



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



In the matter of:)
)
) ISCR Case No. 19-01745
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Kent, Esq., Department Counsel
For Applicant: John V. Berry, Esq.

04/22/2021

Decision

Curry, Marc E., Administrative Judge:

Applicant mitigated the financial considerations and criminal conduct security concerns, but failed to mitigate the personal conduct and drug involvement security concerns. Clearance is denied.

Statement of the Case

On October 10, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H, drug involvement, Guideline J, criminal conduct, Guideline E, personal conduct, and Guideline F, financial considerations. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on June 8, 2017.

On November 17, 2019, Applicant answered the SOR allegations, admitting all of the allegations, except subparagraphs 1(b) and 2(b), and requesting a hearing. On March 16,

2020, Applicant filed a supplemental answer to the SOR. The case was assigned to me on January 22, 2021. On February 5, 2021, the Defense Office of Hearings and Appeals issued a notice of hearing, scheduling the case for February 23, 2021.

The hearing was held as scheduled. I incorporated 11 government exhibits into the record, marked as Government Exhibits (GE) 1 through GE 11, and I incorporated 12 Applicant exhibits (AE), incorporated into the record as AE A through AE L. In addition, I received the testimony of Applicant and three character witnesses. The transcript (Tr.) was received on March 8, 2021.

Findings of Fact

Applicant is a 50-year-old single man. He graduated from college in 1993, earning a bachelor's degree in business administration, and he earned a master's degree in business administration in 2003.

Applicant is the owner and chief executive officer of a company that provides contract services to federal government clients. (Tr. 49; AE C) When he started the company in 2008, he was the only employee. By 2019, the company employed 115 people. In 2020, the company's annual gross revenue totaled approximately \$19.7 million dollars. (Tr. 49) According to the company's chief operating officer, who has worked for Applicant for the last three years and known him for 16 years, Applicant is a well-respected individual who excels in his work. (Tr. 24) Applicant is a humanitarian who donates significant company resources to charities, targeting youth who are either underprivileged, or underrepresented in certain professional fields, and families with food insecurity. (Tr. 78) Applicant has held a security clearance since 2008.

Applicant used marijuana from 2016 to approximately June 2019. (Answer at 5) He consumed it in cookie or brownie form. He began using it to reassure a friend who had been prescribed it to control pain related to multiple sclerosis and was hesitant to use it. In an effort to reassure her, Applicant told her that "[he would] try it with [her]." (Tr. 53) Subsequently, Applicant "used it to relax and get a good night's sleep," approximately once per month in social settings and on vacations. (GE 1 at 41; GE 3 at 8; Supplemental Answer at 4)

When Applicant disclosed his marijuana use on his 2018 security clearance application, he noted that he "might" use it again in the future. (GE 1 at 41) As time elapsed, his intention to continue using marijuana became more definitive. Specifically, in his subject interview he stated that he was likely to use it again, and in response to interrogatories, completed in June 2019, he answered "Y" in response to the question, "[d]o you intend to use this drug in the future?." (GE 2 at 3)

Applicant no longer uses marijuana. It is unclear from the record when Applicant stopped using marijuana. In his Supplemental Answer of March 2020, he stated that he had not consumed marijuana since January 2019. (Supplemental Answer at 15) Earlier, in his response to interrogatories completed in June 2019, he noted that he used marijuana on

“various dates throughout the year,” and intended to smoke it in the future. (GE 2 at 3), Applicant testified that he “was not fully as present as [he] should have been” when disclosing the dates of his marijuana usage. (Tr. 88)

Applicant executed an affidavit in November 2019 stating his intention never to use marijuana again. (Supplemental Answer at 39) In February 2021, he executed an affidavit stating that he had complied with the previous affidavit and reiterated his intent not to use marijuana in the future. (AE A)

Applicant used marijuana under “the wrongful impression that [he] could use [it while] holding a clearance so long as the state laws provided for legal use, despite the fact that marijuana usage is still prohibited under federal law.” (Supplemental Answer at 17) At the hearing, Applicant testified that his marijuana use stemmed from “ignorance of not understanding the gravity of holding on to a clearance” (Tr. 52) Currently, he is attending education programs, and disassociating himself from social events where marijuana use occurs. (Supplemental Answer at 15)

In January 2014, Applicant was arrested and charged with driving/attempting to drive under the influence of alcohol (DUI), after pulling over to the side of the road to go to sleep upon leaving a night club. (Answer, Enclosure 3 at 6 - 7) He was sentenced to one year of probation, a monetary fine, and 30 days of jail time, suspended.

Applicant now takes a cab or an Uber home if he drinks alcohol during social outings. (Tr. 68) He has had no alcohol-related incidents since the 2014 arrest.

Applicant failed to report his DUI arrest to his facility security office, as required by the National Industrial Security Program Operating Manual (NISPOM), Chapter 1, Section 3, paragraph 1-300. Also, he did not report his marijuana use to his facility security office, as required. When Applicant was arrested and charged with DUI, he was serving as the facility security officer (FSO) of his company. Unaware of the process of reporting oneself on the JPAS system, he decided to wait until the next Defense Security Services audit to disclose the adverse information. (Tr. 62-64) There is no record evidence that he made such a disclosure. Moreover, contrary to Applicant's testimony that he disclosed the 2014 DUI arrest on his 2018 security clearance application, he did not actually disclose it until his investigative interview in October 2018. (GE 1; GE 2 at 20)

As Applicant's company continued to grow, he began to recognize how untenable it was for him to balance his CEO managerial responsibilities with the security maintenance and oversight responsibilities of an FSO. Consequently, in 2020, he hired an FSO. (Tr. 61; AE B) The FSO developed a security compliance program and installed an intranet. Also, the FSO tracks the requisite trainings for employees to complete, and he publishes a monthly security newsletter for the company. (Tr. 62-64)

During the federal government sequestration of 2013, Applicant lost a government contract which represented 90 percent of his business. (Tr. 70; Answer at 41) Absent this income, the business began to struggle, and Applicant could not afford to pay his

expenses. In 2014, he consulted an attorney who advised him to restructure his debt through filing for Chapter 13 bankruptcy protection. (Tr. 69) Applicant took his attorney's advice and filed for Chapter 13 bankruptcy protection in February 2014. (Tr. 69)

After Applicant reviewed the proposed plan, he was not confident that he had the income to successfully execute it. Upon his attorney's advice, he withdrew the petition and refiled a few months later in July 2014 after he had been awarded more contracts and was in a stronger position to comply with a Chapter 13 debt resolution plan. (Tr. 70) Ultimately, Applicant paid 100 percent of his debt through the second bankruptcy plan, three years ahead of schedule. (Tr. 72)

Currently, the only debt Applicant has is his home mortgage. (Tr. 76) His business has grown continuously since 2014, and grossed \$19.7 million of revenue in 2020. (Tr. 74) Applicant earned a salary of \$161,544 in 2020 through his business, and a salary of approximately \$114,000 through another business that he started in 2018. (HE I)

Policies

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

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

Analysis

Guideline H, Drug Involvement and Substance Abuse

The security concerns about drug involvement and substance abuse are set forth in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

Applicant began using marijuana in 2016 and continued through June 2019, nearly a year after he completed a security clearance application, and approximately eight months after an investigative agent interviewed him. During the time he used marijuana, he held a security clearance. AG ¶¶ 25(a), "any substance abuse," and 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position," applies. Applicant repeatedly expressed an intent to continue smoking marijuana during the investigative process, most recently in response to interrogatories executed in June 2019. AG ¶ 25(g), "expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse," applies.

The following mitigating conditions are potentially applicable under AG ¶ 26:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstance 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 action 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;
- (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 stopped using marijuana in 2019, and has executed two successive affidavits expressing his intent not to smoke marijuana in the future. Although this triggers

the application of AG ¶ 26(b)(3), it has minimal probative value, given Applicant's repeated, expressed intention, during the investigative process, to use marijuana in the future.

In October 2014, the then-Director of National Intelligence (DNI) issued a memorandum addressing changes in state laws relating to marijuana. Specifically, he wrote as follows;

An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. (James R. Clapper, Director of National Intelligence, memorandum, *Adherence to Federal Laws Prohibiting Marijuana Use* (Oct. 25, 2014))

Appeal Board jurisprudence has consistently followed the DNI memorandum without deviation or exception, noting specifically that although several states have decriminalized marijuana use, it remains illegal under federal law, and as such, "is subject to the applicable disqualifying conditions under the Directive." (ISCR Case No. 16-00258 at fn. 1 (App. Bd. Feb. 23, 2018))

During the investigative process, Applicant readily disclosed his marijuana use, and he testified that he thought the use posed no problem because it occurred in states where marijuana use was legal. This contention has no bearing on his security-clearance eligibility because it is longstanding legal precedent that ignorance or mistake of law is generally not an excuse for failing to abide by legal obligations. (*Rhode Island v. Massachusetts*, 45 U.S. 591, 613 (1846)). Moreover, per Appeal Board jurisprudence, the completion of a security clearance application constructively places applicants on notice of the incompatibility of marijuana use with security clearance eligibility. (ISCR Case No. 19-00540 at 2 (App. Bd. Dec. 13, 2019))

Applicant's use of marijuana was infrequent. However, in light of his conflicting disclosures about when he stopped using marijuana, together with his use of marijuana with impunity, I am not persuaded that he has mitigated the drug involvement security concern. None of the remaining mitigating conditions apply.

Guideline J, Criminal Conduct

Under this guideline, "criminal activity creates doubt about a person's judgment, reliability, and trustworthiness." (AG ¶ 30) Applicant's DUI arrest of January 2014 generates the application of AG ¶ 31(b), "evidence . . . of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted." Applicant's arrest occurred seven years ago. He has never been arrested either before the DUI arrest or since the DUI arrest. Under these circumstances AG ¶ 32(a), "so much time has elapsed since the criminal behavior happened . . . that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," applies. Applicant's growth of his business that has occurred since the DUI arrest and his extensive humanitarian activities triggers the mitigating condition under AG ¶ 32(d), "there is evidence of successful

rehabilitation; including, but not limited to the passage of time without recurrence of criminal activity . . . good employment record, or constructive community involvement.” In sum, I conclude Applicant has mitigated the criminal conduct security concern.

Guideline E, Personal Conduct

Under this guideline, “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.” (AG ¶ 15) Applicant’s failure to report his 2014 DUI and his marijuana use, as required by NISPOM, Chapter 1, Section 3, paragraph 1-300, triggers the application of AG ¶ 16(d), “credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.”

Although Applicant did not promptly report his marijuana use, as required under the NISPOM, he reported it when he completed his security clearance application, and repeatedly disclosed his marijuana use throughout the investigative process. Moreover, he hired an FSO to handle the company’s security maintenance and oversight responsibilities. Under these circumstances, the first prong of AG ¶ 17(d), “the individual has . . . taken . . . positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior . . .” applies. However, Applicant’s contradictory disclosures about when he reported the 2014 DUI raises doubts about his credibility, such that I am unable to conclude that the second prong of AG ¶ 17(d) (“ . . . such behavior is unlikely to recur”) applies.

The conflicting evidence that Applicant provided regarding the date of his last marijuana use and his express intent to continue using marijuana as recently as June 2019, in tandem with the contradictory record evidence of when he reported the 2014 DUI, lead me to resolve the personal conduct security concerns against Applicant.

Guideline F, Financial Considerations

Under this guideline, “failure to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified or sensitive information,” (AG ¶ 18)

Applicant’s two bankruptcy petitions, filed in February 2014 and July 2014, respectively, trigger the application of AG ¶ 19(a), “inability to satisfy debts,” and AG ¶ 19(c), “a history of not meeting financial obligations.” Applicant’s business struggles were isolated to the period of the 2013 federal government sequestration when mandatory

cutbacks resulted in the loss of a major contract, rendering him unable to meet his business expenses. Subsequently, Applicant consulted an attorney who helped him file for Chapter 13 reorganization in February 2014 as alleged in subparagraph 1.a. When Applicant realized that he might not be able to comply with the court-imposed debt reduction plan, he withdrew the petition, waited until his company was on more solid financial footing, and filed another Chapter 13 petition in July 2014, as alleged in subparagraph 1.b.

Applicant satisfied the payment plan three years ahead of schedule. His business has continued to grow, he holds no other debt other than a home mortgage, and he recently started another business which is also profitable. Under these circumstances, AG ¶ 20(a), “the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;” and AG ¶ 20(b), “the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce, or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances,” apply. Applicant mitigated the financial considerations security concerns.

Whole-Person Concept

Under the whole-person concept, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). They are as follows:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual’s age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Applicant is an extraordinary entrepreneur who started a business and developed it into an entity that employs more than 100 people and earns millions of dollars of revenue annually. He is a pillar of his community, making significant donations to charities, and helping people in need. Although all of these attributes are commendable, they do not obviate the responsibility to carefully review the security application while completing it, and to provide responsive answers to the questions asked. Inattentiveness or misinterpretation of the law is not mitigating. Ultimately, the nature and seriousness of Applicant’s conduct – using marijuana with a clearance for multiple months after completing a security clearance application – outweighs the positive factors, such as his sterling work performance, his professional success, and his charitable activities. Upon considering Applicant’s conduct in the conduct of the whole-person concept, I conclude that he failed to mitigate the security concerns.

Formal Findings

Formal findings for 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 H:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b: Paragraph 2,	Against Applicant AGAINST
Guideline E:	APPLICANT
Subparagraphs 2.a – 2.c: Paragraph 3,	Against Applicant
Guideline J:	FOR APPLICANT
Subparagraph 3.a: Paragraph 4, Guideline	For Applicant
F:	FOR APPLICANT
Subparagraphs 4.a- 4.b	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the security interests of the United States to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge