



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



In the matter of:)
)
) ISCR Case No. 21-00248
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: Kel McClanahan, Esq.

11/02/2022

Decision

Hyams, Ross D., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H (drug involvement and substance misuse) and Guideline E (personal conduct). The security concerns under Guideline F (financial concerns) were mitigated. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on April 30, 2020. On August 26, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse), Guideline E (personal conduct), and Guideline F (financial concerns). Applicant responded to the SOR on September 13, 2021, and requested a hearing before an administrative judge. After a delay because of the COVID-19 pandemic, the case was assigned to me on May 18, 2022.

The hearing was originally scheduled for July 7, 2022. Applicant requested a continuance and it was rescheduled. The hearing was convened on July 19, 2022.

Department Counsel submitted Government Exhibits (GE) 1 through 14. Applicant's counsel objected to GE 6, 8, and 12 because they were records relating to prior revocation actions that he argued were not relevant. His objection was overruled because the issues in these documents were relevant or related to the issues in the current case. (Tr. 18-19) GE 1-14 were admitted in evidence. Applicant's exhibits (AE) A-B were admitted in evidence without objection. After the hearing, I held the record open to provide Applicant with the opportunity to submit additional documentary evidence. He timely submitted documents that I marked as AE C-F, and admitted in evidence without objection.

Amendment to the SOR

At the start of the hearing, Department Counsel moved to amend the SOR to withdraw SOR ¶ 2.a. The motion was granted without objection.

Findings of Fact

In his answer, Applicant admitted SOR ¶¶ 1.a and 3.a, and denied SOR ¶¶ 1.b, and 2.b-2.e. He included a short explanation for each allegation. His admissions and explanations are incorporated into the findings of fact. After review of the pleadings, testimony, and evidence submitted, I make the following additional findings of fact.

Applicant is 36 years old. He earned a bachelor's degree in 2015, and is now attending school to obtain a master's degree. He was married in 2009, but he and his wife have been separated since 2020. They were also separated from about 2017-2019. He has two minor children. He served on active duty in the Air Force from 2008-2012, in the Air Force Reserve from 2013-2014, and in the Air National Guard from 2014-2019. He received an honorable discharge. He currently works as a victim notifications specialist for a government contractor. (Tr. 21-26; GE 1)

On his 2008 SCA, Applicant reported that he used marijuana about 20 times from January 2004 – September 2007. He stated that he used it recreationally with friends before entering the military. In his September 2008 background interview with a government investigator, he stated that the usage number that he reported was just an estimate, and the actual number could be double. He stated that he had no intent to use marijuana again. (Tr. 27-36, 46; GE 3, 4)

On his 2013 SCA, Applicant did not report any illegal drug use in the last seven years. This period covered March 2006 to March 2013, which includes some of the marijuana use he reported on his 2008 SCA. In his April 2013 background interview, he was confronted about his earlier marijuana use, and stated he had no intent to use marijuana again. He testified that he did not intend to hide his marijuana use, and that he wanted to explain the situation on the SCA, but failed to do so. (Tr. 36-46; GE 2, 4)

In 2015, Applicant applied for a job that required him to possess a security clearance. The job also required a pre-employment drug screening as a condition of being hired. On June 16, 2015, the employer submitted an incident report through the Joint

Personnel Adjudication System (JPAS), which stated that the testing lab notified them that Applicant tested positive for one of the eight prohibited substances, and that in a prescreening interview, he stated that he had not used illegal drugs in the past seven years. The DoD CAF issued him an SOR for the positive urinalysis. In his 2016 answer, he stated that he does not understand how his urine tested positive for marijuana, and that the testing office would not give him or the employer any information. He asserted that he believed his urine was contaminated at the testing facility through the process that they used. He provided no evidence supporting this assertion. In June 2016, the DOD CAF rejected this explanation, and temporarily revoked his security clearance. In his July 2020 background interview, he stated that this must have been a false positive result. At the hearing, he testified that he does not know how his urine tested positive for marijuana, and that he had not used it at that time. (Tr. 27-46; GE 4, 5, 7, 8; AE C-D)

