



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



In the matter of:)	
)	
)	ISCR Case No. 22-00803
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeffrey Kent, Esquire, Department Counsel
For Applicant: *Pro se*

09/11/2023

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H, drug involvement and substance misuse and Guideline E, personal conduct. Applicant's eligibility for access to classified information is denied.

Statement of the Case

On August 3, 2022, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and Guideline E, personal conduct. The action was taken 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) effective within the DOD on June 8, 2017.

In an undated answer to the SOR, Applicant requested a hearing before an administrative judge. The case was assigned to me on July 3, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 19, 2023. I

convened the hearing as scheduled on August 17, 2023. The Government offered exhibits (GE) 1 through 3. Applicant testified and offered Applicant Exhibits (AE) A and B. There were no objections to any of the evidence offered and it was admitted in evidence. Post-hearing, Applicant sent an email with a narrative statement. I marked it as AE C. There was no objection, and it was admitted in evidence. DOHA received the hearing transcript on August 25, 2023.

Procedural Matters

In accordance with DOD Directive 5220.6 the Government moved to amend the SOR to render it in conformity with the evidence admitted. The Government requested to amend SOR ¶¶ 1.a and 1.b by adding the words “or holding a sensitive position.” There was no objection, and the motion was granted. (Tr. 100-103)

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a through 1.d, 2.a and 2.b, with explanations. He denied SOR ¶ 2.c, with explanations. I have incorporated his admissions into the findings of fact. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 44 years old. He earned some college credits but not a degree. He was married from 2005 to 2007. He remarried in 2016 and was divorced in 2020. He has two children from his second marriage, ages 11 and 6. He has been employed by federal contractors since approximately 2011 and by his present employer since 2019. He is responsible for providing maintenance on the hardware of both classified and unclassified government computers. He stated he does not have access to classified sites but is responsible for the cables and fiber optics to them. (Tr. 16-22, 104-108; GE 1)

Applicant and his second wife separated sometime around May 2019. He stated that he believed at that time they were still working on saving their marriage. In October 2019, he learned that she obtained a default judgment for divorce from him. The judgment was later vacated, and they proceeded to divorce and were awarded equal custody of the children. After the divorce was final, he learned from one of his children that his ex-wife had been having an affair with his cousin while they were still married. Applicant sent her inappropriate text messages. He admitted he lost his temper. Based on the text messages, his ex-wife sought protection from the court. (Tr. 22-29; GE 2, 3)

Prior to the hearing, Applicant’s attorney advised him that it would be beneficial if he started an anger management class. When he enrolled, it was recommended that he also take a class on domestic abuse, which included the anger management class. The class lasted 24 weeks. When he went to court, the judge ruled the text messages were harassing and threatening, which resulted in an ex parte order of protection issued against Applicant in July 2020. He was not permitted to see his children as part of this

order. He was ordered to continue taking the anger management classes. (Tr.27-38, 84-86; AE A; Answer to the SOR)

Applicant testified that he has severe back pain and in 2013, his doctor prescribed oxycodone for the pain. He did not feel good on the pain medication. In 2015, due to his own concern about the addictive nature of the drug, he told his doctor he wanted to pursue different pain management. He was weened off oxycodone. His doctor suggested he use Cannabidiol (CBD). He was told it was natural and not a narcotic. It relieved his pain and allowed him to function normally. Applicant stated he could purchase the CBD legally in his state. He used it as a muscle relaxer for his pain and back condition. He believed he could use CBD because it is legal in his state. He did not know of any federal law implications. He purchased and used it regularly from May 2015 to May 2021. (Tr. 39-52, 91-100)

The Security Executive Agent for the United States Government provided clarifying guidance concerning marijuana on December 21, 2021. Part of that guidance addressed CBD products:

