



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



In the matter of:)
)
) ISCR Case No. 21-00166
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

04/22/2022

Decision

LOUGHRAN, Edward W., Administrative Judge:

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

Statement of the Case

On April 23, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E and H. Applicant responded to the SOR on October 15, 2021, and requested a hearing before an administrative judge. The case was assigned to me on January 25, 2022.

The hearing was convened as scheduled on February 11, 2022. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. Applicant testified, called three witnesses, and submitted Applicant's Exhibit (AE) A, which was admitted without objection. The record was held open for the Government to submit additional documentary evidence. The Government submitted GE 4 and 5, which were admitted in evidence without objection. Applicant's email response to the documents is marked AE B and admitted without objection.

Findings of Fact

Applicant is a 27-year-old employee of a defense contractor. He has worked for his current employer since July 2020. He has a bachelor's degree that he earned in 2018 and a master's degree that he earned in 2020. He is married without children. (Transcript (Tr.) at 28, 41; GE 1, 2)

Applicant was diagnosed at a young age with a medical condition and placed on medication. In 2008, when he was 13 years old, he was charged as a juvenile with three counts of assault. He stated that he was in summer camp, blacked out, lost control of his anger, and the next thing he remembers he was in handcuffs. (Tr. at 12-21; Applicant's response to SOR; GE 2, 3)

Applicant was charged in May 2012 with assault and public peace – interference with school – impede staff. He was 17 years old at the time. He was convicted of the lesser offense of disorderly conduct. He was sentenced to probation for a year. His record was expunged. Applicant was being escorted to the Dean's office by a security guard for using the bathroom without a hall pass. He stated that he was grabbed by the security guard and, in response, punched the guard in the head. (Applicant's response to SOR; GE 2, 3)

Applicant was charged in August 2012 with harassing communication. He stated that he was going through a rough time with his family. He argued with his stepfather, got in his face, and yelled at him. The disposition of this case is not in evidence, but it does not appear that Applicant was convicted of any offense. (Applicant's response to SOR; GE 2, 3)

Applicant was in college in February 2018, when he was in the library and aggressively tried to meet a female student. She reported that he frightened her, backed her against the wall, grabbed her wrist, and started to pull her toward the door. She refused to leave. He grabbed her phone, told her to unlock it, and put his number in the phone. Applicant stated that he was attempting to become more extroverted, and he thought he was just flirting with the student. (Tr. at 38-41, 47; Applicant's response to SOR; GE 1-3, 5)

The student reported the incident to the police. Applicant was charged with the felony charge of kidnapping, and the misdemeanor charges of harassment, computer crime – unauthorized access, and false imprisonment. The charges were dismissed pursuant to a pretrial diversion program. (Applicant's response to SOR; GE 1-3, 5; AE B)

Applicant started smoking marijuana in about 2012, the same year his state legalized recreational marijuana use under state law for adults. His use increased until he was smoking marijuana several times a day. He continued to smoke marijuana until about November 2019. (Tr. at 30; Applicant's response to SOR; GE 2)

Applicant had a religious conversion experience in about October 2019, and he realized that marijuana was harming him. He went to a recovery group through his church. He has not used marijuana or any illegal drug since November 2019. He stated that he now feels, eats, and speaks better than when he was using marijuana. He has an easier time controlling his emotions. He is a powerlifter and is able to lift heavier weights. He provided a signed statement of intent to remain completely drug free and abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility. (Tr. at 14, 30-32; AE A)

Applicant has been under the care of a psychiatrist since he was a child. The psychiatrist testified that Applicant was diagnosed with affective dysregulation disorder, which meant that Applicant had difficulty regulating his anger and anxiety. Treatment included a lengthy residential stay, psychoanalysis, intensive outpatient psychotherapy four times a week for years, and medication management. The psychiatrist indicated that people with Applicant's problem are attracted to marijuana because it provides short-term relief from anxiety and an elevation of mood. Applicant continues to see the psychiatrist twice a month. He is on medication, but much less than when he was younger, and his psychiatrist stated that he is in recovery. (Tr. at 12-21; GE 4; AE B)

Applicant submitted a Questionnaire for National Security Positions (SF 86) in August 2020. He intentionally failed to report his illegal drug use. He stated that he was advised by a co-worker that "you want to be honest, but you don't want to be too honest because you say too much, you know, you might get denied your clearance," and that "you shouldn't say something if you don't think it's going to come up." Applicant stated that he did not think his marijuana use was relevant because he was "not that kind of person anymore." He stated that he deeply regrets it, but he was honest about everything else. (Tr. at 35-38, 48-50; Applicant's response to SOR; GE 1)

Applicant did not correct the falsification when he was interviewed for his background investigation in August 2020. He finally revealed his marijuana use in November 2020 when he was confronted with a workplace issue wherein he was discussing marijuana use. He told the investigator that he did not report his marijuana use on the SF 86 because he was scared and did not know if he had to report it because marijuana was legal in his state. (Tr. at 41-43; Applicant's response to SOR; GE 2)

Applicant called witnesses who testified to his excellent job performance and moral character. He is praised for his work ethic, professionalism, dedication, and integrity. (Tr. at 22-25)

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); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant possessed and used marijuana from about 2012 through November 2019. 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;

(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.

There is no evidence of any illegal drug use after November 2019. I find that Applicant has abstained from illegal drug use for an appropriate period, and that illegal drug use is unlikely to recur. AG ¶¶ 26(a) and 26(b) are applicable. The aspects of the behavior reflecting questionable judgment will be addressed further under personal conduct.

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 conditions are 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;

(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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant intentionally provided false information about his marijuana use on the 2020 SF 86. AG ¶ 16(a) is applicable.

Applicant's history of criminal conduct is alleged under Guideline E, and his marijuana use is cross-alleged under Guideline E. His criminal conduct and illegal drug use reflect questionable judgment and an unwillingness to comply with rules and regulations. The conduct also created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(c) and 16(e) are 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's conduct in 2008 when he was a 13-year-old juvenile is too remote to be of security significance. That conduct is mitigated. SOR ¶ 2.b is concluded for Applicant.

Applicant was 17 years old in 2012 when two of his charges took place. However, in light of his ongoing illegal activities, the conduct remains relevant.

I believe that the incident in the library in 2018 resulted from Applicant misreading the situation and not from an actual kidnapping attempt. However, it falls into Applicant's pattern of poor judgment and bad decisions. He has a history of minor offenses, used marijuana essentially on a daily basis through November 2019, and lied

about it on his SF 86 and during his initial interview. While I believe that specific conduct (marijuana use) is unlikely to recur, I am unable to conclude that other problematic conduct is unlikely to recur. The above mitigating conditions are insufficient to overcome ongoing concerns about Applicant's judgment, reliability, trustworthiness, and honesty.

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.

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

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:	For Applicant
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	For Applicant
Subparagraphs 2.b-2.f:	Against Applicant

Conclusion

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.

Edward W. Loughran
Administrative Judge