The record shows that on June 16, 2015, the testing lab contacted the employer so that they could speak with Applicant about the result. The employer provided the testing lab with his contact information, and asked him to call the confidential line for the lab. Not only did Applicant have the opportunity to get information from the testing lab, they **offered** to discuss the results with him. Six days later, he emailed the employer and stated that he ate a protein bar with hemp seeds or oil in it, and that it must have caused him to test positive for marijuana. At the hearing, he did not mention the hemp protein bar in his testimony, and there was no assertion about it in **his** 2020 background interview. (Tr. 27-46; GE 4, 5, 7, 8; AE C-D)

On his 2020 SCA, Applicant did not report any marijuana use in the last seven years, or use while possessing a clearance. In his July 2020 background interview, he reported that he used marijuana, while possessing a security clearance, from October 2017 – February 2018. He stated that he purchased it from a friend, and used marijuana about 8 times. He reported that he was depressed at the time. He stated that he has no intent to use marijuana again. He reported that he did not list this usage on his SCA because he was scared that he would not get the clearance. At the hearing, he testified that he did not recall ever saying that. However, when reminded that he verified the accuracy of this interview in March 2021, he stated that he did not correct this statement because of an oversight. He testified that he used marijuana in 2017 because alcohol did not suffice to deal with his pain, and he was health conscious. He stated that the marijuana got him through it. He also stated that he could not remember how he obtained the marijuana, and tried to evade answering the question. He admitted that he knew that using marijuana with a security clearance was prohibited. He reported that he stopped using it because he was trying to get his life back on track. He stated that he had counseling for issues relating to his marriage separation, and that his marijuana use was discussed at the counseling. (Tr.27-36, 47-76: GE 1, 4)

In his March 2021 response to interrogatories, Applicant reported using marijuana from September 27, 2017 to October 2, 2017, about every other day. At the hearing, he was asked about the discrepancy in dates from the marijuana use he reported in his July 2020 background interview and his March 2021 interrogatory response. He stated that he just gave an estimate, and that he cannot recall the timeframe. He said that he was

depressed during this period, and used marijuana over four or five months. He also did not report his first period of marijuana use in the interrogatory response, despite being asked if he “ever used any federally illegal drugs....” He claimed that he thought that he was just being asked about the last seven years. (Tr. 45, 63-69; GE 4)

Applicant’s credit reports show a charged-off credit-card account for about \$16,000. He asserted that it became delinquent after losing his job in 2019. This debt was resolved in October 2020 through a settlement agreement with the creditor. (Tr. 50-54; GE 9-11, 14; AE A, B)

The SOR alleges under Guideline H that Applicant used marijuana from January 2004 to February 2018, including while possessing a security clearance, and that his job offer was rescinded in 2015 for failing a urinalysis. The SOR alleges under Guideline E that he falsified his 2013 SCA and 2020 SCA for failing to disclose marijuana use, and falsified his 2021 interrogatory response for failing to disclose all his marijuana use. The SOR alleges under Guideline F that he is indebted on a charged-off credit card for about \$16,000.

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

AG ¶ 24 expresses the security concern regarding drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The Controlled Substances Act (“CSA”) makes it illegal under Federal law to manufacture, possess, or distribute certain drugs (Controlled Substances Act, 21 U.S.C. § 801, *et seq.* See § 844). All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. §§811, 812. Marijuana, ecstasy, and mushrooms (Psilocybin) are classified as Schedule I controlled substances in §812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment. §812(b)(1).

Applicant admitted two periods of marijuana use, including use while granted access to classified information or holding a sensitive position from about October 2017 to February 2018. There is also documentation in the record that shows that Applicant tested positive for marijuana in a 2015 pre-employment urinalysis screening. AG ¶¶ 25(a), 25(b), and 25(f) apply.

I have considered the mitigating conditions under AG ¶ 26. 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;

(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 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 gets some credit under ¶ 26(a). He reported last using marijuana in 2018, which was four years ago. While some of his life circumstances at that time were unique, others were not. Although he asserted that he had not used marijuana between 2008 and 2017, the 2015 positive urinalysis results and rescinded job offer bring that assertion into doubt. The fact that he started using marijuana about a year after his clearance was suspended for a positive urinalysis is particularly egregious. He testified that he knew that illegal drug use while granted access to classified information was not permitted. His marijuana use with a clearance clearly shows that his reliability, trustworthiness, and

judgement are in doubt, and I am unable to find that his marijuana use is unlikely to recur. AG ¶ 26(a) does not fully apply.