With respect to the use of CBD products, agencies should be aware that using these cannabis derivatives may be relevant to adjudications in accordance with SEAD 4. Although the passage of the Agricultural Improvement Act of 2018 excluded hemp from the definition of marijuana within the Controlled Substances Act, products containing greater than a 0.3 percent concentration of delta-9 tetrahydrocannabinol (THC), a psychoactive ingredient in marijuana, do not meet the definition of "hemp." Accordingly, products labeled as hemp-derived that contain greater than 0.3 percent THC continue to meet the legal definition of marijuana, and therefore remain illegal to use under federal law and policy. Additionally, agencies should be aware that the Federal Drug Administration does not certify levels of THC in CBD products, so the percentage of THC cannot be guaranteed, thus posing a concern pertaining to the use of a CBD product under federal law. Studies have shown that some CBD products exceed the 0.3 percent THC threshold for hemp, notwithstanding advertising labels (Reference F). Therefore, there is a risk that using these products may nonetheless cause sufficiently high levels of THC to result in a positive marijuana test under agency-administered employment or random drug testing programs. Should an individual test positive, they will be subject to an investigation under specific guidelines established by their home agency.

The Substance Abuse and Mental Health Services Administration (SAMSHA) provided a warning about CBD products on July 24, 2019:

Studies have shown that some CBD products' labeling does not accurately reflect their content. Cannabis based products containing a THC level greater than 0.3% on a dry weight basis do not fall under the

Farm Bill's definition of hemp even if they are labeled as such. In one study, the amount of CBD in 69% of the 84 tested CBD products was inconsistent with that on the label, and some products contained unlabeled cannabinoids, including THC in amounts up to 6.4 mg/ml. As such, an employee's drug test may be positive for the THC metabolite, delta-9-tetrahydrocannabinol-9-carboxylic acid (THCA), due to THC in the CBD product.

SAMSHA further advised that "federal agencies should make every effort to inform applicants and employees of the risk that using such products may result in a positive marijuana test."

Applicant passed a number of drug tests and provided the results. He testified that he asked his supervisor if he was permitted to use CBD and was told it was not illegal. (Tr. 47-48; AE B)

In May 2021, Applicant went back to court to have his visitation with his children reinstated. The court determined that if both parties wanted to see their children, they were required to take a drug test. Applicant testified that earlier that month, he was attending a bachelor party in a state where marijuana is legal. He testified he used marijuana at the party and was aware that although it was legal in the state where he was located, it was illegal under federal law. He held a security clearance at the time. He said it had been a stressful year due to the court proceedings, and he decided "well I'll just have fun one night." (Tr. 39, 53-55, 91-92)

While in court, the judge asked Applicant if any drug would be detected during the drug screening. Applicant told the Court about his marijuana use earlier that month and that he is prescribed Adderall. The judge told both parties before the drug test that if they did not testify honestly, they would be subject to contempt and a ten-day jail sentence. Applicant's drug screen tested positive for marijuana and methamphetamine. Applicant adamantly denied he knowingly used methamphetamine. He said he had no idea how he tested positive for methamphetamine, but he had several theories. He said the judge believed he had lied to him. Applicant concurred that he would have believed the same if he saw a positive drug result. Applicant testified that the judge told him that he needed to go to drug rehabilitation and assess his life, and he told him how to live. Applicant acknowledged he had a negative attitude, and he was upset. He told the judge "You need to worry about you. I got me." Applicant testified that he was held in contempt of court because the judge believed he was dishonest about his drug use after he tested positive for two illegal drugs. He served a 10-day sentence for contempt. (Tr. 55-63, 86-88; GE 2)

Applicant testified that part of his visitation order is that if he wanted to see his children, he had to provide a drug screen. Applicant did not have to do a drug screen if he did not plan to see his children. Applicant provided negative drug screen results taken from hair follicles. This type of test is able to detect a longer period if drugs are in the system. He provided negative test results from November 2021, February 2022,

November 2022, December 2022, January 2023, February 2023, May 2023, and July 2023. (Tr. 77; AE B)

Applicant testified that he sent a group text message to his former stepson, the son of his ex-wife, wishing him a happy birthday. The text also went to his ex-wife. He said he did not realize she was on the group text. She believed it was a violation of the no contact ex parte order. Court documents from November 2021 state that Applicant admitted he was held in civil contempt for violating a no contact order. He denied his text had any derogatory message. (Tr. 65-75, 88-91; GE 2 page 13)

Applicant testified that he continued to participate in counseling even after the 24-week class ended. He said he did not know he had anger issues until he went through counseling. He still meets with a counselor, and they have lunch together. He also attends classes occasionally. The counselor provided a report that Applicant had successfully completed the required session. He made a \$2,500 donation to his counselor's facility. (Tr. 84-86; AE A)

