



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



In the matter of:)
)
) ISCR Case No. 19-01331
)
Applicant for Security Clearance)

Appearances

For Government: Nicholas Temple, Esq., Department Counsel
For Applicant: Nathan Wake, Esq.
05/19/2021

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant did not mitigate the drug involvement, criminal conduct, and personal conduct security concerns. National security eligibility for access to classified information is denied.

History of the Case

Applicant submitted a security clearance application (SCA) on January 19, 2018. On October 26, 2019, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guidelines H (Drug Abuse and Substance Misuse), J (Criminal Conduct) and, E (Personal Conduct) . Applicant answered the SOR on December 12, 2019, and requested a hearing before an administrative judge (Answer). The case was assigned to me on June 3, 2020, but was delayed due to the COVID-19 pandemic. On March 5, 2021 the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for March 31, 2021. Applicant’s counsel entered his appearance on March 30, 2021. At the scheduled hearing, before going on the record, Applicant’s counsel requested a continuance. I overruled the Government’s objection and granted a continuance to April 8, 2021. The hearing was held on April 8, 2021, via video teleconference on the Defense Collaboration Service.

At the hearing, Applicant admitted SOR ¶ 3.a. Government Exhibits (GE) 1 through 4 and Applicant Exhibits (AE) 1 through 7 were admitted without objection, and Applicant

testified. I marked my March 4, 2021 prehearing order as Hearing Exhibit (HE) I; Department Counsel's January 23, 2020 discovery letter as HE II; and Department Counsel's exhibit list as HE III. I received the transcript (Tr.) on April 19, 2021, and the record closed.

Findings of Fact

Applicant is 36 years old and married. He and his wife have a 15-year-old daughter, a 4-year-old son, and 19-month-old son. He received his General Education Development (GED) in May 2002, and subsequently completed one semester's worth of community college classes. He has worked for defense contractors almost continuously since September 2006. Throughout this time, he has also worked second jobs at restaurants and at a nightclub. Since March 2020, Applicant has worked as a property manager and equipment specialist for his current employer. He first applied for a secret security clearance in 2012 and has continuously held classified access since 2012. He completed his second SCA in January 2018. (GE 1; GE 2; Tr. 12-14, 21-29, 80)

Applicant admitted all of the SOR allegations. He first used marijuana in 1995, at the age of ten, when his mother introduced it to him, and used marijuana at the age of 16 for six months. Starting in 2003, when he was 18, Applicant used marijuana three to four times a month. He stopped using marijuana from 2009 to 2012, when he worked for a defense contractor that conducted random drug tests. At the hearing, he admitted that he discontinued using marijuana during this period, because he was fearful of losing his job. (GE 2; Tr. 48-50, 54, 59, 67-69)

In 2012, Applicant completed a SCA for employment with a new company. This defense contractor required a pre-employment drug test, but it did not conduct random drug testing of its employees. Applicant knew that it was against his employer's policy to use drugs, including marijuana, and he was aware that marijuana use could adversely affect his employment and security clearance status. In his 2012 SCA, Applicant did not disclose his history of marijuana use, despite using marijuana during the previous seven years. This issue was not alleged in the LOI; therefore, it is not disqualifying behavior, but it will be considered within the Guideline E mitigation analysis and whole-person analysis. (GE 1; GE 2 at 4-5, 23; Tr. 48-50, 54, 59-61, 67-69)

After his pre-employment drug test in 2012, Applicant resumed using and purchasing marijuana. In his September 2018 background interview, he admitted that he used marijuana daily after work from 2012 until November 2015. At the hearing, he initially claimed that he "may have done it a couple of times, like on occasions from what [he could] remember." He eventually admitted that the information he told the background investigator regarding his marijuana use was accurate. (GE 2 at 4-5; Tr. 60)

Starting in November 2014, Applicant worked as a bouncer at a nightclub. After leaving work at the nightclub on a Sunday night in November 2015, Applicant was pulled over by the police, because his license-plate light was out. The police officer smelled marijuana coming from his vehicle and asked Applicant if he possessed marijuana. Applicant affirmatively answered, and the police seized a small bag of marijuana from his

pants pocket and three-ounce bag of marijuana from his gym bag. At the hearing, he admitted that he purchased the three-ounce bag from a coworker that night, and he used marijuana prior to the traffic stop. Applicant planned to give some of the marijuana to his mother-in-law, but the remainder was for his personal use. (GE 2 at 3; Tr. 32-34, 48-50, 54, 59, 67-69, 71-72)

The police officer who detained Applicant, told him to call a specific police investigator the next day. Applicant was then released, he was not taken into custody or arrested. Applicant called the police investigator, who wanted him to provide information as to where he obtained the marijuana. Additionally, the investigator wanted him to go undercover to help the police conduct a sting operation. Applicant refused to name his dealer or provide additional assistance, as he did not want to get “involved.” (GE 2; Tr. 33)

Applicant stated multiple times, throughout the course of his September 2018 background interview, that he discontinued his marijuana use following the November 2015 traffic stop. He adopted this statement, without any changes, in his August 2019 response to DOHA interrogatories and reaffirmed that he stopped using marijuana in November 2015. (GE 2 at 5, 22)

In June 2016, Applicant was pulled over by a highway patrol officer, and he was arrested due to an outstanding warrant related to the incident that occurred in November 2015. He was charged with possession of marijuana, in the first degree, a felony. Following his 2016 arrest, Applicant’s defense attorney recommended that Applicant participate in a six-week drug education class. Additionally, the prosecution agreed to dismiss the charges (*nolle prosequere*) after Applicant completed a six-month pretrial intervention program (PTIP). During the PTIP, Applicant was subject to six random drug tests, all of which were negative, and he was not diagnosed with a drug use disorder. He paid all associated fines and court costs. As a result of Applicant’s compliance and successful completion of the PTIP, the charges were dismissed. (GE 2; GE 3; GE 4; AE 1; AE 2, AE 3; AE 4; AE 5; Tr. 31-32, 36-45, 58, 77, 87)

Applicant testified that prior to his arrest in June 2016, he used marijuana three times a week. He affirmed in his March 2021 affidavit that he used marijuana until June 2016. At the hearing, he was confronted regarding the inconsistent information he gave to the background investigator during his September 2018 interview. Specifically, that he discontinued using marijuana in November 2015. He claimed the inconsistency was the result of confusion. (GE 2; AE 7; Tr. 78-79)

According to Applicant, he was able to stop using marijuana in 2016, in part, due to the PTIP and the classes he received. He has not attended drug counseling or Narcotics Anonymous (NA) meetings since his PTIP program ended in approximately August 2017. As of the day of the hearing, he intended to continue to abstain from all future marijuana use and provided a signed affidavit affirming his intent. (AE 7; Tr. 45, 50-53, 76-7)

In January 2018, Applicant submitted his second SCA. He failed to disclose his involvement with illegal drugs, his 2015 traffic stop and 2016 drug-related arrest, and his employment as a bouncer at the nightclub. Applicant admitted to the background investigator that he did not list his marijuana use, because he was afraid he would lose his job. Additionally, he told the background investigator that his criminal defense attorney told him he could have the 2016 arrest expunged from his record if he went through the proper steps, but at the time of the interview, he had not taken any action. (GE 2 at 4-5)

At the hearing, Applicant testified that his criminal defense attorney told him that he was not required to disclose the arrest in his 2018 SCA, because the charges were ultimately dropped. Upon further questioning, he disclosed that he knew he was required to report his drug use, regardless of the status of the criminal charges. Additionally, he reaffirmed that he was concerned that his drug involvement and arrest he would cost him his job. (GE 1; GE 2; Tr. 55-56, 80)

Following both the incident in November 2015 and his arrest in 2016, Applicant did not notify his employer, a defense contractor, of the issues. He was afraid that he would lose his job. At the hearing, he testified that he recognized that this was a mistake and a security violation. (GE 2 at 3; GE 3; Tr. 33-34, 72)

During his September 2018 background interview, Applicant admitted he had not disclosed his drug use and arrest to his FSO, but he intended to notify them. In his August 2019 response to the DOHA interrogatories, he stated that he disclosed the derogatory information to his FSO after he received the interrogatory package. At the hearing, he claimed he told his FSO about his drug use and 2016 arrest in March 2018, prior to his background interview. (GE 2; GE 55-56, 60-62, 65-66, 73)

Although his mother-in-law continues to use marijuana, Applicant has made it clear to her that she cannot use it at his home or around him. He no longer associates with anyone else who uses marijuana. His received a pre-employment drug test in 2016. Following a workplace accident, Applicant was screened in 2019, and both of these drug tests were negative. Applicant testified that he intends to provide truthful and accurate information regarding his drug and arrest history in the future. (GE; Tr. 34-35, 46-47, 57, 74-77)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines 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(c), the entire process is a conscientious scrutiny 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."

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 the applicant or proven by Department Counsel." The applicant 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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 Abuse and Substance Misuse

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.

Applicant's admissions and the record evidence established the following disqualifying conditions under AG ¶ 25:

- (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.

The burden shifted to Appellant to prove mitigation of the resulting security concerns. AG ¶ 26 provides conditions that could mitigate security concerns 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; and
- (d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant no longer associates with individuals who use drugs, and he has not used marijuana since his June 2016 arrest. He signed an affidavit that he will not use

drugs in the future. There is evidence that AG ¶ 26(b) is at least partially applicable in this case.

Applicant successfully completed the PTIP related to his June 2016 arrest. However, there is no evidence in the record that the PTIP was a drug treatment program with aftercare requirements, nor did Applicant submit a favorable prognosis from a qualified medical professional. Therefore, AG ¶ 26(d) is not applicable in this case.

Applicant used marijuana for the first time when he was ten. Starting as early as 2003, he used marijuana with regularity, except between 2009 and 2012, when his employer, a defense contractor, regularly conducted urinalyses of employees. Subsequent to this employment, Applicant worked for another defense contractor. He did not disclose his pre-2009 drug involvement in his 2012 SCA. Additionally, because this employer only required a pre-employment drug test, but did not conduct random urinalyses, Applicant resumed using and purchasing marijuana, despite holding a security clearance. He knew that drug involvement violated his employer's policies and DOD policy.

In November 2015, Applicant was pulled over by police officers who seized two bags of marijuana from him, and one bag contained three-ounces. Despite this incident, he continued to use marijuana frequently until he was arrested in June 2016. Applicant's decision to purchase and use marijuana after he was granted a security clearance cannot be considered a minor lapse in judgment, but rather a pattern of behavior that reflects his unwillingness to follow rules and regulations.

Security clearance decisions are not limited to conduct during duty hours. Off-duty conduct, especially where it reflects poor judgment, provides a rational basis for the government to question an appellant's security worthiness. (See, e.g., *Cole v. Young*, 351 U.S. 536, 550 n.13 (1956); *Croft v. Department of Air Force*, 40 M.S.P.R. 320, 321 n.1 (1989)). Applicant's behavior showed a disregard for the law, regulations, and the fiduciary relationship he voluntarily entered into with the government.

Although Applicant stopped using marijuana almost five years ago, his history of drug involvement and his extensive use, while holding a security clearance, raise significant concerns, especially since he was not forthcoming about this information throughout the security clearance process, as discussed below. He failed to establish mitigation under AG ¶ 26(a) and the drug involvement concerns are not mitigated.

Guideline J: Criminal Conduct

AG ¶ 30 expresses the security concerns pertaining to criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

The record evidence of Applicant's arrest establishes one disqualifying condition under AG ¶ 31:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

AG ¶ 32 provides conditions that could mitigate security concerns raised in this case. The following are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

In August 2017, Applicant successfully completed the terms of his PTIP, and the charges related to his June 2016 arrest were dismissed. Although there is no evidence in the record that Applicant engaged in any subsequent drug-related criminal behavior, he failed to provide honest, truthful, and complete information regarding his criminal history and drug involvement in both his 2012 SCA and January 2018 SCA. Under U.S. Criminal Code, Title 18, § 1001, it is a criminal offense to knowingly falsify or conceal a material fact in a SCA. Therefore, mitigation under AG ¶¶ 32(a) and 32(d) was not established.

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. . . .

Applicant's deliberate omissions of his drug involvement and arrest history in his January 2018 SCA established the following disqualifying condition under 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.

AG ¶ 17 describes conditions that could raise a security concern and be mitigating. Two are potentially applicable in this case:

(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 falsified his criminal history and extensive drug involvement in his January 2018 SCA. At the hearing, Applicant gave inconsistent testimony regarding the timeline of his drug use and why he failed to disclose his marijuana use in his 2018 SCA, but he eventually admitted he withheld information regarding his drug involvement, because he was afraid that it would negatively impact his ability to secure and keep a job from his employer, a defense contractor.

Applicant also gave inconsistent testimony regarding why he failed to disclose his criminal history in his January 2018 SCA. He told the background investigator in September 2018 that his criminal attorney told him he could get the 2016 arrest and charges expunged, but he had not taken the necessary steps. He affirmed that the information that he gave to the investigator was correct in August 2019. At the hearing, for the first time, Applicant claimed that his criminal attorney told him he was not required to disclose the arrest in his SCA, because the charges were dismissed. These statements minimized his behavior, were self-serving, and demonstrate that Applicant continues to struggle to be honest and forthright with the government regarding his behavior.

Applicant told the background investigator in September 2018, that he discontinued using marijuana following the November 2015 traffic stop. He affirmed this information in his August 2019 response to interrogatories. In his affidavit and at the hearing, Applicant claimed that he stopped using marijuana in June 2016. At the hearing, his explanation for this discrepancy was that he was confused.

Applicant failed to disclose his drug involvement in his 2018 SCA, but it was also developed at the hearing, that he also failed to disclose his drug involvement in his 2012 SCA. When questioned regarding this issue, he initially tried to minimize his behavior, but

he eventually admitted that he used drugs within the reporting period. He failed to disclose his drug use on the SCA, because he feared it would affect his employment.

After the November 2015 traffic stop and June 2016 arrest, Applicant did not inform his supervisor or FSO of the incidents, nor did he disclose his marijuana involvement. He did not inform his employer of these issues until he received a set of DOHA interrogatories in 2019. He acknowledged at the hearing that he knew he had a duty to report this derogatory information.

Applicant made deliberate choices to keep the government and his employer in the dark regarding his behavior, raising the concern that he is unreliable and untrustworthy and calling into question his judgment and willingness to comply with rules and regulations.

Applicant's statements and testimony regarding his drug involvement, his completion of his SCAs, and his reporting of these issues are inconsistent and lack credibility. These inconsistent statements demonstrate that he continues to be untruthful with the government. This concern has not been mitigated by the passage of time. He failed to establish mitigation under AG ¶¶ 17(a), 17(b), and 17(c).

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 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.

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 have incorporated my comments under Guidelines H, J, and E in my whole-person analysis. I also considered Applicant's favorable evidence.

Applicant chose to use and purchase marijuana while working for multiple defense contractors. He failed to disclose this information in both his 2012 and 2018 SCAs. There has not been a sufficient passage of time to overcome the concerns with his drug

involvement, criminal behavior, and falsifications. His hearing testimony was inconsistent and not credible, indicating a continued lack of truthfulness.

Applicant has not met his burden of proof and persuasion. He did not mitigate the security concerns or establish his eligibility for a security clearance.

Formal Findings

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

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a - 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a - 1.b:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security of the United States to grant or continue Applicant's national security eligibility for access to classified information. Eligibility for access to classified information is denied.

CAROLINE E. HEINTZELMAN
Administrative Judge