Applicant has not been forthcoming about his marijuana use since his initial disclosure in 2008. He did not report the full extent of his usage on his 2008 SCA. He failed to report marijuana use on his 2013 SCA and 2020 SCA. His urinalysis tested positive for marijuana in 2015, and he offered several different explanations over time. These explanations are not credible considering the larger context of his known usage and failure to report. At the hearing, his testimony was vague and evasive at times. He has repeatedly stated to investigators that he has no future intent to use marijuana, but the record shows that those assertions did not hold true. He stated that in 2017-2018, marijuana is what he used to get him through the pain and depression. While he reported that he discussed his marijuana use at counseling, he failed to provide sufficient evidence showing that he has had substance abuse counseling and that he took any other actions to ensure that he does not turn to marijuana in the future. He did not provide an assessment or prognosis from a duly qualified medical professional. He also failed to provide sufficient evidence that he has disassociated from drug-using associates and contacts, changed or avoided the environment where drugs were used, or provide a signed statement agreeing to abstain from all drug involvement and substance misuse, acknowledging that any future involvement is grounds for revocation of national security eligibility. AG ¶¶ 26(b) and 26(d) do not apply.

Applicant made a commitment to the government and his employer not to use illegal drugs when he initially applied for a security clearance, and in subsequent reapplications. This issue was reinforced by his 2016 clearance suspension for a positive urinalysis. His subsequent drug use while granted access to classified information or holding a sensitive position shows that he cannot be trusted to follow the rules and regulations required to handle and protect classified information. The Appeal Board has held that “a person who broke a promise to abide by drug laws after having been placed on notice that drug use is not compatible with access to classified information has not demonstrated the quantum of reliability expected of those with access to classified information.” ISCR Case No. 16-03460 at 4 (App. Bd. May 24, 2018).

Guideline E, Personal Conduct

AG ¶ 15 details the personal conduct security concern:

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. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

I have considered the disqualifying conditions for drug involvement under AG ¶ 16 and the following 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 national security eligibility or trustworthiness, or award fiduciary responsibilities.

The record shows that Applicant failed to disclose his marijuana use on his 2013 SCA, 2020 SCA, and in his 2021 response to interrogatories. AG ¶ 16(a) applies.

I have considered the mitigating conditions under AG ¶ 17. 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; 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.

AG ¶ 17(a) and 17(c) does not apply. Applicant's lack of candor regarding his marijuana use has occurred multiple times over about a nine-year period. His explanations and excuses for his failure to report are not credible. In 2020, he failed to report it on his SCA despite using marijuana only about two years prior. Furthermore, he told the background investigator that he was scared that if he reported it, he would not get his clearance. In his 2021 interrogatory response, he under reported his later period of marijuana use significantly, by about four months. I also found his testimony at the hearing to lack candor and be evasive. This behavior is ongoing, and there is insufficient evidence that it is unlikely to recur. It continues to cast doubt on his reliability, trustworthiness, and good judgment.

SOR ¶ 2.e cross alleges the Guideline H and Guideline F concerns under Guideline E. As explained below, as I found mitigation for Applicant on the Guideline F concerns, I will find for him on this allegation as well.

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

- (a) inability to satisfy debts; and
- (c) a history of not meeting financial obligations.

The Guideline F allegation of a charged-off credit card is established by the credit reports and Applicant's admission. AG ¶¶ 19(a) and 19(c) apply.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following are potentially applicable:

- a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances; and
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant was unable to pay his credit card because he lost his job in 2019, and the account was charged off. In October 2020, he made a settlement agreement with the creditor, and the debt was resolved prior to the issuance of the SOR. AG ¶¶ 20(a), 20(b), and 20(d) 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 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, E, and F in my whole-person analysis.

Applicant mitigated the financial concerns, but did not provide sufficient evidence to mitigate the drug involvement and substance misuse, and personal conduct security concerns. This continues to cast doubt on his reliability, trustworthiness, and good judgment with respect to his eligibility for a security clearance. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility for a security clearance.

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.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT

Subparagraph 2.a:	Withdrawn
Subparagraphs 2.b - 2.d:	Against Applicant
Subparagraph 2.e:	For Applicant
Paragraph 3, Guideline F:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

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

Ross D. Hyams
Administrative Judge