



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



In the matter of:)
)
) ISCR Case No. 22-02383
)
Applicant for Security Clearance)

Appearances

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

08/31/2023

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the Guideline H, drug involvement and substance misuse security concerns but failed to mitigate the Guideline E, personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On February 1, 2023, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse 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 on June 8, 2017.

Applicant answered the SOR on February 13, 2022, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government’s file of relevant material (FORM), and Applicant received it on April 26,

2023. He was afforded an opportunity to file objections and submit material in refutation, extenuations, or mitigation within 30 days of receipt of the FORM. The Government's evidence is identified as Items 1 through 4. Applicant did not submit any material in refutation, extenuation or mitigation and did not object to any of the evidence offered by the Government. Items 1 through 4 are admitted in evidence. The case was assigned to me on July 31, 2023.

Findings of Fact

Applicant admitted all of the SOR allegations. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 34 years old. He is a college graduate. He married in 2019 and recently had a child. He has worked for his present employer, a federal contractor, since 2022. (Item 3)

In December 2019, Applicant was interviewed by an official from a government agency (GA). Applicant stated during the interview that in 2016 his brother supplied him with marijuana candy that Applicant consumed on this one occasion in the family home. His brother had purchased the marijuana candy in a local store in the state where they lived and where marijuana is legal to use under state law. He told the official that he had not used it or any other drug since the 2016 incident. At that time, he did not realize marijuana use was illegal under federal law. He understood his use was a mistake that he regretted, and it would not happen again. He did not disclose it on other documents because he was not focused on marijuana being illegal. He stated he had nothing to hide and could not be blackmailed. (Item 4)

Applicant was interviewed again by an official from another GA in February 2020. He stated during this interview when discussing prior illegal drug use that he had used marijuana three times between 2009 and 2016. He said he gave his brother money as a contribution to purchase edible marijuana in a state where it is legal. (Item 3)

Applicant also disclosed to the GA official that in 2015 he had purchased marijuana brownies from a dispensary in state X. He consumed one marijuana brownie, gave one to his girlfriend, and gave the rest to his brother. He mailed the brownie to his girlfriend, who was located in the same state, as part of a care package, using Federal Express. He said he was concerned about shipping the marijuana brownie because he believed it could have been illegal to mail the drug, though it was never detected. He denied to the official that he had any other involvement with illegal drugs and denied having any intent to use them in the future. He admitted that he failed to disclose this drug involvement on security forms he completed in October 2019 because of fear of it disqualifying him from employment. (Item 3)

Applicant completed a Questionnaire for National Security Positions (SF 86) in December 2021. In response to section 25 about prior illegal drug use, he stated: "Tried

a marijuana candy approximately 3 times since 2015, as legalized in the state of [x]. As of 2018 I have not and will not attempt to acquire or use any marijuana.” He listed the estimated date of his first use as June 2018 and his most recent use as November 2018. (Item 2)

In Applicant’s answer to the SOR, he admitted that in February 2020 during a polygraph examination with another GA and after being advised of the penalty under Title 18 U.S.C. § 1001, he deliberately failed to disclose his involvement with illegal drugs for fear of it disqualifying him from employment. (Item 1)

In Applicant’s answer to the SOR, he admitted that in December 2019 during an interview with an official from another GA and after being advised of the penalty under Title 18 U.S.C. § 1001, he knowingly withheld his more recent drug involvement because he thought that withholding it would make it less likely to disqualify him from employment. (Item 1)

Applicant admitted that from about 2015 to about November 2018, he used tetrahydrocannabinol (THC), which is an active ingredient in marijuana with varying frequency. (Item 1)

Applicant explained in his answer to the SOR that he has made a conscious effort to change his behavior and be honest and truthful. He understood his failure to disclose information during his polygraph is a serious infraction. He admitted his failure to disclose information about his drug involvement occurred twice during his investigation from 2019 to 2020 and it has been three years since this occurred. He now has a family, and he wants to teach his child the values of being honest, truthful, and personal integrity. His prior motivation for failing to be honest was self-preservation and based on fear and shame. He further explained that during an incident at work that could have been damaging, he admitted his wrongdoing and accepted responsibility when he could have been removed from a project. He said he chose to be honest to his supervisor. He believes he has demonstrated a change in his behavior. He said in 2022 he went through another full investigation, and he was truthful even when the information could have been harmful to obtaining a clearance and employment. He stated he will continue to make a conscious effort to be truthful and honest in all circumstances that do not benefit him. He acknowledged he made a mistake and has learned from it. (Item 1)

Regarding his past drug use, Applicant explained that he understands marijuana use is illegal under federal law and his use was recreational and has ceased since 2018. It has been five years since his last use of marijuana. He has no desire to use it in the future. He has responsibilities towards his family and employment and its illegal nature are his primary motivators to not use it again in the future. (Item 1)

Policies

When evaluating an applicant’s national security eligibility, the administrative judge must consider the AG. 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 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. Likewise, I have avoided drawing 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. Directive ¶ E3.1.15 states 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 as to obtaining 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 as to 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 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 guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 16, and following that may be potentially applicable:

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

In December 2019 Applicant knowingly withheld his complete drug involvement during a subject interview with an official from another GA after being advised of his duty to tell the truth under penalty of law. He believed that making such a disclosure would likely disqualify him from employment. In February 2020 after being advised that under penalty of law he was required to tell the truth, he deliberately failed to disclose the extent of his marijuana use when he was interviewed for a polygraph examination by an official with another GA because he feared if he did it would disqualify him from employment. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

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

Applicant did not make a prompt, good-faith effort to correct his falsifications before he was confronted with the facts. In his SOR answer, he acknowledges his mistakes in not being truthful in the past and promises to be truthful in the future. He was over 30 years old when he deliberately failed to provide honest answers during the investigative process, which is past the age of youthful immaturity. The investigative process relies on people who are trusted with the nations secrets to provide honest answers each and every time. It should not have to be a conscious decision to tell the truth but rather an automatic response. Applicant failed to do so when he was interviewed by a government

official and then a few months later again failed to do so during a polygraph interview. He feared the impact of telling the truth would have on his employment opportunities. His conduct was not minor, and it occurred on more than one occasion. I have insufficient evidence to conclude that future self-preservation conduct is unlikely to recur. His conduct casts doubt on his reliability, trustworthiness, and good judgment. The above mitigating conditions do not apply.

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 are potentially applicable:

- (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 possessed and used THC an active ingredient in marijuana with varying frequency from about 2015 to about November 2018. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns. 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 acknowledged his drug use and its infrequency. He stated in his answer to the SOR that he does not intend to use illegal drugs in the future due to becoming a father and wanting to set a good example, his employment, and that it is illegal under federal law. There is no evidence he has used illegal drugs since 2018. Although it is likely he still associates with his brother, I believe he has put his recreational marijuana use behind him and is committed to abstinence. The above mitigating conditions apply.

SOR ¶ 2.b cross-alleged under the drug involvement and substance misuse guideline the personal conduct paragraph under Guideline E. No specific conduct was alleged. Applicant's deliberate failure to disclose information about his drug use and his deliberate withholding of information was appropriately alleged under Guideline E, so the cross-allegation under Guideline H is unnecessary. I find for Applicant on the cross-allegation at SOR ¶ 2.b.

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. Applicant failed to meet his burden of persuasion. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant mitigated the security concerns arising under Guideline H, drug involvement and substance misuse but did not mitigate those under Guideline E, personal conduct.

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.b:	Against Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge