



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



In the matter of:)	
)	
)	ISCR Case No. 22-01939
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

08/23/2023

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E, personal conduct, Guideline H, drug involvement and substance misuse, and Guideline J, criminal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On December 9, 2022, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H, E, and J. The DOD acted 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) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on December 14, 2022. He requested a hearing. The case was assigned to me on February 17, 2023. The Defense Office of Hearings and

Appeals (DOHA) issued a notice of hearing on March 10, 2023, and the hearing was held as scheduled on April 11, 2023. The Government offered exhibits (GE) 1 through 4, which were admitted into evidence without objection. The Government's exhibit list was marked as hearing exhibit (HE) I. Applicant testified and offered exhibit (AE) A, which was admitted without objection. DOHA received the hearing transcript (Tr.) on May 1, 2023.

Findings of Fact

Applicant admitted SOR allegations 1.a-1.f; 2.a-2.b; 3.a-3.e, 3.g, and 3.i. He denied SOR ¶¶ 3.f and 3.h. His admissions are adopted as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 52 years old. He has worked for his current contractor-employer since January 2020. He served in the U.S. Army from 1991 until 2001, when he was honorably discharged. He has worked for various government contractors since his Army discharge. He has taken some college courses. He is divorced and has one adult child. He has held a security clearance or a public trust position in the past. (Tr. 5, 18-19, 22; GE1-2)

Under Guideline E, the SOR alleged that Applicant deliberately gave false information on his March 2022 security clearance application (SCA) when he failed to disclose that he was fired from a job within the past seven years because of a positive urinalysis test (SOR ¶¶ 1.a-1.b) and his illegal drug use (SOR ¶ 1.c). It also alleged that he was terminated from his job in April 2019 because he tested positive for marijuana (SOR ¶ 1.d). It alleged that he admitted to a background investigator that he intentionally omitted information from his SCA (SOR ¶ 1.e). It also alleged he used marijuana and tested positive for its presence in 1995 or 1996, while possessing a security clearance (SOR ¶ 1.f). Applicant admitted all the allegations during his background interview, in his SOR answer, and during his testimony. (Tr. 19-22; GE 2; SOR answer)

Under Guideline H, the SOR alleged in April 2019 Applicant failed a urinalysis test for marijuana (SOR ¶ 2.a); and that he was arrested in August 2003 for unlawful use and possession of a controlled substance marijuana (SOR ¶ 2.b). Applicant admitted all the allegations during his background interview, in his SOR answer, and during his testimony. (Tr. 19-24; GE 2; SOR answer)

Under Guideline J, the SOR cross-alleged the drug allegations stated in SOR ¶ 2 above (SOR ¶ 3.a and 3.j). It also alleged a series of criminal arrests as follows: a March 1992 arrest in a foreign country for misuse of privileges (SOR ¶ 3.i); a July 1992 arrest for theft of government property (SOR ¶ 3.h); an August 1993 arrest for adultery (SOR ¶ 3.g); a December 1993 arrest for adultery (SOR ¶ 3.f); a June 2000 arrest for assault (SOR ¶ 3.e); a July 2000 arrest for driving while license under restraint (SOR ¶ 3.d); an April 2001 arrest for his failure to appear (SOR ¶ 3.c); and his August 2001 arrest for damaging property, criminal mischief, and making a false police report (SOR ¶ 3.b). Applicant admitted all the allegations, except for SOR ¶¶ 3.f and 3.h, during his

background interview, in his SOR answer, and during his testimony. (Tr. 19-24, 26-31, 34-37, 40-42, 45-46; GE 2; SOR answer)

In 2019, Applicant was working for his employer on a government project. He held a position of trust at the time. He knowingly ingested some edible marijuana lozenges while employed by this company. He consumed two over two days. Three weeks later, he was assigned to drive a company vehicle and was involved in an accident. He was required to take a urinalysis test because of the accident. It came back with a positive result for the presence of marijuana. His employer immediately terminated him from his position based upon his use of marijuana. He was aware of the company's drug policy and knew he was not allowed to use any illegal drugs during his employment with this contractor. (Tr. 21-22, 45; GE 2)

In March 2022, Applicant completed an SCA for his current employer. He gave false information on his SCA when he deliberately failed to disclose in Section 13A and 13C that he was fired for cause in 2019 because of his use of marijuana as established by a positive urinalysis test. He also deliberately failed to disclose his 2019 marijuana use in Section 23 of his 2022 SCA. During his background investigation and at his hearing, Applicant admitted knowingly making these false statements because he was afraid that revealing the truth would jeopardize his chances of receiving a security clearance. He admitted his arrest for using and possessing marijuana in 2003 on a military installation. He denied the marijuana was his, or that he used it on that occasion, and there is no record evidence contradicting his statement. He admitted using marijuana and testing positive for it in approximately 1995 or 1996 when he was in the Army. (Tr. 19, 46; GE 2)

In August 2001, he was angry with his ex-wife who was storing some furniture at his residence. In his anger, he destroyed several pieces of furniture. He later called the police and reported that someone broke into his house and destroyed the furniture. He was confronted by the officers about submitting false information and admitted that he did so. He was charged with destruction of property and filing a false police report. He admitted committing these offenses. (Tr. 30-31; GE 2, 4)

Applicant admitted his arrest for failing to appear for a court appearance in 2001. He admitted his arrest for driving while his license was under restraint in July 2000. He admitted his arrest for assault in June 2000. He admitted his arrest for adultery in August 1993. He admitted his arrest in March 1992 for misuse of privileges. There is no additional evidence available about these offenses. (SOR answer)

Applicant denied an arrest for adultery and sodomy in December 1993, and an arrest for larceny of government property in July 1992. There is no evidence in the record to contradict his denials. (Tr. 27, 35; GE 1-4; SOR answer)

Applicant testified that he has not used marijuana since 2019. He has not been arrested since 2003. He provided a written statement promising to abstain from using any illegal substances in the future. (Tr. 25, 29, 33; AE A)

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 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, these guidelines are applied 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 careful weighing 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 an 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 E, Personal Conduct

AG ¶ 15 expresses 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.

Under AG ¶ 16, conditions that could raise a security concern and may be disqualifying include:

(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; and

(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:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

Applicant admitted that he deliberately provided false information on his 2022 SCA. In 2019, he was fired from his employment for testing positive for marijuana by his employer. In 1995 or 1996, he also tested positive for marijuana when he was in the Army while holding a security clearance. AG ¶¶ 16(a) and 16(d) apply. His admissions to a

background investigator that he intentionally omitted information from his SCA, as alleged in SOR ¶ 1.e, do not constitute disqualifying conduct.

I have also considered all of the mitigating conditions for personal conduct under AG ¶ 17 and considered the following relevant:

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

(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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant disclosed the circumstances concerning his job termination in 2019 and his drug use after he was confronted with the information by his background investigator. Lying on an SCA is not a minor offense and it occurred as recently as 2022. Lying on his SCA, and using marijuana when he knew it was against company policy and was illegal in the Army, cast doubt on his reliability, trustworthiness, and good judgment. Applicant acknowledged his wrongdoing; however, he has a history of such behavior going back to his filing of a false police report in 2001. AG ¶¶ 17(a), 17(c), and 17(d) do not apply.

Guideline H, Drug Involvement and Substance Abuse

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

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

Applicant tested positive for marijuana in 2019, which led to his firing from his contractor position. AG ¶¶ 25(a) and 25(b) apply to SOR ¶ 2.a. Although he admitted his arrest for possession and use of marijuana in 2003, he denied the underlying allegations that he used and possessed marijuana. Since there is no record evidence to support the 2003 allegation, I find in favor of Appellant concerning SOR ¶ 2.b.

AG ¶ 26 provides conditions that could mitigate security concerns, two of which potentially apply in this 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;
- (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.

Applicant used marijuana while working for a government contractor. He was in a position of trust at the time of the incident. His claimed abstinence beginning in 2019 is not sufficient to overcome his marijuana use. Although he asserts that he will not use marijuana now, he has a history of use that goes back over almost 30 years to his days in the Army when he held a security clearance. His claimed abstinence and promise not to use in the future are insufficient to convince me that recurrence is unlikely. His use of marijuana while holding a security clearance and holding a position of trust cast doubt upon his current reliability, trustworthiness, and good judgment. AG ¶ 26(a) does not apply. AG ¶ 26(b) has some application.

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 is potentially applicable:

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

Applicant was charged with multiple offenses including arrests in 2003, two in 2001, two in 2000, two in 1993, and two in 1992. He also admitted to using marijuana in 2019. I find that the above disqualifying condition applies, except to SOR ¶¶ 3.f and 3.g, which were not established.

I have also considered all the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

(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.

Had Applicant not used marijuana as recently as 2019 or lied on his SCA in 2022, his older criminal record might have been mitigated by the passage of time. However, it is clear from his recent actions that he is not rehabilitated and continues to engage in criminal activity. His actions continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 32(a) and 32(d) do not fully 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 the 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 considered Applicant's military service.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns under Guidelines E, H and J.

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 E:	AGAINST APPLICANT
Subparagraphs 1.a-1.d, 1.f:	Against Applicant
Subparagraph 1.e:	For Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraphs 3.a, 3.f, 3.h:	For Applicant
Subparagraphs 3.b-3.e, 3.g, 3.i-3.j:	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. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge