugs. He also did not admit use in a screening with another agency. He admits that he was scared and did not want any negative effects on his job or security clearance. Applicant's pattern of deliberate falsifications over more than a five-year period undermines his credibility, and engenders serious questions regarding his suitability for a security clearance. I have doubts and questions as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the concerns under Guidelines J and H, but failed to mitigate the security concerns arising under Guideline E.

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 H:	FOR APPLICANT
Subparagraphs 1.a-c:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a-d:	Against Applicant

Conclusion

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

Noreen A. Lynch
Administrative Judge