



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 19-00887
)	
Applicant for Security Clearance)	

Appearances

For Government: Brittany White, Esq., Department Counsel
 For Applicant: *Pro se*
 01/03/2020

Decision

MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted security clearance applications (SCA) on March 7, 2012 (SCA1) and April 13, 2018 (SCA2). On June 26, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The DOD CAF acted 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) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on August 15, 2019, and requested a decision on the written record without a hearing. On September 27, 2019, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including documents identified as Items 1 through 6. He was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government’s evidence. He received the FORM on September 30,

2019, and did not respond. Items 1 and 2 contain the pleadings in the case. Items 3 through 6 are admitted into evidence. The case was assigned to me on November 26, 2019.

Findings of Fact

Applicant, age 26, has never married nor had children. He earned his high school diploma in 2011. He is one course shy of earning a degree from the university he attended between August 2011 and May 2016. He has been employed as an engineer by a defense contractor since May 2016. (Items 3, 4; Item 5 at 4)

The SOR alleged Guideline H and E concerns involving Applicant's use of marijuana, including after having been granted access to classified information (SOR ¶¶ 1.a, 1.b, and 2.a). It also alleged Guideline E concerns involving Applicant's deliberate falsifications of SCA1 and SCA2 (SOR ¶¶ 2.b, 2.c, 2.e), 2017 driving under the influence (DUI) arrest (SOR ¶ 2.d), and 2012 open container citation (SOR ¶ 2.f). He admitted each of the SOR allegations and proffered facts in support of mitigation. Although he answered "I admit" to the allegations set forth in SOR ¶¶ 2.b, 2.c, and 2.e, given his accompanying explanations, I conclude that he denied deliberately falsifying SCA1 and SCA2. (Item 2)

Applicant underwent his first background investigation for a DOD clearance, apparently in connection with an engineering internship he had with a department of the U.S. Navy. The record did not explain the reason for the delay between his submission of SCA1 in 2012 and the internship that occurred in 2015. The current background investigation was initiated by SCA2, which Applicant submitted in April 2018. The record did not address the status of any interim or final clearances that he may have been granted in connection with the first investigation. There is also no information in the record as to whether Applicant was granted an interim clearance pending adjudication of the current investigation. The Government did not otherwise establish that Applicant was granted access to classified information as alleged in SOR ¶ 1.a. (Item 2 at 35; Item 3 at 38-39; Item 4 at 34; Item 5 at 6-7; Items 6 and 7)

Applicant did not report any illegal drug use on either SCA1 or SCA2. In June 2018, he was interviewed twice in connection with SCA2. During the first interview, he initially reported that he used marijuana only about three times during his sophomore year of college between 2011 and 2012. He described his use as "experimental" and "isolated." (Item 3 at 23-24; Item 4 at 30-31; Item 5 at 5-6, 10)

Throughout the course of the second interview, he reported three additional instances of marijuana use, about which he claimed his memory had been refreshed after the first interview. As to each instance, he denied "knowingly" using marijuana. The first instance occurred in about December 2017, when Applicant asserted that he "may have" consumed a food product infused with marijuana while at a party. He did not know the food product "possibly" contained marijuana until three days after the party when a friend told him that he heard that there were marijuana-infused food products at the party. (Item 5 at 7)

The second instance occurred during a camping trip in April 2018. He was offered a cigar by individuals previously unknown to him whom he had befriended. It was only after he took one puff of the cigar that he realized it contained marijuana, whereupon he immediately stopped smoking it because he knew that the federal government does not allow marijuana use. He described that use as “accidental.” The third instance occurred a few days after the first interview, when he tested positive for marijuana on a drug test he was administered in connection with his DUI treatment program. However, he denied that he smoked any marijuana after April 2018. At the conclusion of the second interview, he stated that there were “no further issues” with marijuana that “he could recall.” (Item 5 at 6-7)

Applicant reported two alcohol-related offenses on his SCAs, although he reported his DUI as *nolle prosequi*. He was fined for an open container violation in March 2012. He was arrested and charged with DUI of alcohol in October 2017. In January 2018, he pled guilty and received probation before judgment, the terms of which included unsupervised probation (of an unspecified duration) and installation of an interlock device on his vehicle for six months. Upon the advice of counsel, he voluntarily underwent alcohol treatment to assist with his court case. He asserted that the DUI was an “isolated incident.” He abstained from alcohol for an unspecified period following his arrest. Thereafter, he maintained that he no longer intended to drive after consuming alcohol and planned to consume alcohol “more responsibly.” As of June 2018, his consumption usually consisted of approximately two beers, but he admitted to having consumed beer to intoxication (approximately six beers) on two occasions in the prior six months. (Item 3 at 22; Item 4 at 28-29; Item 5 at 4-5, 8; Item 6 at 3-4, 14)

After being diagnosed with “alcohol abuse, uncomplicated” during his initial intake in December 2017, Applicant was admitted to a 12-week outpatient DUI program to begin in January 2018. His discharge date was projected to be in April 2018. His treatment plan included weekly group sessions, monthly individual sessions, and weekly urinalyses and breathalyzer testing. His discharge was delayed due, in part, to his work schedule, and, in part, because of testing positive for marijuana on his urinalyses. He tested positive on each of the 11 urinalyses administered from December 2017 through July 2018. His counselor noted that the final three urinalysis results indicated that Applicant was recently abstinent from marijuana, which was a requirement for his discharge. Applicant was discharged in July 2018, at which time it was noted that his “condition” had improved and that his prognosis was “fair.” (Item 5 at 6, 7; Item 6 at 11, 12, 13, 14, 16)

In his August 2019 SOR answer, Applicant denied any “conscious” marijuana use after college. He stated that “all conscious use of marijuana was strictly in the years and environment of college attendance,” and that “the two instances of post-college marijuana consumption was unknowing.” He declared his intent not to use any illegal substances for the “duration of [his] clearance,” knowing that it would “jeopardize” his ability to maintain a security clearance. He also stated that he “would be willing to provide annual, semi-annual, or monthly drug screenings to prove . . . [his] determination and willingness to abide by the regulations of [his] clearance.” (Item 2)

As of June 2018, Applicant asserted that he no longer associated with persons who use illegal substances or frequented places where illegal substances were being used. As of May 2019, he averred that he was focusing more on work and his health rather than social events, and avoiding situations where he was not in control of his environment. He had recently completed a half marathon and was coaching a youth soccer team. (Item 2, Item 5 at 7, 10, 11)

Policies

“[N]o one has a ‘right’ to a security clearance.” (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” (*Egan* at 527). 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.” (EO 10865 § 2).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the 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.

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.” (EO 10865 § 7). Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. (*Egan*, 484 U.S. at 531). “Substantial evidence” is “more than a scintilla but less than a preponderance.” (*See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994)). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. (ISCR Case No. 92-1106 at 3, 1993 WL

545051 at *3 (App. Bd. Oct. 7, 1993)). Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. (Directive ¶ E3.1.15). An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005)).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002)). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” (*Egan*, 484 U.S. at 531; AG ¶ 2(b)).

Analysis

Guideline H (Drug Involvement and Substance Misuse)

The concern under this guideline is set out 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.

The facts and circumstances surrounding Applicant's marijuana use establish the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse (see above definition);

AG ¶ 25(b): testing positive for an illegal drug; and

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The SOR alleged facts that rendered AG ¶ 25 (f), any illegal drug use while granted access to classified information or holding a sensitive position, potentially applicable. However, the Government did not establish that Applicant was granted access to classified information. Thus, I find that there is insufficient record evidence to apply AG ¶ 25(f). Accordingly, I find in favor of Applicant that portion of SOR ¶¶ 1.a and 2.a that refers to his use of marijuana after having been granted access to classified information.

None of the following potentially applicable mitigating conditions under this guideline are fully established:

AG ¶ 26(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

AG ¶ 26(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.

Any illegal drug use is troubling in the context of evaluating security worthiness. If Applicant had ceased all illegal drug use after college, he could have demonstrated successful rehabilitation and mitigated any drug-involvement concerns. However, he not only continued using marijuana after college and while employed by a defense contractor, but he was also not candid about his post-college use during the security clearance process. Abstaining from marijuana use was a requirement for Applicant's discharge from his DUI program. He tested positive for marijuana on each of the 11 urinalyses administered from December 2017 through July 2018, although his final three tests suggested that he had then been recently abstinent. Given his lack of candor, I question not only the frequency of the marijuana use that Applicant self-reported, but also the sincerity of his commitment to abstinence. The facts and circumstances surrounding Applicant's marijuana use raise substantial doubts about his current reliability, trustworthiness, and good judgment.

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.

The above-stated general concern is established by Applicant's marijuana use, and his 2012 and 2017 alcohol-related misconduct. He was not honest about his marijuana use during the security clearance process. These facts also establish the following specific disqualifying conditions under this guideline:

AG ¶ 16(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; and

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

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. ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's education and experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. (ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010)

Applicant had used marijuana during the preceding seven years reportable on SCA1 and SCA2. I did not find credible Applicant's explanations and excuses for his failure to report any marijuana use on SCA1 and SCA2. His continued lack of candor during the security clearance process suggests that he was aware of the potentially negative impact his marijuana use could have on his security clearance. Accordingly, I find substantial evidence of an intent on the part of Applicant to omit and conceal materially relevant information from SCA 1 and SCA 2. Therefore, AG ¶ 16(a) is established.

None of the following potentially relevant mitigating conditions under this guideline are fully established:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

AG ¶ 17(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; and

AG ¶ 17(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.

An applicant's completion of a security questionnaire is the initial step in requesting a security clearance and the investigative process is contingent upon the honesty of the applicant. The Appeal Board has stressed the importance of providing full and frank answers on the SCA:

The security clearance investigation is not a forum for an applicant to split hairs or parse the truth narrowly. The Federal Government has a compelling interest in protecting and safeguarding classified information. That compelling interest includes the government's legitimate interest in being able to make sound decisions (based on complete and accurate information) about who will be granted access to classified information. An applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the industrial security program. ISCR Case No. 01-03132 at 3 (App. Bd. Aug. 8, 2002).

Applicant's marijuana use and his 2012 and 2017 alcohol-related misconduct underscore a pattern of poor judgment that also calls into question his ability or willingness to comply with laws, rules, and regulations. His deliberate lack of candor during the security clearance process is particularly egregious. Applicant failed to demonstrate a sufficient pattern of responsible behavior for me to conclude that his questionable judgment is behind him. I have serious doubts about Applicant's current reliability, trustworthiness, and judgment.

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

adjudicative guidelines, each of which is to be evaluated in the context of the whole person. In evaluating the relevance of an individual's conduct, 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 Guidelines H and E in my whole-person analysis, and I have considered the factors AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated security concerns raised by his marijuana use and lack of candor about it during the security clearance process, nor his 2012 and 2017 alcohol-related misconduct. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Subparagraphs 2.d – 2.f:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge