DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 18-02046
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Brittany White, Esq., Department Counsel
For Applicant: Personal Representative

02/21/2020

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Decision

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GARCIA, Candace Le'i, Administrative Judge:

Applicant did not mitigate the criminal conduct and drug involvement and substance misuse security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On December 3, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J (Criminal Conduct) and Guideline H (Drug Involvement and Substance Misuse). The action was taken under Executive Order (Exec. Or.) 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) implemented by DOD on June 8, 2017.

Applicant responded to the SOR (Answer) on February 5, 2019, and elected to have a hearing before an administrative judge. The case was assigned to me on April 4, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing

(NOH) on April 19, 2019, scheduling the hearing for June 6, 2019. I canceled that hearing on June 3, 2019, at Applicant's request, due to the unavailability of his personal representative. DOHA issued a second NOH on June 6, 2019, rescheduling the hearing for July 22, 2019. I convened the hearing as rescheduled.

Government Exhibits (GE) 1 through 14 were admitted in evidence without objection. Applicant objected to GE 15, consisting of an unauthenticated Report of Investigation summarizing two background interviews conducted by a DOD investigator on March 14 and May 31, 2018. I sustained Applicant's objection and did not admit GE 15 in evidence. Applicant testified. He did not call any witnesses or submit any documentation. At Applicant's request, I kept the record open until August 12, 2019, for additional documentation. On August 8, 2019, I received documentation from Applicant that I marked collectively as Applicant's Exhibit (AE) A and admitted in evidence without objection. DOHA received the hearing transcript (Tr.) on July 30, 2019. (Tr. at 31-36, 150)

Findings of Fact

In his Answer to the SOR (Answer), Applicant admitted all of the allegations except SOR ¶¶ 1.d, 2.a, and 2.b, which he denied. His admissions are incorporated in my findings of fact. He is 29 years old. As of the date of the hearing, he was engaged to be married to his girlfriend of 11 years, who is the mother of their two minor children. (Answer; Tr. at 11-14, 47-48, 77, 91-97, 115, 124-125, 135-140, 144-146; GE 1)

Applicant graduated from high school in 2008. He earned an associate's degree in 2016 and a bachelor's degree in 2018. As of the date of the hearing, he has worked as an information technology help desk analyst for his current employer, a DOD contractor, since November 2017. He also worked as a part-time children's football official since 2008. He has never held a security clearance. (Tr. at 9-10, 15, 47, 89-91, 96-97, 135-138; GE 1; AE A)

In approximately May 2009, Applicant was arrested and charged with driving under the influence (DUI) of alcohol or drugs, first offense, and purchase or possession of alcohol. He was 18 years old. This was his first criminal-related offense. He was driving a friend to 7-11 when the police pulled him over for a broken tail light. He testified that he had previously been at a party where he had taken a sip of a drink thinking it was juice, but when he realized it contained alcohol he "tried to quickly spit it out." His blood alcohol content (BAC) was .002%. The charges were *nolle prossed*. He testified that his attorney told him and his father that they did not have to worry as the case was closed. (SOR ¶ 1.a; Tr. at 48-52, 56-57, 97-106; GE 1-4)

In approximately May 2010, when Applicant was 19 years old, the charge of DUI of alcohol or drugs, as set forth above, was reinstated, to his surprise. He was represented by an attorney, and this case was consolidated with his December 2010 charge of marijuana possession (SOR ¶¶ 1.b, 2.b), as discussed below. Applicant testified that his attorney advised him to plead guilty, because he could not afford to fight the charge and he did not want to delay his efforts at the time to enlist in the U.S.

military. He pled guilty to DUI of alcohol or drugs in February 2011, and was sentenced to 60 days in jail, suspended, fined $500, and his driver's license was suspended for 12 months. (SOR ¶ 1.a; Tr. at 48-52, 56-57, 97-110; GE 1-4)

In approximately December 2010, at age 20, Applicant was charged with marijuana possession. He testified that at his sister's request, he drove to a fast food restaurant to buy her food, using her car as he did not own a car at the time, when he was pulled over by the police for failure to yield. The police officer found an empty bag in the car and claimed it was an "empty marijuana pack." Applicant testified that though he was aware that his sister smoked marijuana on occasion, he was unaware that she had any marijuana-related paraphernalia in the car. He was given a ticket to show up to court. He was represented by an attorney, and this case was consolidated with his May 2010 charge of DUI alcohol or drugs (SOR ¶ 1.a), as set forth above. He testified that his attorney told him he was just getting a ticket. In February 2011, he also pled guilty to the amended charged of paraphernalia possession. He was sentenced to 90 days in jail with 85 days suspended, placed on unsupervised probation for 3 years, and fined $416. He spent about a weekend in jail. (SOR ¶¶ 1.b, 2.b; Tr. at 52-60, 103-110; GE 1, 5)

In approximately May 2011, at age 20, Applicant was charged with marijuana possession, driving with a suspended or revoked license, and driving with a defective brake light, all of which occurred on a military base. He testified that he was pulled over on the base in which he worked while smoking a Black & Mild cigar. He testified that the cigar did not contain marijuana, and he believed the police pulled him over because of racial profiling, as he is an African American man. He testified that the car he was driving was a relative's car, as he still did not own a car at the time, and the police found marijuana in the car. Applicant denied that the marijuana belonged to him and testified that he was unaware of any marijuana present in the car. He was given a ticket to show up to court. He was represented by a court-appointed attorney. He testified that he underwent random pre-trial drug testing for five to six months, and approximated that he was drug tested five to ten times during this period. He pled guilty in a federal district court to the infraction of driving without a valid operator's license and was fined $100; the remaining charges were dismissed. (SOR ¶ 1.c; Tr. at 58-63, 110-116; GE 6-7)

Applicant attributed his criminal involvement from 2009 to 2011 to not fulfilling his father's expectations after he graduated from high school. He described his father, who is honorably retired from the U.S. military, as an "accomplished" man, and he felt like he was a disappointment. He "got depressed." He testified that he was young, he made mistakes trying to find himself, and he associated with the wrong crowd. (Tr. at 46-48, 77, 91-97, 115, 135-140, 144-146; AE A)

In approximately December 2014, at age 24, Applicant was charged with stealing from a military exchange an iPhone USB charging cable and a pair of gloves, with an aggregate value of less than $1,000, and assaulting an employee of the exchange. He was at the commissary visiting his mother, who worked there. He testified that he was hurriedly shopping, without a cart and while on his phone, when he accidentally walked out of the exchange with a $10 cellular phone charger before paying for it, as he was rushing to get home to his pregnant fiancée. When he then attempted to pay for the

charger, he was not permitted to do so. He denied assaulting any employee of the exchange. He was handcuffed and then released and given a ticket to show up to court. He testified that he consulted with a private attorney, but elected to accept a court-appointed attorney instead. In March 2015, he pled guilty in a federal district court to theft of government property and was sentenced to six months of supervised probation and fined $150. He testified that he chose to plead guilty because "there really wasn't nothing I could really do to get around it." He continued, "I just wanted to move forward. I accepted it." (SOR ¶ 1.d; Tr. at 42, 63-67, 115-124; GE 1, 8-9)

In approximately August 2015, at age 24, Applicant was charged with felony possession with intent to distribute five+ pounds of marijuana, felony transporting five+ pounds of marijuana, and resisting arrest. As of the date of the hearing, this was his last criminal offense. He stated the following in his 2017 security clearance application (SCA):

> An unknown package arrived at my parents['] home. I wrote ["]wrong address["] on the package without opening the package. At this point I am completely unaware of what the package contained. I put the package in my car with intentions to return it to the post office. I am unaware that there were unmarked police cars parked around my neighborhood watching me. By the time I drove to the end of my street, I was pulled over by several police officers. I was taken to the police station and was informed the package contained marijuana. I cooperated with the police hoping to find [anyone] who could have used my address without my knowledge or consent. I was the one who suffered being charged for this offense I had no intentions of committing.

(SOR ¶¶ 1.e, 2.b; Tr. at 38-46, 67-78, 124-135, 140-141; GE 1, 10-11; AE A)

Applicant reiterated the same narrative at hearing. He testified that this incident occurred in April 2015. At the the time, he, his fiancée, and his children lived with his parents in their home. He testified that when the police took him to his parents' home, where he was observed to have received the package and after they stopped him as he was en route to the post office, they entered the home aggressively to search it. He testified that the police assumed he would be resistant because of his size, and things got "crazy" because everyone in the home at the time, to include his mother and fiancée, demanded that the police show them their search warrant. He testified that the police did not find anything in the home. He stated in his SCA and testified that the federal authorities told him they did not believe he was involved with the marijuana package and did not pursue criminal charges against him, but county authorities were looking for a conviction and he fit the bill. He testified that the county had a conviction rate of approximately 97%, and he believed his ethnicity factored into their pursuit of criminal charges against him, which did not occur until approximately six months after the incident, in August 2015; Applicant's father echoed the same sentiment in the reference letter he wrote for Applicant. (SOR ¶¶ 1.e, 2.b; Tr. at 38-46, 67-78, 124-135, 140-141; GE 1, 10-11; AE A)

Applicant was represented by an attorney. He pled guilty to possession with intent to distribute five+ pounds of marijuana. He testified that he did so because he was scared and he did not believe he had another choice, as his attorney told him that he was facing five to ten years in jail, his attorney's fees were $25,000, and he had to think about his young family. He testified that his attorney advised him to plead guilty because "it's about the jury and the area you're living in and the county of how you look, you fit the profile." He testified that his attorney told him that "if you plead guilty, you can start fresh and you can start your life over." He also testified that he believed he was pleading guilty to a misdemeanor, because he was told such by his attorney. The charge of "resisting arrest" was dropped because he was compliant. He was sentenced to 10 years in jail, with 9 years and 1 month suspended, his driver's license was suspended for six months, and he was fined $628; the remaining charges were *nolle prossed*. (SOR ¶¶ 1.e, 2.b; Tr. at 38-46, 67-87, 124-135, 140-141; GE 1, 10-11; AE A)

Applicant served 10 months in jail, from May 2016 to March 2017. He was then placed on work release and required to report in person to his probation officer once monthly. After several months, his in-person probation requirement was switched to once every three months; it was then lifted and he was required to simply call into his probation officer once monthly. He testified that he was drug tested during the period in which he was on probation, initially once every three months and then randomly. He completed probation in August 2018. (SOR ¶¶ 1.e, 2.b; Tr. at 38-46, 67-87, 124-135, 140-141; GE 1, 10-11)

In approximately March 2017, at age 26, Applicant was found by a federal district court to have violated his federal probation from his March 2015 conviction for theft of government property (SOR ¶ 1.d), as a result of his August 2015 felony charges, as discussed above (SOR ¶¶ 1.e, 2.b). His federal probation was revoked and he was sentenced to 15 days in jail, with credit for time served. He served this time in conjunction with the 10 months that he served from 2016 to 2017. (SOR ¶ 1.f; Tr. at 78-79, 134-135, 140-141; GE 12-14)

Applicant testified that he was unaware at the time that his guilty pleas to the charges in SOR ¶¶ 1.a to 1.e equated to admissions of guilt. He testified that he was also unaware that he was developing a criminal record as a result of his guilty pleas. He testified that he only began to understand the meaning of his guilty pleas when he started the security clearance process in approximately 2017. He testified that had he truly understood, he would have taken a "different approach" and he "would have fought for more than just always pleading, pleading, pleading." (Tr. at 108-110, 144-146)

Applicant used marijuana at least two to three times in approximately April 2014. He testified that this was the first time he used marijuana, and he experimented with it socially with friends. He stated in his SCA that he did not intend to use marijuana in the future because he has two children to support, he planned on marrying, and he intended to continue his career in information technology. He denied using marijuana after April 2014, and denied using it in April 2017. He testified that he could not have used marijuana in 2017 because he was being drug tested as part of his probation for his felony conviction (SOR ¶ 1.e), as discussed above. He testified that he had not been

drug tested since he completed probation in August 2018, and he had not yet been drug tested by his current employer as of the date of the hearing. He testified that he no longer socialized with the individuals with whom he used marijuana in 2014. He testified that if he were ever to find himself in a situation where illegal drugs were being used, or legal drugs were being misused, he would leave. (SOR ¶ 2.a; Tr. at 79-89, 93-94, 107-108, 141-142; GE 1)