Applicant testified that he was going through a difficult time in his life when he was dealing with an acrimonious divorce, and he was unable to see his children. He attributed his marijuana use to stress in his life. He loves and is devoted to his job. He admitted he made a mistake. Applicant's post-hearing statement mentioned his family's service in the military and federal government. He stated he is not a threat or liability. He stated: "I refused to snitch when I tested positive for drugs and was charged with contempt." He further stated that he does not sell out his friends, family, or country. He believes he has been an asset to the military community. (Tr. 78; AE C)

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(c), 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 access to classified information will be resolved in favor of 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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

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 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 Executive Order 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

The security concern relating to the guideline 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.

AG ¶ 25 provides conditions that could raise security concerns. The following is potentially applicable:

- (a) any substance misuse;

- (b) testing positive for an illegal drug;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

I have considered Applicant's candid testimony about his CBD use. Although he knowingly used CBD, he did not believe he was using marijuana. There is no evidence he was using it for anything other than for medicinal purposes. Based on the information about the possibility that CBDs may have levels of THC that are in excess of what is on their labels, I do not believe he intentionally or knowingly attempted to use THC. There is no evidence that the CBDs he used contained THC. I find for Applicant on SOR ¶ 1.b.

There is sufficient evidence to conclude that Applicant knowingly and intentionally used marijuana in May 2021 based on his admission and a positive drug test. Applicant failed a court-ordered drug screen testing positive for both marijuana and methamphetamine. There is insufficient evidence that Applicant's job is classified as a sensitive position. There is evidence he held a security clearance when he used marijuana and methamphetamine, but not while he was granted access to classified information. AG ¶¶ 25(a) and 25(b) apply. AG ¶ 25(f) does not apply.

The guideline also includes conditions that could mitigate security concerns under the drug involvement guideline. The following mitigating conditions under AG ¶ 26 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 to overcome the 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 being 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 knowingly and intentionally used marijuana because he thought he would have fun. This does not reflect a mature attitude about illegal drug use, especially when holding a security clearance. He denies he used methamphetamine, but his court-ordered drug test reflects a positive result. His use of the drugs was while he was attempting to gain visitation of his children. I have considered his negative drug tests that are required if he wants to see his children. Although he is remorseful for his conduct, I am unable to find that his conduct does not cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) does not apply. Applicant may be committed to not using illegal drugs again in the future, but it is too soon to negate his knowing and intentional past drug use. Despite some mitigation under AG ¶ 26(b), it is insufficient to mitigate his conduct.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern for 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

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

(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;

(d) credible adverse information that is not explicitly covered under any other guideline and may 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: . . . (2) any disruptive,

violent, or other inappropriate behavior; (3) a pattern of dishonest or rule violations . . . ; and

(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: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant was deemed by the Court to have sent harassing and/or threatening text messages to his former spouse, resulting in an ex parte order of protection issued against him in July 2020. Applicant was held in contempt of court in May 2021 for being dishonest to the court and was sentenced to 10 days in jail, which he served. His court documents reflect that in November 2021 he admitted to being in civil contempt for violating a no contact order. The above disqualifying conditions apply.

After the Government produced substantial evidence of the above disqualifying conditions, the burden shifted to Applicant to prove mitigation. Mitigating conditions under AG ¶ 17 are potentially applicable to the disqualifying security concerns based on 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;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant has participated in domestic violence counseling and anger management, which are positive steps. However, honesty is a cornerstone of the security clearance process. Failing to follow an ex parte order of protection raises questions about his ability and commitment to following rules and regulations. To be dishonest and somewhat glib to a judge also raises concerns about Applicant's respect for the law and authority. There is no doubt Applicant was involved in an acrimonious divorce and custody issues. However, violating a court order and going to jail for contempt were not minor and were not infrequent. AG ¶¶ 17(d) and 17(e) have some application, but they are insufficient to overcome the seriousness of Applicant's conduct.

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(a):

(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 E and H in my whole-person analysis.

Applicant has not met his burden of persuasion. Overall, the record evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for a security clearance. Applicant failed to mitigate the Guideline H, drug involvement and substance misuse, and Guideline E, 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c-1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.c:	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 a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge