



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



In the matter of:)	
)	
)	ISCR Case No. 21-01022
)	
Applicant for Security Clearance)	

Appearances

For Government: Karen Moreno-Sayles, Esq., Department Counsel,
For Applicant: *Pro se*

05/08/2023

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant mitigated the drug involvement and substance misuse, criminal conduct, and personal conduct security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On August 5, 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 J (criminal conduct), and Guideline E (personal conduct). The action was taken 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) implemented by DOD on June 8, 2017.

Applicant responded to the SOR on September 18, 2021 (Answer), and he requested a hearing before an administrative judge. On March 18, 2022, Department Counsel amended the SOR to add an allegation numbered as ¶ 3.d under Guideline E. The case was assigned to me on November 3, 2022. The Defense Office of Hearings and

Appeals (DOHA) issued a notice of hearing on November 15, 2022, scheduling the matter for a video teleconference hearing on December 2, 2022. I convened the hearing as scheduled.

At the hearing, I admitted in evidence, without objection, Government's Exhibits (GE) 1 and 3 through 7. I marked but did not admit GE 2 in evidence because Department Counsel did not proffer it. Applicant testified and he did not submit any documentation or call any witnesses. At his request, I kept the record open until December 16, 2022, for him to provide documentation. He did not do so, and the record closed. DOHA received the hearing transcript (Tr.) on December 12, 2022.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a through 1.c and 2.a through 2.c, and he denied SOR ¶¶ 3.a through 3.d. He is 35 years old, unmarried, and he does not have any children. He has owned his home since August 2014. (Answer; Tr. at 11, 71; GE 1)

Applicant graduated from high school in 2006, and he attended college from September 2011 to March 2012 but did not earn a degree. He previously worked for two defense contractors, from approximately July 2006 to August 2008 and then August 2008 to February 2018, respectively. As of the date of the hearing and since March 2018, he has worked in the field of information technology for his current employer, another defense contractor. He was first granted a security clearance in approximately 2008. (Answer; Tr. at 5, 7-8, 31-34, 38-40, 89-90, 103-104; GE 1, 3)

Applicant first used marijuana and cocaine in high school. He used them socially with friends. He used marijuana approximately once weekly and cocaine approximately once or twice a year. He used marijuana approximately 100 times from January 2006 to December 2017. He also used cocaine, approximately five times, from December 2006 to December 2017. He used the drugs socially, and they were provided by friends, his brother, or his now-deceased girlfriend. He disclosed his illegal drug use on his 2019 SCA and he discussed it during his June 2019 background interview. (Answer; Tr. at 40-49, 82, 98-100, 102-106; GE 1, 3)

In approximately 2006, Applicant was arrested and charged with possession and intent to distribute marijuana. This was his only drug-related offense. He was at a social gathering, and he went with a friend so that the friend could obtain marijuana for consumption at the gathering. The friend drove his car. He did not have marijuana on his person, but the police officer found approximately an ounce of marijuana in his car. He pled guilty to simple possession, received probation before judgment, and the charge was subsequently expunged. He discussed this incident during his June 2019 background interview, and he stated therein, reiterated in his Answer, and testified that he did not disclose this arrest on his 2019 SCA due to oversight. He completed the SCA within two to three hours and he did not give it the appropriate attention that he should have. (Answer; Tr. at 31-38, 44-45, 82-98, 100-102, 107; GE 1, 3)

In July 2006, Applicant completed an FD-316, or "Access of Non-FBI personnel to FBI Facilities Background Data Information Form." After he completed the form, he was arrested and charged with possession and intent to distribute marijuana, as discussed above. He maintained that he did not falsify the FD-316 form because he had not yet been arrested when he completed it. In September 2006, the FBI denied Applicant ". . . access to FBI facilities, due to drug-related arrests that were not indicated" on his July 2006 FD-316. He resubmitted for access with the FBI after his drug charge was expunged, and the FBI granted him a clearance in 2008. (Answer; Tr. at 31-38, 44-45, 82-98, 117; GE 1, 3, 5-7)

Applicant indicated during his June 2019 background interview, reiterated in his Answer, and testified that he did not disclose the FBI's 2006 denial of his access to FBI facilities on his 2019 SCA due to oversight. He reiterated that he completed the SCA within two to three hours and he did not give it the appropriate attention that he should have. He only remembered that his access to FBI facilities had been granted when he completed the 2019 SCA and he forgot that it had been previously denied, as discussed above. (Answer; Tr. at 31-38, 82-98, 117; GE 1, 3, 5-7)

Applicant first consumed alcohol in high school. In approximately 2012, Applicant was arrested and charged with driving under the influence (DUI). This was his first DUI. He stated that he consumed a beer at a hockey game and then went to a bar for dinner, where he consumed another beer and a shot of liquor. He drove home, which was less than a mile from the bar. His blood alcohol content (BAC) was .11%. The charge was *nolle prosequi* and he received six weeks of court-ordered alcohol treatment. He discussed this DUI during his June 2019 background interview, and he indicated therein that he did not disclose this DUI on his 2019 SCA because he mistakenly believed he was not required to since it occurred more than seven years prior. He reiterated that he completed the SCA within two to three hours and he did not give it the appropriate attention that he should have. (Tr. at 49-52, 82-85, 106-107, 113-114; GE 3, 4)

In approximately June 2014, Applicant was arrested and charged with DUI. This was his second DUI. He was at a sports bar with several co-workers and his former supervisor after attending his father's memorial service. He consumed approximately four double mixed drinks and drove home. His BAC was .16%. In October 2014, he pled guilty to misdemeanor DUI and was sentenced to three days in jail and one year of probation. He was ordered to complete an 18-week court-ordered outpatient alcohol treatment program and abstain from alcohol during his year of probation. He consumed alcohol on one occasion and consequently failed a drug test, but then abided by the court's order and successfully completed the program and probation. He disclosed this DUI on his 2019 SCA and discussed it during his June 2019 background interview. Since this DUI, he consumes only a couple of beers at home or when he is entertaining clients approximately once monthly. (Tr. at 52-63, 82-85, 107-108; GE 1, 3, 4)

Applicant last used marijuana and cocaine in 2017. He reached a turning point after he lost his father and girlfriend in 2014 and 2017, respectively. His girlfriend of three years, who was not a drug user, died of an accidental overdose after she snorted a pain pill that, unbeknownst to her, contained fentanyl. She died in his home, and he witnessed

it. He stated that he does not socialize with drug users. He stated that his previous roommate, who he sees on occasion, no longer uses drugs. As of the date of the hearing, his seven-year-old niece and his brother, who previously provided him with and used illegal drugs, lived with him. He stated that his brother was two years clean and part of a Narcotics Anonymous (NA) program. He stated that he has no future intention to use marijuana or other illegal drugs, and that if he were to find himself in a situation where illegal drugs were being used, he would leave. He stated that he learned from the 2019 security clearance process the effect that any criminal involvement would have on his career, and he was committed to not doing anything that would jeopardize it. (Answer; Tr. at 45-47, 63-82, 98-99, 102-106, 108-117; GE 1, 3)

Policies

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(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."

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 Exec. Or. 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*

Exec. Or. 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 the following applicable conditions that could raise security concerns under AG ¶ 25:

- (a) any substance misuse . . . ; and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant used marijuana and cocaine from 2006 to 2017, and he was arrested in 2006 and charged with possession and intent to distribute marijuana. AG ¶¶ 25(a) and 25(c) is established.

Conditions that could mitigate the drug involvement and substance misuse security concerns are provided 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; 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.

I find that AG ¶¶ 26(a), 26(b)(1), and 26(b)(2) are established. Applicant's sole drug-related offense occurred in 2006, 17 years ago, and more than five years have passed since he last used illegal drugs. He disclosed information about his illegal drug use on his 2019 SCA and during his 2019 background interview. He testified that he no longer socialized with individuals who use illegal drugs, and he had no intention to use illegal drugs in the future. The record evidence resolves doubts about Applicant's reliability, trustworthiness, and judgment. I found Applicant to be candid and credible at the hearing. He has taken responsibility for his past drug use and he is committed to remaining drug free.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct as: "[c]riminal 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. I considered the following relevant: "(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 was arrested in 2006 and charged with possession and intent to distribute marijuana. He was also charged in 2012 with DUI and convicted in 2014 of DUI. AG ¶ 31(b) is established.

AG ¶ 32 provides the following relevant mitigating conditions:

(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; 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.

As previously stated, 17 years have passed since his drug-related charge. Nine to eleven years have passed since his 2012 DUI charge and his 2014 DUI conviction. He was candid and sincere at the hearing and he accepted responsibility. He disclosed his 2014 DUI on his 2019 SCA and discussed it during his June 2019 background interview. I find that enough time has elapsed since his criminal behavior and without recurrence of

criminal activity, and the record evidence does not cast doubt on his reliability, trustworthiness, and judgment. AG ¶¶ 32(a) and 32(d) are established.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant:

(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; and

(g) association with persons involved in criminal activity.

Applicant does not socialize with individuals who use illegal substances. His previous roommate, who he sees on occasion, no longer uses drugs, and his brother that lives with him, who previously provided him with and used illegal drugs, has been two years clean and part of an NA program. AG ¶ 16(g) is not established.

Applicant credibly testified that he did not deliberately falsify his 2006 FBI FD-316 because his 2006 drug-related arrest and charge occurred after he completed the form, and there is no evidence in the record to contradict his testimony. He also credibly testified that he did not deliberately falsify his 2019 SCA when he disclosed only that his access to FBI facilities had been granted in approximately 2008 and only his most recent DUI in 2014. He completed the SCA within two to three hours and he did not give it the appropriate attention that he should have, and he did not also disclose his 2006 drug-related and 2012 DUI charges, or his 2006 denial of access to FBI facilities, due to oversight. AG ¶ 16(a) is not established.

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, J, and E in my whole-person analysis. I had the opportunity to observe Applicant's demeanor during his hearing and found that he was credible, candid, and remorseful. Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the drug involvement and substance misuse, criminal conduct, and personal conduct 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: Subparagraphs 1.a - 1.c:	FOR APPLICANT For Applicant
Paragraph 2, Guideline J: Subparagraphs 2.a - 2.c:	FOR APPLICANT For Applicant
Paragraph 3, Guideline E: Subparagraphs 3.a - 3.d:	FOR APPLICANT For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Candace Le'i Garcia
Administrative Judge