Applicant testified that he was a "different person." He acknowledged the mistakes he made in his past, but stressed that "I wake up and do everything differently. I got kids that look up to me." He stated that he took "full responsibility and accountability [for] each of these situations and encounters I have ever had with the law enforcement." Since he began working for his employer in November 2017, he has received two pay increases and earned $40,000 annually as of the date of the hearing. He testified that he has not had any unfavorable issues at work and his employer was aware of his criminal history. He was rated favorably in his 2018 performance review. He earned a grade point average of 3.8 with his bachelor's degree. He moved out of his parents' home in 2018 and has since rented a home for himself, his fiancée, and their children. He testified that he is a family man, and he spends time with them during his free time. (Tr. at 77, 91-97, 115, 135-140, 144-146; AE A)

Applicant's father described him as a "good man who has gone through the many challenges that many of America's young black men [go] through . . . ." Having held a security clearance and worked as a security manager during his military career, his father stated that Applicant's character was evidenced by the trust he has earned from the various individuals who provided references on his behalf. His coworker of two years attested to his work ethic, professionalism, timeliness, and positivity. His former high-school basketball coach described him as a dedicated family man of strong moral character. Several other individuals who have known Applicant for a number of years, to include one who has known him since 1998 and another who has been a fellow referee since 2014, reiterated that Applicant possessed the character and trustworthiness to hold a security clearance. (AE A).

Policies

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 to be 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching 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."

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Exec. Or. 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* Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct as: "[c]riminal 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 conditions that could raise a security concern and may be disqualifying. I considered the following relevant: "(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's criminal conduct occurred over a span of six years, from 2009 to 2015. He has four convictions: two in 2011, for DUI of alcohol or drugs and for paraphernalia possession; in 2015 for theft of government property; and in 2016 for

felony possession with intent to distribute five+ pounds of marijuana. He was also found in 2017 to have violated his federal probation. AG ¶ 31(b) is established.

AG ¶ 32 provides the following mitigating conditions:

> (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.

There is no evidence that Applicant was pressured or coerced into committing the conduct underlying his criminal convictions. To the contrary, his guilty pleas and his admissions in his Answer constitute evidence that he engaged in the conduct that led to his criminal convictions. His assertions that he did not truly understand the nature of his guilty pleas at the time of his offenses, and he was convinced by the various attorneys that represented him to take such pleas due to factors such as racial bias, cannot substitute or negate the record evidence. AG ¶¶ 32(b) and 32(c) are not established.

I commend Applicant's involvement with his community as a children's football official since 2008, his attainment of his associate's and bachelor's degrees in 2016 and 2018, and his favorable employment record with his current employer since 2017. However, his criminal conduct spanned a period of six years and he only completed probation in August 2018. As such, I find that not enough time has elapsed since his criminal behavior and without recurrence of criminal activity, and the record evidence still casts doubt on his reliability, trustworthiness, and judgment. AG ¶¶ 32(a) and 32(d) are not established.

Guideline H, Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern pertaining to drug involvement and substance misuse as: "[t]he 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."

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant: "(a) any substance misuse . . . ;" and "(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia."

Applicant used marijuana in 2014. He was also convicted in 2011 of paraphernalia possession and in 2016 of felony possession with intent to distribute five+ pounds of marijuana. AG ¶¶ 25(a) and 25(c) are established.

AG ¶ 26 provides the following potentially relevant mitigating conditions:

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

More than five years have passed since Applicant's 2014 marijuana use. There is no evidence that he has used marijuana or any other illegal drug, or misused any legal drugs, since 2014. He credibly testified that he is a family man and he no longer associates with the individuals with whom he used marijuana in 2014, and he would leave any situation in which illegal drugs were being used or legal drugs were being misused. As he did not provide a signed statement of intent, AG ¶ 26(b)(3) is not established as to SOR ¶ 2.a. However, AG ¶¶ 26(a), 26(b)(1), and 26(b)(2) are established as to SOR ¶ 2.a, and I find SOR ¶ 2.a in Applicant's favor.

For the same reasons as set forth above in my Guideline J analysis, I find that none of the above mitigating conditions are established as to SOR ¶ 2.b.

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 relevant 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 eligibility for a security clearance 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J and H in my whole-person analysis. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the criminal conduct and drug involvement and substance misuse security concerns.

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.f:	Against Applicant
Paragraph 2, Guideline H:	AGAINSTAPPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Candace Le'i Garcia
Administrative Judge