



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



In the matter of:)
)
) ISCR Case No. 19-03619
)
Applicant for Security Clearance)

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: Brittany Forrester, Esq.

06/09/2022

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On August 18, 2020, the Defense Counterintelligence and Security Agency issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H, drug involvement and substance misuse, and Guideline E, personal conduct. The action was taken 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) effective on June 8, 2017.

Applicant answered the SOR on September 4, 2020, and requested a hearing before an administrative judge. The case was assigned to me on February 18, 2022. The

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 15, 2022, scheduling the hearing for May 10, 2022, by Microsoft Teams. The hearing was held as scheduled. The Government offered exhibits (GE) 1 through 5. Applicant testified and offered Applicant Exhibits (AE) A through I. There were no objections and all exhibits were admitted into evidence. DOHA received the hearing transcript on May 20, 2022.

Findings of Fact

Applicant partially admitted the allegations in the SOR with explanations. His admissions are adopted as findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 41 years old. He attended college, but did not graduate. He never married and has no children. Applicant worked for a federal contractor from 2000 to 2004 and again from 2008 to the present. He took four months off to care for his mother in 2012. He was granted a secret security clearance in 2015 and later an interim top secret security clearance that was withdrawn in February 2020. He believed he held a public trust position from 2000 to 2004, while working as a contractor for a federal agency. (Transcript (Tr.) 10-12, 21-22, 39-40)

In 1999, while a high school student, Applicant was stopped by the police and his car was searched. The police found a marijuana pipe. Applicant testified he could not recall the specifics of the incident. He stated that the pipe belonged to his friend. Applicant was charged with possession of drug paraphernalia. Applicant testified he served community service and the charge was dismissed. He stated that the arrest had an impact on him, and he became careful about having people in his car. He stated his failure to disclose this arrest and charge on his May 2016 security clearance application (SCA) was due to an oversight. (Tr. 23, 30-31, 34, 37, 46-48; GE 1, 2, 5)

Applicant completed an SCA in 2011. In it, Applicant disclosed that he used marijuana from February 2010 to April 2010, a couple of times during social situations. He testified that he was offered marijuana by others and used it at concerts and social gatherings. He would use marijuana about once a month. (Tr. 23, 36; GE 1)

Applicant testified that he used marijuana beginning in 1999. He was using marijuana while holding a public trust position from 2000 to 2004. Applicant repeatedly testified that he did not want to misrepresent himself on the frequency of his marijuana use because it was a long time ago. He acknowledged that from 2002 to 2008 he likely used marijuana on average once a month. He used marijuana in 2010 and continued using it and increased his use in 2012 to about two to three weekends a month. He was caring for his sick mother and had taken time off from his job from January 2012 to June 2012. This was a stressful time for him. Because he was at home more, he used marijuana more often. He stated he was using it more by himself than with others. He occasionally purchased it. He would find the seller through a friend. He would then purchase a small amount. He also often acquired it from friends. (Tr. 24, 33-35, 39-46, 51-57, 70-72)

Applicant did not disclose his more extensive drug use in his 2011 SCA because he made a mistake and did not want to misrepresent himself. He decided when it came time he would explain it in person during his investigation interview. He testified that he did not recall meeting with an investigator after he completed his 2011 SCA. His failure to disclose his more extensive marijuana use on his 2011 SCA was not alleged in the SOR. He denied being aware that he was denied a security clearance in 2011 because of his drug use.¹ (Tr. 24, 33-35, 39-46, 51-64)

Applicant used marijuana with varying frequency from 1999 to October 2016. After completing his May 2016 SCA and being granted a security clearance, Applicant used marijuana in October 2016. He did not disclose any of his past marijuana use on his May 2016 SCA. His explanation was he had been employed by the federal government since 2000, and this was the first time he was to meet with an investigator. He decided he wanted to tell the investigator face to face about his past drug use. Applicant explained his October 2016 use of marijuana was at a concert with friends. He explained his failure to disclose his drug charge was an oversight and unintentional. (Tr. 23-24, 29, 46, 49, 59-64, 70-74)

Applicant further testified that he did not disclose his marijuana use on his 2016 SCA because he was nervous and was using it socially. He stated "it was a mistake to put that falsified information on there. There is really nothing else I can say about it." (Tr. 27) He said when questioned by the government investigator he disclosed it. His personal subject interview with the investigator was not included as evidence to corroborate his statement. He further explained that he felt if he disclosed his drug use in his SCA that it would not portray him in a way that best represented him. He testified that he was aware that he was required to provide honest answers on his SCA and that he signed it attesting to its accuracy. He said it was always his intention to tell the investigator of his prior drug use, and he did not intentionally fail to disclose this information or lie on his SCA. He said he knew the subject would come up in his background investigation. Applicant testified that he could not justify why he did not disclose his past drug use. He said he was nervous about disclosing it, but did not intentionally withhold it despite him stating "no" on his SCA regarding past drug use. The last page of Applicant's 2016 SCA allows for additional comments to be included. Applicant made comments in this section about certain questions on his SCA. It did not include any comments about wanting to explain to an investigator about his drug use. (GE 2; Tr. 27, 70-77)

Applicant testified that he considers himself honest and trustworthy. In the future, he will provide honest answers. He has learned from his past mistakes and that he must be honest and forthcoming. He testified that his marijuana use was during his youth. At the time of his last marijuana use he was 34 years old. He stated that he matured slower than others. He admitted he used marijuana as a coping mechanism and to help with stress. He also stated using it during social gatherings and concerts was a form of stress

¹ Any derogatory information that was not alleged in the SOR will not be considered for disqualifying purposes, but may be considered when making a credibility determination, in the application of mitigating conditions, and in a whole-person analysis.

management and because he does not drink alcohol, using marijuana is his way of celebrating. (Tr. 28, 64-70)

I did not find Applicant's testimony credible when he stated that he did not deliberately fail to disclose his prior drug use and drug charge on his 2016 SCA because he wanted to discuss his drug usage with an investigator. I find he deliberately failed to disclose the requested information on his SCA. I find his explanation that it was an oversight that he did not disclose his 1999 drug arrest as plausible, and he did not deliberately fail to disclose the arrest.

