



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



In the matter of:)
)
) ISCR Case No. 19-00883
)
Applicant for Security Clearance)

Appearances

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

10/04/2022

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 June 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 August 30, 2021, and requested a hearing before an administrative judge. The case was assigned to me on July 25, 2022.

The hearing was convened as scheduled on September 14, 2022. Government Exhibits (GE) 1 through 3 and 6 through 16 were admitted in evidence without objection. The objections to GEs 4 and 5 were sustained. Applicant testified. He submitted numerous documents with his response to the SOR, which will be considered, but no additional documents at his hearing.

Findings of Fact

Applicant is a 62-year-old employee of a defense contractor. He has worked for his current employer since 2015. He has held a security clearance for more than 35 years. He has a bachelor's degree that he earned 1982. He is divorced with two adult children. (Transcript (Tr.) at 10, 15-17; GE 1, 2)

Applicant has a history of marijuana use, from about 1978 to 1982 while he was in college; once in December 2001 to January 2002 while he held a security clearance; and again in 2017 and 2018, while holding a security clearance. His marijuana and drug paraphernalia possession resulted in several charges. He was cited in 1979 for possession of marijuana; in January 2002 for possession of drug paraphernalia; in September 2017 for possession of marijuana and drug paraphernalia; and in January 2018 for possession of drug paraphernalia. (Tr. at 15, 18-19, 26, 55-56; Applicant's response to SOR; GE 1, 2, 6, 7, 9)

Applicant made a signed statement as part of his background investigation in September 1989. He discussed his 1979 citation for possession of marijuana. He admitted that he possessed marijuana in 1979. He wrote that he first smoked marijuana in April or May 1979 at a party. He stated that he smoked marijuana two to three times from April or May 1979 until the June 1979 arrest. He falsely stated that he had not used marijuana after the arrest in June 1979.¹ He stated that he had no intention to use marijuana in the future. (Tr. at 55-58; GE 9)

Applicant was cited in January 2002 for possession of drug paraphernalia. He denies that he possessed drug paraphernalia. He asserted that the pipe that was allegedly used to smoke marijuana was actually a tobacco pipe and was only used to smoke tobacco. He stated that it was proven to be tobacco, and he was found not guilty of the charge. (Tr. at 22, 36-37, 40; Applicant's response to SOR)

Applicant made a signed statement in May 2002. He admitted his marijuana use from 1978 to 1982 while attending college. He also admitted to using marijuana on one occasion in December 2001 or January 2002, while employed by a defense contractor and holding a security clearance. He said he used it at his home with a named friend from his home state who was visiting. He stated that he had no intention to use marijuana in the future. He essentially stated the same facts in a signed statement in March 2005. In spite of those two statements, Applicant testified at his hearing that he did not recall using marijuana in 2001 to 2002. (Tr. at 19-20, 23-26, 40-41; Applicant's response to SOR; GE 6, 7) I did not find his testimony credible. I find by substantial evidence² that he used marijuana while holding a security clearance in about December 2001 or January 2002.

¹ Any adverse matter that was not alleged in the SOR will not be used for disqualification purposes. It may be considered when assessing Applicant's credibility, in the application of mitigating conditions, and in the whole-person analysis.

² Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." See, e.g., ISCR Case No.

Applicant submitted a Questionnaire for National Security Positions (SF 86) in September 2015. He reported that he was fired from his employment in June 2015 because of "Misunderstanding of company policy." He provided a detailed explanation under other questions. He reported his 1979 citation for possession of marijuana, but he did not report his January 2002 citation for possession of drug paraphernalia. He denied that he "**EVER** illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed." (GE 1)

Applicant was interviewed for his background investigation in June 2017. He discussed his 2015 job termination. He stated that the 1979 marijuana possession charge was discussed previously, and there were no other developments to report. (GE 2)

Applicant was stopped for a traffic citation in September 2017. The deputy noticed the smell of unburnt marijuana and saw something suspicious in the cup holder. Applicant stated that it was an old pipe that he used to smoke tobacco. When he was handed the pipe, the deputy saw burnt marijuana residue, and it smelled like burnt marijuana. Applicant admitted to smoking "bud" that day. The deputy also found two plastic bags in the vehicle with just over two grams of marijuana. Applicant was cited with possession of marijuana. (Tr. at 15, 26, 30-31; Applicant's response to SOR; GE 2, 3, 13, 15)

Applicant received a deferred adjudication for the offense. He was required to pay a fine and fees, and he was required to attend a personal behavior class. (Tr. at 15, 16, 38-39; Applicant's response to SOR; GE 2, 3, 15)

Applicant held a security clearance at the time. He self-reported the charge and its disposition to his security officer in November 2017. He indicated that he purchased the marijuana and smoked it in a state where it was legal under state law. He transported it to his state, where it was not legal under state law. He falsely stated that he had not used illegal drugs on any other occasions since 1979. (Tr. at 15, 26; GE 3, 15)

Applicant was going through airport security in his home state in January 2018. A small knife and a pipe with marijuana residue was found after his carry-on bag was x-rayed. The small metal pipe was wrapped in a napkin in a ziplock bag inside a toiletry bag. Airport police were notified. Applicant admitted to the police officer that the carry-on bag and the ziplock bag was his. The officer asked him what was in the ziplock bag to which Applicant replied it was "a small pipe that he had forgotten that was in his bag." He also stated that he smoked tobacco. The police officer examined the pipe and determined based on his experience that the residue was burnt marijuana. Applicant

17-04166 at 3 (App. Bd. Mar. 21, 2019) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994); ISCR Case No. 04-07187 at 5 (App. Bd. Nov. 17, 2006).

then admitted that he smoked marijuana, and that the last time he smoked marijuana with the pipe was the previous month on Christmas. (Tr. at 31-39; GE 14)

Applicant was cited with possession of drug paraphernalia, provided a court date, and permitted to board his flight. Applicant was found not guilty of the charge in April 2019. (Applicant's response to SOR; GE 14)

Applicant testified that he borrowed the carry-on bag from his son, and he was unaware that the pipe was in the bag. He stated that he never asked his son about the pipe because he did not want to worry his son. He denied telling the police officer that he used the pipe to smoke marijuana. (Tr. at 31-39; Applicant's response to SOR; GE 14) I did not find his testimony credible. I find that the incident happened substantially as reported in the police report of the incident.

Applicant was interviewed by a background investigator in October 2018 about the 2017 and 2018 citations and his marijuana use. He admitted that he used marijuana in college from 1978 to 1983, but he stated that he did not use it again until he possessed and used marijuana in July 2017. He discussed his September 2017 charge for marijuana possession. He used marijuana three or four days while he was on vacation in July 2017, and again in September 2017. He stated those were the only times he used drugs while holding a security clearance. He stated that he had not used marijuana at any other time, and he did not intend to use it in the future as it could derail his career. (GE 2)

Applicant discussed the January 2018 citation from the airport with the investigator. He stated that the pipe was not his, and he did not know how it got in his bag. He stated that it could belong to one of his children. (GE 2)

Applicant denied that he provided false information during the interview. He stated that he told the truth and that it was not his pipe that was found at the airport. (Tr. at 31-39; Applicant's response to SOR) As indicated above, I did not find him credible. I find that he lied to the investigator, and he provided additional false statements in the SOR response and during his hearing testimony.

Applicant also has a history of workplace issues. An incident report was issued by an employer in February 1997 because Applicant "did not comply with company policy of paying his [company] credit card in a timely manner and by using his credit card for personal use." He stated that he paid the balance off in full, and no further action was required. He went to work for another defense contractor in August 1997, where he worked until he was terminated in May 2015 for unauthorized use of an employer-issued credit card. (Tr. at 45-50; GE 6, 8, 10, 16)

In 2001, Applicant's employer counseled him for charging personal rental cars to the company's corporate credit card without proper authority, for having an unpaid balance on a corporate credit card, and for not repaying a cash advance from the company. The company assisted him in resolving the matter. He was suspended without pay for a week. He was "placed on permanent probation for any similar

violations,” with the warning that “[s]hould similar violations occur he will be immediately terminated.” (Tr. at 50; GE 6, 11)

Applicant was terminated in May 2015 for misuse of a company credit card. He stated that he was having financial difficulties, and he used the company credit card for “expenses that involved transportation to work and some expenses on an approved trip.” He asserted that it was a “[m]isunderstanding of company policy,” and that he “never falsified any trip reports and paid the balance of the credit card.” (Tr. at 44, 50-55; Applicant’s response to SOR; GE 1, 2, 12, 16)

Applicant submitted documents and letters attesting to his excellent job performance and ethical standards. He is praised for his work ethic and sensitive handling of classified information. (Applicant’s response to SOR)

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);
- (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 from about 1978 to 1982 while he was in college; once in December 2001 to January 2002; and again in 2017 and 2018. He

purchased marijuana in 2017. He was cited for possession of marijuana or drug paraphernalia in 1979, 2002, 2017, and 2018. AG ¶¶ 25(a) and 25(c) are applicable.

SOR ¶ 1.a alleges that Applicant “used marijuana, with varying frequency, from about 1978 to at least December 2017, to include **after** you were granted access to sensitive **information.**” SOR ¶ 1.a alleges conduct covered under AG ¶ 25(a), but it does not allege the conduct identified in AG ¶ 25(g), which covers illegal drug use “**while** granted access to classified information or **holding** a sensitive **position.**” (emphasis added) AG ¶ 25(g) is not applicable. See ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022) for a discussion on the distinction between holding a security clearance and having access to classified information.

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.

There is no evidence of any illegal drug use after January 2018. There are no bright-line rules for when conduct is recent. All of Applicant’s illegal drug use might be mitigated if I had found him credible, but I did not. 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 conditions are potentially applicable:

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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. This includes, but is not limited to, consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources; 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.

As a preface, I accept the police report as to what occurred in the airport in January 2018, that Applicant admitted that he smoked marijuana, and that the last time he smoked marijuana with the pipe was the previous month on Christmas. I also find that Applicant intentionally provided false information during his background interview in October 2018 when he stated that the pipe was not his; he did not know how it got in his bag; and he had not used marijuana since September 2017. AG ¶ 16(b) is applicable.

Applicant was terminated in May 2015 for misuse of a company credit card. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. The conduct also created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(d) 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 denied that he lied during his background interview. Having determined that he intentionally provided false information about his drug use in an attempt to

mislead the government, I have also determined that his testimony at the hearing was also false. It would be inconsistent to find his conduct mitigated.³

As to the termination in May 2015 for misuse of a company credit card. Had that been the only incident, it would likely be mitigated. However, he engaged in similar conduct at a different company in 1997, and in 2001 at the same company that terminated him. That company placed him “on permanent probation for any similar violations,” with the warning that “[s]hould similar violations occur he will be immediately terminated.” That history, coupled with the fact that his testimony cannot be trusted, prevents mitigation.

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

³ See ISCR Case 03-22819 at 4 (App. Bd. Mar. 20, 2006), in which the Appeal Board reversed the Administrative Judge’s decision to grant Applicant’s security clearance:

Once the Administrative Judge found that Applicant deliberately falsified a security clearance application in September 2002, the Judge could not render a favorable security clearance decision without articulating a rational basis for why it would be clearly consistent with the national interest to grant or continue a security clearance for Applicant despite the falsification. Here, the Judge gives reasons as to why he considers the falsification mitigated under a “whole person” analysis, namely that Applicant has matured, has held a position of responsibility, recognizes how important it is to be candid in relation to matters relating to her security clearance, and has changed her behavior so that there is little likelihood of recurrence. However, the Judge’s conclusion runs contrary to the Judge’s rejection of Applicant’s explanations for the security clearance application falsification. At the hearing (after earlier admitting the falsification in her March 2003 written statement to a security investigator), Applicant testified that she had not intentionally falsified her application. Given the Judge’s rejection of this explanation as not being credible, it follows that the Judge could not have concluded Applicant now recognizes the importance of candor and has changed her behavior.

comments under Guidelines E and H in my whole-person analysis. I also considered Applicant's favorable character evidence, but he cannot be trusted to tell the truth.

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:

Paragraph 1, Guideline H:	Against Applicant
Subparagraphs 1.a-1.f:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraphs 2.a-2.c:	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