



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



In the matter of:)	
)	
)	ISCR Case No. 20-01162
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: Alan Edmunds, Esq., Applicant's Counsel
Gerard Arcilla, Esq., Applicant's Co-Counsel

May 5, 2021

Decision

CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On March 1, 2018, Applicant submitted a security clearance application (SCA). On October 2, 2020, in accordance with DoD Directive 5220.6, as amended (Directive), the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines F, H, G, and E. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on June 8, 2017.

Applicant answered the SOR in writing (Answer) on November 11, 2020; which included Applicant Exhibits (AppXs) A-I, and requested a hearing before an administrative judge. The case was assigned to me on January 14, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on January 27, 2021. I convened the hearing as scheduled on March 2, 2021. The Government offered

Government Exhibits (GXs) 1 through 3, which were admitted without objection. Applicant testified on his own behalf and offered AppXs J~L, which were admitted without objection. DOHA received the transcript of the hearing (TR) on March 12, 2021. The record was left open for the receipt of additional evidence. On March 10, 2021, and March 25, 2021, respectively, AppXs M and N were submitted, and received without objection. The record closed at that time.

Findings of Fact

Applicant admitted to all the allegations in SOR, with explanations, except for SOR allegation ¶ 4.b. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 39-year-old employee of a defense contractor. He has a Master's of Science degree, and has been employed with the defense contractor since June of 2010. (TR at page 7 lines 9~25, and GX 1 at pages 7 and 15.) Applicant has held a security clearance since 2001, initially as a member of the U.S. Marine Corps. (GX 1 at pages 36~38.) His "less than a year and a half" marriage was annulled in 2014. (TR at page 22 lines 5~23, and GX 1 at page 23.)

Guideline F - Financial Considerations & Guideline E - Personal Conduct

1.a. and 4.c. Applicant admits that he failed to file his Federal and state income tax returns for tax years 2014~2018 in a timely fashion. He mistakenly "believed" that Applicant did not have "to file the taxes unless . . . [he] owed money." (TR at page 25 line 18 to page 26 line 13.) In 2019 and 2020, he has filed returns for those tax years as evidenced by documentation from the taxing authorities. (TR at page 40 lines 19~23, at page 51 lines 7~34, and AppX I.)

Guideline H - Drug Involvement and Substance Misuse & Guideline E - Personal Conduct

2.a. and 4.c. Applicant used marijuana with varying frequency, from about 2009 to at least August of 2018 (a period of more than ten years) while holding a security clearance. (TR at page 30 line 22 to page 31 line 2, at page 34 line 8 to page 36 line 19, at page 37 lines 1~25, and at page 40 line 24 to page 41 line 23.) He avers that he did not know the use of marijuana was illegal under Federal law, as it was legalized under state law. (*Id.*)

This averment is countered by the fact Applicant used both his former spouse's and current girlfriend's marijuana prescription to obtain the drug. (TR at page 65 lines 7~11, at page 67 line 5 to page 68 line 11, and at page 71 line 17 to page 75 line 1.) Furthermore, such usage is clearly contrary to his employer's drug policy that clearly states: "Even though marijuana has been legalized in certain US states, it is still considered illegal under federal law. Therefore, our company prohibits use even in locations where it is not against state law." (TR at page 83 line 1 to page 84 line 5, at

page 85 line 17 to page 88 line 1, and GX 3 at page 2.) Applicant intends no future illegal drug usage. (AppX J.)

2.b. and 4.c. Applicant used Hallucinogenic Mushrooms twice in 2010 while holding a security clearance. Again, he avers he did not know such use was illegal. (TR at page 23 line 16 to page 24 line 2.) This averment does not pass scrutiny, particularly as his employer warns against the use of drugs that may impair decision making. (TR at page 75 line 2 to page 76 line 7, and GX 3 at page 2.) Although it appears that his employer alludes to on-the-job conduct, “loose lips can sink ships” off-the-job, where judgment is impaired by hallucinogens. Applicant intends no future illegal drug usage. (AppX J.)

Guideline G - Alcohol Consumption & Guideline E - Personal Conduct

3.a.~3.d. and 4.c. Applicant admits that between 2011 and April of 2020, he consumed alcohol at times in excess and to the point of intoxication. (TR at page 31 lines 3~25, and at page 42 lines 2~11.) Applicant further admits that alcohol was involved, in about 2013, when he threatened a university employee, who was “cheating” with his then wife. (TR at page 46 line 4 to page 47 line 6.) He also admits that alcohol was involved, in about 2013, when he physically assaulted his former spouse who was “cheating” on Applicant. (TR at page 43 line 12 to page 45 line 9.) In 2018, Applicant missed work, pursuant to his doctor’s instruction, to address his alcohol consumption. (TR at page 42 lines 12~22.)

Applicant now attends Alcoholics Anonymous (AA) on a regular basis, and last consumed the intoxicant in April of 2020, about a year prior to his hearing. (TR at page 31 lines 3~25.) In February of 2021, Applicant was evaluated by a Licensed Clinical Social Worker, who diagnosed Applicant as suffering from “**Mild Alcohol Use Disorder – In Sustained Remission.**” (AppX K at page 9, emphasis in original.) She further opined: “**No Treatment Warranted.** Continued participation in the fellowship of Alcoholics Anonymous, regular meeting with his sponsor, and working the steps.” (*Id.*)

Guideline E - Personal Conduct

4.a. Applicant answer “No” to Section 23 on his March 2018 SCA as to “Illegal Use of Drugs . . . in the last (7) seven years . . . [and] While possessing a Security Clearance.” (SCA at pages 34~35.) This was a willful falsification, as he admits to using marijuana pursuant to the prescriptions of his former spouse and his current girlfriend.

4.b. Applicant knowingly provided materially false information during a November 2018 interview with a DoD investigator as to his above-mentioned illegal drug usage. (TR at page 47 lines 14~21.)

4.c. This allegation has been discussed at length, above.

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person applying for national security eligibility seeks to enter 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline F - Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. One is potentially applicable in this case:

(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant failed to file five years of taxes in a timely fashion. The evidence is sufficient to raise these disqualifying conditions.

AG ¶ 20 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 20 including:

(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

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant is now aware of his filing responsibilities, even if he owes no taxes. He is current with his filings. Mitigation under AG ¶ 20 has been established. Financial Considerations is found for Applicant.

Guideline H - Drug Involvement and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Misuse is set forth at AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

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

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

Appellant used Hallucinogenic Mushrooms, smoked marijuana, misused the prescriptions of his former spouse and current girlfriend. He had a security clearance for his job at that time. Therefore, AG ¶ 25 (a), (c), and (f) are established.

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

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

- (1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used; and

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

Applicant's illegal drug usage is fairly recent, Marijuana in 2018. The fact that he used it on numerous times while holding a security clearance is also problematic. Mitigation has not been established. Drug Involvement is found against Applicant.

Guideline G - Alcohol Consumption

The security concern relating to the guideline for Alcohol Consumption is set out in AG ¶ 21:

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.

The guideline at AG ¶ 22 contains seven conditions that could raise a security concern and may be disqualifying. Two conditions may apply:

(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 the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder; and

(d) diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of alcohol use disorder.

Applicant has been diagnosed as suffering from a Mild Alcohol Use Disorder, and had alcohol-related incidents in 2013. These facts establish prima facie support for the foregoing disqualifying conditions, and shift the burden to Applicant to mitigate those concerns.

The guideline at AG ¶ 23 contains four conditions that could mitigate security concerns. Three conditions may apply:

(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;

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations; and

(d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Applicant's alcohol-related incidents were about eight years ago. He has ceased his alcohol consumption, and attends AA on a regular basis. His usage has been characterized as being in Sustained Remission. Alcohol Consumption is found for Applicant.

Guideline E - Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

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

(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;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative; and

(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.

Applicant falsified his SCA, and was not truthful during his subsequent interview. He also used illegal substances while holding a security clearance. The evidence is sufficient to raise these disqualifying conditions.

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

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully; and

(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.

Applicant made no prompt good-faith effort to correct his falsehoods. Use of controlled substances while holding a security clearance is not minor. Personal Conduct is found against Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility by considering the totality of the applicant's conduct and all 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.

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

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. I have incorporated my comments under Guideline F, H, G, and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

Applicant was less than candid with the Government about his past-drug abuse. That usage was while Applicant held a security clearance. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Drug Involvement and Personal Conduct security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a. and 2.b.:	Against Applicant

Paragraph 3, Guideline G:	FOR APPLICANT
Subparagraphs 3.a.-3.d:	For Applicant
Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraphs 4.a.- 4.c.:	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.

Richard A. Cefola
Administrative Judge