Applicant testified that he could not recall what he told a government investigator, but if he did tell the government investigator that he used marijuana from 2000 to 2002 at least once a week and on the weekends then it was probably true. He was working for a federal agency at this time. He believed that he held a public trust position.

Applicant testified that he is aware that federal contractors have an anti-drug policy requiring their employees to be drug-free. He was aware he was on notice through the 2011 and 2016 SCAs that use of illegal drugs was inconsistent with federal employment. He has not used marijuana since October 2016 and does not intend to use it again. He stated he no longer lives close to associates he previously used drugs with. (Tr. 24, 50-51)

Applicant testified that he takes full responsibility for his actions and understands the Government's security concerns. He provided evidence to show he has taken two drug tests that were negative. He also provided a statement of intent not to use illegal drugs in the future, and copies of his performance evaluations that reflect he has been consistently an outstanding performer. (Tr. 22, 25-26; AE A through I)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. 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(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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states 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 as to obtaining 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 as to 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 H: Drug Involvement and Substance Misuse

The security concern relating to the guideline 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.

AG ¶ 25 provides conditions that could raise security concerns. The following are potentially applicable:

(a) any substance misuse;

(c) illegal possession of a controlled substance, including cultivation, processing, manufacturing, 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 was arrested and charged in 1999 with possession of drug paraphernalia. He used marijuana with varying frequency from 1999 to October 2016. He held a security clearance when he used marijuana in October 2016 holding it. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns. The following mitigating conditions under AG ¶ 26 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 to overcome the 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 being 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 used marijuana with varying frequency from about 1999 to 2016, often in social settings, but also when he was alone to cope with stress. His last use of marijuana was in October 2016. He stated he does not intend to use marijuana in the future, and he has moved away from associates with whom he used it. He signed a statement of intent to abstain from future use. His last use was almost six years ago. I believe that it is unlikely that Applicant will use marijuana in the future. Both AG ¶¶ 26(a) and 26(b) apply. However, they are insufficient to mitigate the security concern raised by Applicant using marijuana after he held a security clearance. He was on notice in 2011, when he completed his SCA that illegal drug use was inconsistent with holding a security clearance. He was aware that federal agencies and contractors have an anti-drug use policy. He chose to use marijuana while working for these employers and after he was granted a security clearance. He had an opportunity to cease his drug use after he was again put on notice when he completed his May 2016 SCA, but months later violated that trust. Applicant failed to mitigate the drug involvement and substance misuse security concern.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concerns for personal conduct:

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. I find the following 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 failed to disclose on his May 2016 SCA that he was arrested and charged with possession of drug paraphernalia in 1999. He testified that his omission was due to oversight. I find that explanation to be plausible and find he did not deliberately fail to disclose this charge. I find partially in his favor on SOR ¶ 2.a. However, the evidence is sufficient to conclude that Applicant deliberately failed to disclose on his SCA his past marijuana use, the second part of SOR ¶ 2.a. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

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

(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; and

(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 otherwise inappropriate behavior, and such behavior is unlikely to recur.

Applicant testified that he did not disclose his past drug use on his SCA because he wanted to discuss it with an investigator, which he could also have done regardless of whether he disclosed it on his SCA. That statement acknowledges that he made a deliberate decision to not disclose it, despite his justification for why he did not disclose it. Applicant testified that when he completed his 2011 SCA, he anticipated having an opportunity to talk to an investigator, but it never happened. The government relies on those it grants security clearances to be forthcoming with information. In this instance the government was never put on notice that there were potential issues. That is the responsibility of the Applicant. In the additional comments section of his 2016 SCA, he made comments about a different question. He could have easily made a similar comment, alerting the investigator that he had issues he wanted to discuss about his drug use. He did not. Deliberately failing to disclose required information is not a minor offense. The crux of being granted a security clearance is trust and honesty. Providing honest answers when asked is a requirement. Applicant failed to meet that standard. There is insufficient evidence that he made a prompt effort to correct his omissions. The above mitigating conditions do not 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 have incorporated my comments under Guidelines H and E in my whole-person analysis

Although there is some evidence of mitigation regarding Applicant's drug use, it is insufficient to mitigate the security concerns based on his use after being granted a security clearance and his deliberate failure to disclose his past drug use on his SCA. 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 security concerns arising under Guideline H, drug involvement and substance misuse, and 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: | AGAINST APPLICANT |
| Subparagraph 1.a-1.b: | For Applicant |
| Subparagraph 1.c: | Against Applicant |
| Subparagraph 1.d: | For Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |
| Subparagraph 2.a: | Against Applicant ² |

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge

² As noted above, I have partially found in Applicant's favor on this allegation