



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



In the matter of:)
)
) ISCR Case No. 19-03208
)
Applicant for Security Clearance)

Appearances

Government: Mark D. Lawton, Esq., Department Counsel
For Applicant: *Pro se*

05/01/2023

Decision

Curry, Marc E., Administrative Judge:

Applicant’s drug and alcohol-related arrests, his past use of marijuana, and his security clearance application falsifications generate security concerns that he failed to mitigate. Clearance is denied.

Statement of the Case

On August 21, 2020, the Department of Defense Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H, drug involvement, Guideline J, criminal conduct, and Guideline E, personal conduct. The SOR explained why the CAF was unable to find it clearly consistent with the national interest to grant or continue his security clearance eligibility. The CAF took the action 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DOD on June 8, 2017.

On September 15, 2021, Applicant answered the SOR, admitting all of the allegations and requesting a hearing. The case was assigned to me on May 18, 2022. On December 12, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a statement of videoteleconference hearing, scheduling the case for January 10, 2023.

The hearing was held as scheduled. I considered four Government exhibits, marked and incorporated into the record as Government Exhibit (GE) 1 to GE 4. The transcript (Tr.) was received on January 25, 2023.

Findings of Fact

Applicant is a 28-year-old, married man with one child. He has a high school education and has been working for the past seven years as a sheet metal worker for a ship building company. (Tr. 26) He was recently promoted to foreman. (Tr. 21) He has held a security clearance since 2015. (Tr. 16)

Applicant used marijuana up to four days per week from about 2011 to 2018. (GE 2 at 6) During the last three years of his marijuana use, he held a security clearance. Applicant's use of marijuana led to two arrests. Specifically, in June 2014, he was arrested and charged with misdemeanor possession of marijuana. Subsequently, he pleaded guilty and was placed on probation for six months and ordered to perform 24 hours of community service. (GE 2 at 7) As part of his probation, his driver's license was suspended for six months. Applicant successfully completed the probation.

In 2016, a police officer pulled over Applicant's automobile when he noticed that his inspection sticker had expired. When the officer spoke to Applicant, he noticed that the car smelled like marijuana, prompting him to search it. After noticing a small mason jar filled with marijuana, the officer arrested Applicant and charged him with misdemeanor possession of marijuana. (Item 2 at 8; Tr. 23) A few months later, the court deferred judgment for six months and placed Applicant on probation during that time. While on probation, Applicant's driver's license was suspended, he was to perform 32 hours of community service, complete random drug tests, and his driver's license was restricted. (GE 4 at 2) Applicant did not complete the community services hours as ordered, and he failed two random drug tests. His non-compliance with the terms of probation prompted the court to find him guilty of the charge. (GE 2 at 8)

One evening in March 2017, while driving home from a party where he had been drinking alcohol, Applicant fell asleep at the wheel after stopping at a red light. The driver of the car behind Applicant's car exited his vehicle and knocked on Applicant's driver-side window. When Applicant did not awaken, the driver of the other car called the fire department. When a fire truck arrived, the firefighters knocked on the window, then broke it after Applicant did not respond. Applicant still did not wake up. By the time Applicant woke up, a police officer had arrived and administered a breathalyzer, which he failed. Applicant was arrested and charged with driving under the influence of alcohol (DUI). (GE 2 at 9) After pleading guilty to the offense, Applicant was fined \$500, ordered to complete alcohol and drug counseling, attend Alcoholics Anonymous (AA) meetings, required to install an

ignition interlock device for a period of six months, and sentenced to 30 days' incarceration (suspended). (Answer at 2) Applicant complied with the requirements of the court order. (Tr. 25)

Applicant reduced his alcohol consumption significantly after the DUI arrest. Now, he drinks approximately three drinks per month. (Item 2 at 7) Applicant has not used marijuana since December 2018, and no longer associates with his friends who use marijuana. (Item 2 at 6) He attributes his use to immaturity, acknowledged that he was "in the wrong," and testified that it "didn't register that [he] would have future issues," if he continued to use marijuana." (Tr. 28)

Applicant completed a security clearance application in November 2018. He underreported his use of marijuana, estimating that he had used it a few times between August 2011 and December 2012, when in fact he was using it occasionally at the time he completed the application. (Answer at 2; Tr. 30) Applicant also falsified his answer to the question asking about drug use while possessing a security clearance by answering "No," and failed to disclose his marijuana use within that context. (Answer at 3) Applicant admits these allegations, explaining that he was "scared and . . . overthinking" when he completed the application. In response to a question concerning whether he would ever use any marijuana in the future, Applicant responded, "I don't intend on using this substance EVER [emphasis provided by Applicant] because I am an employee at the [company]." (Tr. 34) He continued to use marijuana for approximately one month after completing the security clearance application.

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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. 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 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 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. 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

Under 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.” Applicant’s use of marijuana, including his use after being granted access to classified information triggers the application of AG ¶¶ 25(a), “any substance misuse,” and 25(f), “any illegal drug use while granted access to classified information or holding a sensitive position.”

The following mitigating conditions set forth under AG ¶ 26 apply are potentially applicable, as follows:

- (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; [and]

(2) changing or avoiding the environment where drugs were used.

Applicant readily admits that his use of marijuana was foolish and irresponsible. He has not used marijuana in more than four years and no longer associates with his friends who use marijuana. AG ¶ 26(b)(1) and 26(b)(2) are applicable

Although Applicant has not used marijuana in more than four years, he used it for three years while granted access to classified information, and for one month after he completed security clearance application in which he emphatically stated he would not use it in the future. AG ¶ 26(a) is not applicable, and any positive security inference generated by the passage of time since the last use is outweighed by the seriousness of his misconduct. I conclude that Applicant failed to mitigate the drug involvement security concern.

Guideline J: Criminal Conduct

Under this guideline, “criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness [and] by its very nature, . . . calls into question a person’s ability or willingness to comply with laws, rules, and regulations.” (AG ¶ 30) Applicant’s history of marijuana and alcohol-related arrests triggers the application of AG ¶ 31(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.”

Applicant has not used marijuana in more than four years. He is now married and has a child. At work, he was recently promoted to foreman. Conversely, he did not comply with the terms of probation for his most recent marijuana-related arrest. Moreover, he continued to use marijuana for a month after completing the security clearance application after explicitly stating on that application that he would never use it again. Consequently, AG ¶ 32(d), “there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, with terms of parole or probation, job training or higher education, good employment record, or constructive community involvement,” applies, but AG ¶ 32(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,” does not apply. Applicant failed to mitigate the criminal conduct security concern.

Guideline E: Personal Conduct

Under this guideline, “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.” (AG ¶ 15) Moreover, “of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.” (*Id.*)

Applicant admits intentionally falsifying a 2018 security clearance application by underreporting his marijuana use and denying ever using it while possessing a security clearance. Consequently, 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,” applies.

Applicant has matured over the past few years since he completed the security clearance application. Moreover, his testimony was both sincere and contrite. However, given the seriousness of his conduct, particularly using marijuana for up to one month after completing the security clearance application, his use while possessing a security clearance, and his security clearance application falsifications, it is too soon to conclude he has mitigated the Guideline E security concerns. I conclude that none of the mitigating conditions apply.

Whole-Person Concept

In assessing the whole person, the administrative judge must consider the totality of Applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). Those factors are:

- (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.

The nature and seriousness of Applicant’s misconduct outweighs the passage of time and the maturation he has experienced since he last used marijuana. Consequently, it is too soon to conclude that Applicant has mitigated the security concerns.

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.d:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT

Subparagraphs 2.a -2.d:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a – 3.b:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge