



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



In the matter of:)
)
) ISCR Case No. 21-02729
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

11/30/2022

Decision

LYNCH, Noreen A., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct), Guideline H (Substance Abuse and Drugs), and Guideline E (Personal Conduct). Applicant did not mitigate the allegations under Guideline J. He did not mitigate the concerns under Guidelines H and E. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted security clearance applications on February 2, 2021, and October 17, 2017. On March 21, 2022, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J, H, and E. The DOD CAF acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016) and implemented on June 8, 2017.

Applicant answered the SOR in an undated document and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written case on May 12, 2022. A complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on May 24, 2022, and did not respond. I was assigned the case on September 6, 2022.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a-1.b, and SOR ¶¶ 2.a-2.c, but denied the allegations in SOR ¶¶ 3..a, regarding falsification of his October 2017 and February 2, 2021 SCAs in response to Section 23 –Illegal Use of Drugs or Drug Activity and Illegal Use of Drugs or Controlled Substances in the last seven years, and while possessing a security clearance have you ever illegally used or otherwise been involved with a drug or controlled substance by answering "No"; and SOR ¶ 3.b. as cross-alleged under SOR ¶ 2.a through 2.c. His admissions are incorporated in my findings of fact (Item 1)

Applicant is a 31-year-old systems engineer employed by a defense contractor since November 2015. He is unmarried and has no children. He obtained an undergraduate degree in 2014. He reported no military service. Applicant has worked for defense contractors since 2014, with short periods of unemployment when he was working on personal projects from November 2014 until June 2015. He obtained a security clearance in 2017. (Item 2)

Guideline J: Criminal Conduct

The allegation in SOR ¶¶ 1.a and 1.b involved an arrest in November 2014, with a charge of possession of marijuana, and the alleged arrest in May 2019, with a charge of possession of marijuana. Applicant admitted the SOR allegations, but noted that the marijuana was obtained through dispensaries and used for sleep assistance and to increase his appetite. For his 2014 marijuana possession offense, he was charged with a misdemeanor, first offense, received a ticket, probation, and a fine. (Items 1, 4)

In Applicant's 2021, personal subject interview (PSI), he volunteered to the investigator that he was offered marijuana by his cousin, and purchased some marijuana from him in 2014. (Item 4) He put some marijuana in his vehicle trunk on the way home, and was stopped for speeding by a police officer. Applicant was taken to jail, and was able to bail himself out. The PSI report states that he went to court at some point and he "was told to submit dismissal paperwork." (Item 4) Applicant told the investigator that later he found out the case was dismissed.

Guideline H: Drug Involvement and Substance Abuse

In his answer, Applicant admitted the three SOR allegations that he used marijuana with varying frequency from about 2012 to about July 2021 (2.a); that he purchased and used marijuana with varying frequency from about 2012 to about July 2021 2.b; and 2.c, that he purchased and used marijuana with varying frequency from about July 2018 to about July 2021, while granted access to classified information. (Item 1)

However, in that same answer, he stated that the “time span was persuaded by the investigator during the interview as a general from and to date.” During his 2018 PSI, he stated that “estimated months and dates noted are fairly accurate.”

Applicant volunteered information about the May 2019 arrest for purchase and use of marijuana from his cousin. He told the investigator that it was an open case because he did not know that his case had been fully dismissed. (Item 4) It is not clear what Applicant meant by that statement.

Applicant used marijuana in college from 2012 to 2014. He also used marijuana perhaps once a year over the next couple of years for recreational use. He stated that he purchased from vendors in states where marijuana was legal from 2019 to the present when he was on vacation. Applicant was drug tested when he was hired and stated that he understood the employer policy on illegal drug use, and that it is against policy to use marijuana while in federal employment. He believes that the legalization of marijuana is coming and that it should not be an issue. (Item 4)

Applicant stated that he used the marijuana also to assist with his anxiety and to make him feel relaxed and creative. He emphasized that he has not developed any dependency on marijuana and has had no counseling or treatment. He compares his marijuana use to alcohol. His future intent does not include the use of marijuana, so that he can keep his job and security clearance. Applicant would use it if marijuana was legalized. However, currently he will refrain from marijuana use, although he could not rule out using marijuana in the future if it is legalized. He stressed that his use of marijuana has “no criminal intent.” (Item 4)

Guideline E: Personal Conduct

The SOR alleged in SOR 3.a and 3.b that Applicant falsified material facts on his October 17, 2017 and February 2, 2021 SCAs by answering “NO” to the questions in Section 23 – Illegal Use of Drugs of Drug Activity as set forth in subparagraph 1.a and 1.b, and 2.a through 2.c above. It further alleged that had he denied ever using drugs or otherwise being involved with a drug substance while possessing a security clearance and he answered “NO.”

Applicant denied the falsification allegations because he believes he made a mistake in assuming the other sections correlated. He claimed he answered the question

incorrectly by an honest mistake. He believes the process to be very difficult. He added that due to having previously submitted SCAs and having pre-populated information the resubmission had an error in it. He added that he would be willing to discuss any items with the investigator if needed. He stated that he did not report the use because he did not believe it was serious. (Item 4) He has held a security clearance since 2017. On both SCAs, he answered "NO." to have you ever illegally used or otherwise been illegally involved with a drug or controlled substance while possessing a security clearance other than previously listed? He did not add any information concerning this issue in his 2022 DOHA interrogatories. He insisted in his subject interview that he was never going to list the information concerning use of marijuana on his SCA because he wanted to tell an investigator whenever he was interviewed. He admitted that he was properly trained on reporting of such issues, but just did not think about it when he recertified his security clearance application. (Item 4) Applicant made no clarifications to his reasons for omission except that he would disclose to the investigator.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline J: Criminal Conduct

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted;

(c) individual is currently on parole or probation;

(d) violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program; and

(e) discharge or dismissal from the Armed Forces for reasons less than "Honorable."

Applicant's use of marijuana continued until at least July 2021. He was arrested in 2014 and 2019. He admitted to the use of marijuana in 2021. AG ¶¶ 31(a) and 31(b) apply.

Conditions that could mitigate security concerns include:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

None of the mitigating conditions apply in this case.

Guideline H, Drug Involvement and Substance Misuse

The security concern for this guideline is set forth in AG ¶ 24, where it is noted that the illegal use of a controlled substance, and the use of other substances that can 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. This is 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.

Applicant's admissions establish that he used and purchased marijuana as alleged in the SOR for some years and while holding a security clearance. The record also establishes that Applicant used illegal drugs after being employed with a Federal contractor and after completing his earlier security clearance application; 2014 and 2019

arrests for marijuana possession, and Applicant's statement that he would continue to use it recreationally if legalized. Applicant's use of marijuana after he knew that his position with a federal contractor required him to refrain from using illegal drugs shows a reckless disregard for rules and regulations. This is sufficient to raise AG ¶ 25(a): any substance misuse, AG ¶ 25(c) illegal possession of a controlled substance, including ... purchase or sale; AG ¶ 25(f) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse. The Government's substantial evidence, as provided by Applicant's admissions, raises security concerns under Guideline H. Therefore, the burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate related security concerns.

Under Guideline H, conditions that could mitigate security concerns arising from drug involvement and substance misuse are enumerated. The following mitigating conditions under AG ¶ 26 potentially apply to Applicant's case:

(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 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.

Applicant's last use of marijuana, an illegal substance, took place in 2021. He has just recently stated that he would abstain from marijuana use because it is a tangible threat to his security clearance. He believes his open and honest response to his investigator should prove that he is trustworthy. He argued that although he has been a drug user since college and after, because he is finally forthright, the Government should ignore the former illegal marijuana use because he made a mistake by not putting it on his security clearance application in response to Section 23 . This does not mitigate his case. This conduct casts doubt about his judgment and reliability. I find that none of the mitigating conditions apply.

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified his SCA by deliberately failing to disclose the delinquent debts alleged in SOR ¶¶ 1.a through 1.e, and it cross-alleges the money laundering alleged in SOR ¶ 2.e.

The security concern under this guideline is set out in AG ¶ 15:

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 disqualifying conditions under this guideline are relevant:

AG ¶ 16(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;

AG ¶ 16(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 . . . a pattern of dishonesty or rule violations; and

AG ¶ 16(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 . . . engaging in activities which, if known, could affect the person's personal, professional, or community standing.

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant is a mature adult who has completed the adjudication process at least twice during his career. He knew that the policy is against use of marijuana. His claim that he just made a mistake or an error on his security clearance application is unsupported by corroborating evidence. I find that he intentionally falsified his applications and that he did not report that he used marijuana while holding a security clearance.

Based on all the evidence, I conclude that Applicant deliberately failed to disclose in Section 23 by answering “NO.” the information that he admitted to in SOR ¶¶ 1.a and 1.b, and SOR 2.a. through 2.c, or that he used marijuana while holding a security clearance. Thus, the disqualifying condition in AG ¶ 16(a) is established. The following mitigating conditions are potentially relevant:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(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) is not established. Applicant did not attempt to correct the omission until he was confronted with the evidence during the PSI.

AG ¶ 17(c) is not established. Applicant's falsification is arguably infrequent, but it was recent and did not happen under unique circumstances. It was not minor, because falsification of a security clearance application “strikes at the heart of the security clearance process.” ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.)

Whole Person

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guidelines J, H, and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). I have considered Applicant's career as an employee of defense contractors. I have also considered that he held a security clearance

since 2017. Because he requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor or to question him about the allegations in the SOR. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). After weighing the disqualifying and mitigating conditions under Guidelines J, H, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns under Guideline J, Guideline H and Guideline E.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline J :	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline H:	Against APPLICANT
Subparagraphs 2.a-2.c:	Against Applicant
Paragraph 3, Guideline E :	AGAINST APPLICANT
Subparagraphs 3.a-3.b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is denied.

Noreen A. Lynch
Administrative Judge