



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-02350
)
Applicant for Security Clearance)

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: *Pro se*

05/03/2021

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. He mitigated the concerns under Guideline G, alcohol consumption. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On November 12, 2019, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H, G, and E. The DOD 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 January 2, 2020, and requested a hearing. The case was assigned to me on March 2, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 31, 2021, and the hearing was held as scheduled on April 22, 2021. This hearing was convened as scheduled using the Defense Collaboration Services (DCS) video teleconferencing capabilities. The Government offered exhibits (GE) 1 through 3, which were admitted into evidence without objection. The Government's pre-hearing discovery letter and exhibit list were marked as hearing exhibits (HE) I and II. Applicant testified and offered exhibits (AE) A-C, which were admitted without objection. DOHA received the hearing transcript (Tr.) on May 3, 2021.

Findings of Fact

Applicant admitted all the SOR allegations with explanations. His admissions are adopted as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 25 years old. He worked for a defense contractor (DC) at various times from March 2018 to March 2020, either in an internship program or a cooperative program. He holds an associate's degree and is working toward his bachelor's degree. He is single, never married, and has no children. (Tr. 6, 23-28; GE1)

The SOR alleged Applicant used marijuana at various times from October 2018 to August 2019; that he used marijuana after being granted an interim security clearance in June 2018; and in response to interrogatories, in August 2019, he admitted that he intended to use marijuana in the future. (SOR ¶¶ 1.a-1.c) It also alleged that Applicant consumed alcohol to the point of intoxication twice per month; and that he was arrested in September 2018 and charged with contributing to the delinquency of a minor. (SOR ¶¶ 2.a-2.b) All these allegation were also cross-alleged as personal conduct concerns. (SOR ¶ 3.a)

Applicant admitted that his marijuana use began after he started working for DC in March 2018. Before that, he had never tried it. By the time of his first use, he had completed filing out his security clearance application (SCA) and he was aware that marijuana use violated DC's drug abstinence policy. He also knew that using marijuana violated both federal and state law at the time. He associated with people at a commercial job who had access to marijuana in vape form and that is the method he used to ingest marijuana. He used marijuana approximately six times while holding a security clearance with the last time being in August 2019. He also stated in interrogatory responses that "my future drug use will remain sporadic and recreational." In November 2020, marijuana use became legal for recreational use under the state law of his residence. During his hearing testimony he modified that position somewhat by claiming that he would only use marijuana in the future if it was legal under federal law. He did not submit a signed statement of intent not to use marijuana in the future. (Tr. 26-27, 30, 37-39, 44-45, 51-52; GE 3)

In an April 2019 statement given during his background investigation, Applicant admitted to drinking to the point of intoxication twice a month. These were his drinking habits in about August 2018. He would drink five or six beers, or two to four cocktails, once or twice a week with friends. In his SOR answer and during his testimony, he modified the amount of alcohol he is now consuming. He claims that he cut back his alcohol use in 2019 to about one to two beers or cocktails per month. He does not regularly become intoxicated anymore. The last time he was intoxicated was in October 2020 at his parents' Halloween party. There is no evidence of his alcohol use causing a legal or employment issue. He has not been diagnosed with an alcohol abuse disorder. (Tr. 31, 45, 49-50; GE 3; Answer to SOR)

At approximately three a.m. on October 15, 2018, Applicant was arrested for contributing to the delinquency of a minor. He was 22 years old at the time and was with two females, ages 18 and 15. The 18-year-old female was driving Applicant's car in a residential neighborhood. The car was stopped by police and it was determined that the 18-year-old had a blood alcohol content of .06 percent, which is over the legal limit for someone under age 21. Both Applicant and the 15-year-old had negative blood alcohol test results. After initially denying that he provided the alcohol to the driver, he later admitted doing so. He was arrested and pleaded guilty through a pre-trial diversion program. He satisfied all the terms of his diversion and after six months, the charges were dismissed. Applicant explained that he was associating with the wrong crowd at that time and he stopped doing so. He has not associated with those two females since the incident. (Tr. 32, GE 2; Answer to SOR)

Applicant admitted that he did not report the arrest to his security officer at DC or to his parents. He claims that he was not aware of his duty to report the arrest to his security officer. He admitted that his nondisclosure to his parents was partly based on him wanting to handle the incident himself, and partly based on his desire to keep the information from them. (Tr. 42, 52-53)

Applicant presented two character letters from a coworker from DC and from his general manager from a commercial job he held. Both noted that he is reliable and competent at his job. Both felt that he is an excellent employee. An appraisal from DC for his 2019 internship acknowledged that he fulfilled management's expectations of him with solid contributions to the team. Over the course of several internships in 2018 and 2019, he was recognized with two "Spot Awards" and three "Achievement Awards."

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 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 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 careful weighing 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an 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.

Section 7 of EO 10865 provides that 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 H, Drug Involvement and Substance Abuse

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

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

questions about a person's ability or willingness to comply with laws, rules, and regulations. Controlled substance means any "controlled substance" as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

- (a) any substance misuse;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used marijuana on six occasions between March 2018 and August 2019. He used marijuana after being granted an interim secret clearance. In his answers to interrogatories in February 2019, he stated his intent was to continue using marijuana. I find all the above disqualifying conditions apply.

AG ¶ 26 provides conditions that could mitigate security concerns. Two potentially apply in this case:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
- and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant used marijuana on several occasions and as recently as August 2019, while holding a security clearance. Given his pattern of use, his claimed abstinence beginning in August 2019 is not sufficient to overcome his recent drug use. He did not provide a signed statement of intent to abstain from all future illegal drug use. Additionally, as recently as August 2019, he indicated his intent was to continue his use of marijuana. Applicant's claimed abstinence is insufficient to convince me that recurrence is unlikely. The frequency and recency of his past use and his recent statement of intent to continue his use casts doubt upon his current reliability, trustworthiness, and good judgment. AG ¶¶ 26(a) and AG 26(b) do not apply.

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern for alcohol consumption:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable in this case:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed with alcohol use disorder; and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

Applicant's arrest in 2018 for contributing to the delinquency of a minor, involved alcohol in the sense that he provided the alcohol that an 18-year-old consumed before driving. However, Applicant did not consume alcohol on that occasion. AG ¶ 22(a) does not apply under these facts. The only evidence that Applicant binged alcohol for a time came from his admissions. However, his recent testimony concerning the amount he regularly consumes (one to two beers or cocktails per month) does not fall into what would be considered a "binge" category. AG ¶ 22(b) minimally applies.

I have also considered all of the mitigating conditions for alcohol consumption under AG ¶ 23 and found the following relevant:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment.

Applicant's alcohol bingeing was infrequent, has stopped, and it does not cast doubt on his current reliability, trustworthiness, or judgment. AG ¶ 23(a) applies.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security concern:

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. . . .

Applicant's use of marijuana soon after he completed his SCA and after he was granted an interim clearance, with full awareness that such use violated state and Federal law and was against his employer's drug policy, is very troubling. Additionally, his statement of future intent to use marijuana is also cause for concern. His poor judgment was also apparent when he was arrested for contributing to the delinquency of a minor in 2018. Cumulatively, all these actions raise questions about his reliability, trustworthiness, and judgment. Based upon the general personal conduct security concern, AG ¶ 15 is raised by the evidence.

I have also considered all of the mitigating conditions for personal conduct under AG ¶ 17 and considered the following relevant:

(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

(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.

Appellant's use of marijuana, as recently as August 2019, while holding a security clearance, his expressed intent to continue his use in the future, and his poor judgment in associating with minors which led to his arrest are not minor. His actions cast doubt on his reliability, trustworthiness, and judgment. AG ¶17(c) does not apply. Although

Applicant claims he no longer associates with the minors with whom he was arrested and has modified his drinking habits, there is still concern that the behavior may recur. AG ¶ 17(d) does not fully apply.

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 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 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 considered Applicant's age, his character statements, and his work evaluation and awards received. However, I also considered Applicant's poor decisions of starting to use marijuana after he completed his SCA and began his job at DC, and contributing to the delinquency of a minor when he was driving around a residential neighborhood with two females, ages 18 and 15, at three a.m. allowing the 18-year-old driver access to alcohol. He also kept his arrest information from his employer and his parents. Although the alcohol consumption concerns are mitigated, Applicant failed to provide sufficient evidence to mitigate the drug involvement and personal conduct security concerns.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns under Guidelines H and E.

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 H:

AGAINST APPLICANT

Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraphs 2.a – 2.b:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	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.

Robert E. Coacher
Administrative Judge