



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 20-01481 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Bryan J. Olmos, Esq., Department Counsel
For Applicant: Patrick J. McLain, Esq.

05/02/2022

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the security concerns under Guidelines E (personal conduct) and H (drug involvement and substance misuse). Eligibility for access to classified information is denied.

Statement of the Case

On September 11, 2020, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H. Applicant responded to the SOR on March 9, 2021, and requested a hearing before an administrative judge. Department Counsel amended the SOR on July 20, 2021, by adding an allegation under Guideline E. Applicant did not respond to the amendment, but he addressed it during his hearing. The case was assigned to me on January 12, 2022.

The hearing was convened as scheduled on April 11, 2022. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant’s Exhibits (AE) A through D, which were admitted without objection.

Findings of Fact

Applicant is a 39-year-old employee of a defense contractor. He has worked for his current employer since 2011. He has a bachelor's degree that he earned 2005 and two master's degrees that he earned in 2011. He has never married, and he has no children. (Transcript (Tr.) at 19-20, 24-25, 36; GE 1-4)

Applicant is the son of a first-generation immigrant father and a second-generation mother who attempted to instill "honesty, integrity, respect, [and] trust" in him. He was raised in a hard-working middle-class family. His father was a blue-collar worker and wanted more for his son, so he sent him to a private high school. Applicant felt out of place with the wealthy students and joined in with their marijuana use as a way to fit in. (Tr. at 15-19; Applicant's response to SOR; GE 1, 3)

Applicant was smoking marijuana on a city street in May 2006. He was arrested and charged with a drug-related offense. The charge was dismissed and expunged without a conviction. Applicant tested positive for the use of marijuana on a pre-employment drug test in May 2008. His job offer was rescinded. (Tr. at 21-22; Applicant's response to SOR; AE C)

Applicant was diagnosed with a learning disorder and attention-deficit/hyperactivity disorder in 2008. He was prescribed Adderall, which helped but affected his sleep. He continued to use marijuana for recreational purposes and to help with some of the unpleasant effects of Adderall. (Tr. at 20-27; Applicant's response to SOR; AE D)

Applicant submitted a Questionnaire for National Security Positions (SF 86) in August 2013. He reported his 2006 arrest for "smoking a joint." He also reported marijuana use from "09/1999 (Estimated)" to "12/2007 (estimated)." He reported the use as recreational and moderate. He stated that he did not intend to use marijuana in the future with the explanation: "I've grown up and it is no longer something that I want to impact my career. I've had bad things happen to me because [o]f it and don't want to go through it again." He intentionally failed to report the full extent of his marijuana use in that he did not stop using marijuana in 2007, but was still periodically using it. He testified that he was worried that if he told the truth, he would not be granted a security clearance and he would lose his job. (Tr. at 13-14, 20, 22, 27-28; GE 1)

Applicant was interviewed for his background investigation in September 2013. His answers were mostly consistent with his SF 86. He stated that he smoked marijuana about twice a week through December 2007. He stated that he had not used marijuana since then, and he had no intention to use it in the future. (Tr. at 13; GE 3)

Applicant was granted a Secret security clearance in about 2013. He continued to periodically smoke marijuana through December 2016. He fully reported his marijuana use on an SF 86 he submitted in April 2019. He stated that he did not intend to use marijuana in the future with the explanation: "I've grown up and it is no longer

something that I want to impact my career. I've had bad things happen to me because [o]f it and don't want to go through it again." (Tr. at 13, 28; GE 2, 4)

Applicant stated that his company wanted him to have a Top Secret clearance, and he felt that he had to be completely truthful. There is no evidence of any illegal drug use after December 2016. He stated that he has dissociated himself from situations where marijuana might be used, and he does not intend to use illegal drugs in the future. (Tr. at 14-15, 29-31; Applicant's response to SOR; GE 4) Applicant submitted a letter from a friend with the following declaration:

I am aware that [Applicant] is trying to get [a] security clearance but had an issue getting it due to his statement on prior marijuana use. I know he stopped using it several years ago because of work, for future jobs, and health. During a trip to [City] in August 2021, a friend from [State] brought some marijuana gummies and offered them to the group. [Applicant] did not have any stating he stopped for the reasons above. (AE A)

Applicant submitted documents and letters attesting to his excellent job performance and moral character. He is praised for his honesty, reliability, veracity, dependability, loyalty, professionalism, dedication, work ethic, efficiency, maturity, and integrity. The authors of the letters recommend that he retain his security clearance. (Applicant's response to SOR; AE A, B)

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 Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is set out 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. 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 notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug;
- (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.

Applicant possessed and used marijuana, including while holding a security clearance. He was arrested in 2006 while he was smoking marijuana on a city street, and he tested positive for the use of marijuana on a pre-employment drug test in May 2008. The above disqualifying conditions are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially 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.

The 2006 arrest for smoking marijuana and the 2008 positive drug test are remote in time, and the gravamen of the conduct (use of marijuana during those periods) is already alleged in SOR ¶ 1.a. SOR ¶¶ 1.c and 1.d are concluded for Applicant.

There is no evidence of any illegal drug use after December 2016. There are no bright-line rules for when conduct is recent. I conclude that all of the marijuana use

before Applicant received a security clearance in about 2013 is mitigated. SOR ¶ 1.a is concluded for Applicant.

Applicant lied about his marijuana use on his 2013 SF 86, and then continued to use marijuana while holding the security clearance he obtained through those lies. His conduct continues to cast doubt on his current reliability, trustworthiness, good judgment, and willingness to comply with laws, rules, and regulations. The above mitigating conditions, individually or collectively, are insufficient to alleviate those concerns.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant intentionally provided false information about his marijuana use on the 2013 SF 86. AG ¶ 16(a) is applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant was dishonest on the August 2013 SF 86, lied again during his September 2013 background interview, and then continued to use marijuana while holding the security clearance he obtained as a result of those lies. He is credited with finally coming clean in April 2019, but that is insufficient to overcome the lie that enabled him to obtain a security clearance. Personal conduct security concerns are not mitigated.

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 have incorporated my comments under Guidelines E and H in my whole-person analysis. I also considered Applicant's favorable character evidence and that he now appears to be telling the truth. Applicant likely would not have received a security clearance in 2013 if he told the truth. However, if he had told the truth initially and actually stopped using marijuana, he almost certainly would have a security clearance today and in the future.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the security concerns under Guidelines E (personal conduct) and H (drug involvement and substance misuse).

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:

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| Paragraph 1, Guideline H: | Against Applicant |
| Subparagraph 1.a: | For Applicant |
| Subparagraph 1.b: | Against Applicant |
| Subparagraphs 1.c-1.d: | For Applicant |
| Paragraph 2, Guideline E: | Against Applicant |
| Subparagraph 2.a: | Against Applicant |

Conclusion

It is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge