



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



In the matter of:)	
)	
)	ISCR Case No. 22-01261
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: Edward O. Lear, Esq., Applicant’s Counsel

August 25, 2023

Decision

CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On June 4, 2020, Applicant submitted a security clearance application (SCA). On September 2, 2022, in accordance with DoD Directive 5220.6, as amended (Directive), the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines H and E. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on June 8, 2017.

Applicant answered the SOR in writing (Answer) on September 7, 2022, and requested a hearing before an administrative judge. The case was previously assigned to another administrative judge, but reassigned to me on February 13, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on April 6, 2023. I convened the hearing as scheduled on June 7, 2023. The Government offered

Government Exhibits 1 through 4, which were admitted without objection. Applicant testified on his own behalf and presented Applicant Exhibits (AppXs) A through II. DOHA received the transcript of the hearing (TR) on June 16, 2023. The record closed at that time.

Findings of Fact

Applicant admitted to the allegations in SOR ¶¶ 1.c.~1.e., and SOR ¶¶ 2.a.~2.e. He denied SOR allegations ¶¶ 1.a. and 1.b. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 63-year-old employee of a defense contractor. He has a Bachelor of Science degree. Applicant has been employed with the defense contractor since January of 2016. He is divorced, and has no children. (TR at page 7 lines 10~24, and at page 15 line 1 to page 16 line 9, and GX 1 at pages 7, 13~14, 15, 25~26 and 27~28.)

Guideline E - Personal Conduct

1.a. Applicant denies that he falsified his June 2020 SCA when he answered “No” to “Section 23 – Illegal Use of Drugs or Drug Activity . . . in the last seven (7) years [June of 2013 to June of 2000].” In his Answer, Applicant avers it “was an accidental omission.” (Answer at page 7.) This explanation is not credible. During the period June 2013 until his last usage in June of 2019, Applicant used marijuana, hundreds if not thousands of times. (TR at page 18 line 16 to page 19 line 15, at page 21 lines 6~10, at page 64 line 10 to page 66 line 2, and GX 1 at pages 41~42.) I find this to be a willful falsification.

1.b. Applicant denies that he falsified his June 2020 SCA when he answered “No” to “Section 13A – Employment Activities, 1. . . . For this employment, in the last seven (7) years have you received a written warning . . .” Again, in his Answer, Applicant avers it “was an accidental omission.” (Answer at page 7.) This explanation is not credible. In about 2016, Applicant received a written warning from his employer for charging more than \$4,000 on his company credit card for personal purchases. (TR at page 21 line 11 to page 23 line 25, at page 54 line 16 to page 55 line 11, at page 56 line 15 to page 57 line 18, and GX 1 at pages 15~16.) I find this to be a willful falsification.

1.c. and 1.d. These allegations relate to the same incident. Applicant admits that in about February of 1981 he was charged with Suspicion of Burglary. (TR at page 24 line 1 to page 25 line 15.) I find that this event that occurred more than 40 years ago does not have present security significance under Personal Conduct.

1.e. Applicant admits that in about February of 1995 he was charged with illegal Possession of a Firearm. (TR at page 25 line 16 to page 26 line 17.) I find that this event that occurred more than 28 years ago does not have present security significance under Personal Conduct.

Guideline H - Drug Involvement and Substance Misuse

2.a. and 2.b. Applicant admits that he used marijuana, sometimes on a daily basis, from about 1978 until about June of 2019, a period of more than 40 years. He estimates his usage to be between 1,000~10,000 times. Applicant also purchased the marijuana he used, knowing that for the vast majority of the 40 years his use and purchases were illegal. (TR at page 20 lines 10~22, at page 47 line 25 to page 49 line 15, and at page 53 lines 16~19.)

2.c. Applicant admits that in September of 2017 he was cited for Possession of a Controlled Substance, i.e., Psilocybin Mushrooms. (TR at page 49 line 16 to page 50 line 3, and at page 66 lines 18~24.)

2.d. Applicant admits that in about November of 1980, in California, he was charged with Possession of Concentrated Cannabis. (TR at page 50 lines 4~6.)

2.e Applicant admits that in about January of 1987, in California, he was charged with Plant Marijuana. (TR at page 50 lines 10~13.)

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person applying for national security eligibility seeks to enter 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline E - Personal Conduct

The security concern relating to the guideline for Personal Conduct 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 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. Two are potentially applicable in this case:

(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;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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;

Applicant falsified his February 2020 SCA in his answers to two posed questions. The evidence is sufficient to raise these disqualifying conditions.

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17 including:

(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; 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.

None of these mitigating conditions apply. It is not reasonable to believe that Applicant forgot that he used marijuana, perhaps thousands of times, during the time period in question. It is also incredible that he did not remember that he received a written warning from his employer, for misuse of his company credit card, in an amount in excess of \$4,000. Personal Conduct is found against Applicant.

Guideline H - Drug Involvement and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Misuse is set forth at 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 at AG ¶ 25 contains seven conditions that could raise a security concern and may be disqualifying. Three conditions are established:

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

Appellant smoked and purchased marijuana over a period of more than 40 years. Therefore, AG ¶ 25 (a) and (c) are established.

The guideline at AG ¶ 26 contains four conditions that could mitigate security concerns. Two conditions may be 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.

None of these apply. It is too soon to find that Applicant's extensive use of marijuana is not of present security significance. Drug Involvement and Substance Misuse is found against Applicant

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment. Applicant is well respected in the workplace and in his community. (AppXs A~II.) However, overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Personal Conduct security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

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

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. National security eligibility for access to classified information is denied.

Richard A. Cefola
Administrative Judge