



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-02964
)
Applicant for Security Clearance)

Appearances

For Government: Kelly Folks, Esq., Department Counsel
For Applicant: *Pro se*

08/09/2021

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the security concerns under Guideline E, personal conduct. Applicant's eligibility for a security clearance is granted.

Statement of the Case

On January 30, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudication Facility (DCSA CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E. The DCSA CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (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 March 2, 2020, and requested a hearing. Department Counsel filed a written amendment to the SOR on February 3, 2021, which

Applicant answered on May 5, 2021 (See amended SOR ¶ 1.h). The case was assigned to me on June 1, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 25, 2021, and the hearing was held as scheduled on June 30, 2021 (Applicant waived the 15-days' notice provision; See hearing transcript (Tr.) 9-10). This hearing was convened as scheduled using the Defense Collaboration Services (DCS) video teleconferencing capabilities. The Government offered exhibits (GE) 1 through 6, which were admitted into evidence without objection, except for GE 2, which was objected to, but admitted for limited weight. The Government's pre-hearing discovery letter and exhibit list were marked as hearing exhibits (HE) I and II. Applicant testified but he did not offer any documentary exhibits. The record remained open until July 16, 2021, but no additional evidence was submitted. DOHA received the hearing transcript (Tr.) on July 8, 2021.

Findings of Fact

Applicant admitted all the SOR allegations with explanations, except for SOR ¶ 1.a, which he partially denied, and amended SOR ¶ 1.h. 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 38 years old. He has worked for his contractor-employer for approximately three years. He is an avionics specialist. He has a high school diploma and has taken some college courses. He served in the U.S. Air Force from 2001 to 2005, but was given a general discharge, under honorable conditions because of drug use. He is divorced and has two children. (Tr. 6, 25, 28-30, 35; GE 1)

The SOR alleged Applicant used marijuana at various times from July 2000 to July 2017; that in 2005, he was punished under Article 15 of the Uniform Code of Military Justice (UCMJ) for wrongful use of marijuana under Article 112a, resulting in an involuntary discharge from the Air Force; that he was arrested in approximately March 2006, May 2013, and July 2017 for unlawful possession of marijuana; that in December 2016, he was fired from his job for fighting with another employee; and that in August 2015, he arrested for wrongful possession of drug paraphernalia. (SOR ¶¶ 1.a-1.h)

Marijuana use July 2000-July 2017 (SOR 1.a). Applicant admitted that his marijuana use started while in high school in approximately 2000 when he used it approximately 10 times before joining the Air Force in 2001. He admitted his pre-service drug use upon enlistment in the Air Force. He then used marijuana approximately one or two times in 2001 or 2002 when he was in the Air Force. He realizes he made a mistake by doing that while in the Air Force. He knew it was wrong at the time. He also admitted using marijuana at various times after the Air Force up to approximately 2013. There were also significant periods when he went without using marijuana, such as when he was on probation for the offense listed in SOR ¶ 1.c. (Tr. 30-31, 33, 36-37, 54; GE 2)

Article 15, UCMJ action in March 2005 (SOR 1.b). Applicant admitted using marijuana while in the Air Force. He was at a social setting with some friends. He was

seen using marijuana and was reported to his command. He realizes that it was a bad decision to hang around the people he was with at the time. (Tr. 30-33)

Aggravated assault offense in November 2005 (SOR 1.c). Applicant admitted to a brief but tumultuous relationship with his ex-wife. He claims that they had an argument that turned physical when his ex-wife cut him with some glass and he picked up the nearest object, which was a clothes iron, and struck her in the head. He was arrested and charged with aggravated assault. He pleaded guilty under a diversion program and was sentenced to five years' probation, *inter alia*. He successfully complied with the terms of the diversion. This incident led to the separation and divorce between Applicant and his ex-wife. He has had no further incidents connected to her. (Tr. 38-41; GE 3)

Arrest for wrongful possession of marijuana in March 2006 (SOR 1.d). Applicant admitted that he was stopped by the police on a warrant related to the aggravated assault. He was searched, found in possession of marijuana, and arrested. He pleaded guilty and was sentenced to six months' probation, one day in jail, fines and costs. (Tr. 42-43; AE 3)

Arrest for wrongful possession of marijuana in May 2013 (SOR 1.e). Applicant admitted that he was driving and was stopped by the police. He was found in possession of some marijuana. He was arrested, pleaded guilty, and was sentenced to six months' probation, one day in jail, and fines and fees. He testified that this was the last time he used marijuana. (Tr. 44; AE 3)

Fired from a job because of a fight with another employee while on the job in December 2016 (SOR 1.f). Applicant believed a coworker was not performing his job as he should and discussed this with a supervisor. The other employee was made aware of Applicant's actions and confronted him. Later in the day, the other employee struck Applicant with a key close to his eye and a physical altercation resulted. Both Applicant and the other employee were fired from their positions. Applicant realized he was wrong for physically engaging the other employee, even though he acted in self-defense. The company had a zero-tolerance policy concerning workplace fights. Although he was fired, he received a strong recommendation from this company for his next position. (Tr. 45-47; AE 3)

Arrest for wrongful possession of marijuana in July 2017 (SOR 1.g). Applicant was a passenger in a friend's car when they were stopped at a city park. They were there after the park closed at 10 pm. A police car arrived and then approached the car Applicant was in. A search of the vehicle revealed the presence of a small amount of marijuana. Applicant claimed he had no knowledge of the marijuana's presence in the vehicle. He believed he was charged with possession of marijuana and the charges were dropped after spending a night in jail. His friend was also charged with possession of marijuana. He still associates with this friend who he has known since second grade. His friend does not use any drugs around Applicant anymore. Court records show that Applicant received a citation for possession of drug paraphernalia on July 22, 2017, which was ultimately

dismissed after a deferred disposition in January 2018. There are no court records showing that Applicant was arrested for marijuana possession anytime in July 2017. It appears Applicant was mistaken about the nature of his arrest. (Tr. 47-48, 51-52; AE 3)

Arrest for wrongful possession of drug paraphernalia in August 2015 (Amended SOR 1.h). Applicant was driving his vehicle and was stopped by the police for a traffic violation. A search revealed the presence of drug paraphernalia. He denied knowledge of its presence or its ownership. He believes a friend left it in the car. He no longer associates with this friend. Court documents show that he pleaded no contest to the citation and paid the associated fine and fees. The case was closed in December 2015. (Tr. 48-49, 53; GE 5)

Starting with providing his criminal history in his security clearance application, Applicant was forthcoming with the significant details of his arrests and has accepted responsibility for his actions. He stated that in 2013, he examined his life and saw that using marijuana was causing him financial and job-related problems. That is when he decided to stop using marijuana. He stated his willingness to remove himself from any friends who continue to use drugs. I found his testimony to be credible. (Tr. 26, 51, 53; GE 1)

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 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 sporadic use of marijuana over time, his Article 15 for marijuana use in the Air Force, his arrests associated with marijuana, his aggravated assault charge, and his job termination for fighting all reflect poor judgment and raise questions about his reliability, trustworthiness, and judgment. Based upon the general personal conduct security concern, AG 15 is raised by the evidence.

In analyzing the applicability of the disqualifying conditions listed in AG 16, I conclude that they do not specifically apply to the facts here. AG 16(a) and 16(b) do not apply because this case does not involve allegations of falsification. AG 16(c) does not apply because the government had sufficient information for an adverse determination under Guideline H, drug involvement and substance misuse; and Guideline J, criminal conduct, but chose not to allege the conduct as such. AG 16(d) does not apply because the conduct alleged could be specifically covered under Guidelines H and J. Perhaps the fighting on the job allegation (SOR 1.d) could be construed as a rules violation or disruptive behavior under AG 16(d)(2)(3), however, that behavior also is already covered by the general concern stated in AG 15 (questionable judgment and rules non-

compliance), therefore, it is unnecessary to restate it. AG 16(e) is not applicable because Applicant was forthcoming about his conduct during the clearance investigative process thereby eliminating any concern that he might be subject to manipulation, exploitation or put under duress because of his past misconduct history. AG 16(f) and 16(g) were not specifically alleged and therefore not applicable.

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;

(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 ended in 2013. He was cited in 2015 and 2017, but credibly claimed no involvement with marijuana, other than being with friends who had it. The 2017 marijuana possession charge was not established because the court records refer to a paraphernalia arrest, which was not alleged. He has stated his intent to not associate with those friends in the future. His aggravated assault offense occurred 15 years ago and there have been no similar incidents. He acted in self-defense when he fought with a coworker on the job and realizes that was a mistake. These actions are remote in time and were under unique circumstances such that similar behavior is unlikely to recur. I am convinced that Applicant has learned from these past experiences and his conduct does not cast doubt on his future reliability, trustworthiness, or judgment. AG ¶¶ 17(c), 17(d), and substantially 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 forthrightness and acceptance of responsibility for his past actions. Applicant provided sufficient evidence to mitigate the personal conduct security concerns.

Overall the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns under Guideline 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 E:	FOR APPLICANT
Subparagraphs 1.a – 1.h:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Robert E. Coacher
Administrative Judge