



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



In the matter of:)
)
) ISCR Case No. 22-01736
)
Applicant for Security Clearance)

Appearances

For Government: Daniel O'Reilley, Esq., Department Counsel
For Applicant: Bradley Moss, Esq.

01/18/2024

Decision

Curry, Marc E., Administrative Judge:

Applicant mitigated the financial considerations and personal conduct security concerns but failed to mitigate the drug involvement security concerns. Clearance is denied.

Statement of the Case

On September 14, 2022, the Department of Defense Counterintelligence and Security Agency Consolidated Adjudication Services Facility (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations, and Guideline H, drug involvement and substance misuse, explaining why it was unable to find it clearly consistent with the national security to grant security clearance eligibility. The DCSA CAS took the action 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 National Adjudicative Guidelines (AG) effective for any adjudication made on or after June 8, 2017. On October 13, 2022, Applicant answered the SOR. He denied all the allegations except subparagraph 1.a, and he requested a hearing. On June 2, 2023, the case was assigned to me after having originally been assigned to another administrative judge. On August 10, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice of video teleconference hearing, scheduling the hearing for September 12, 2023.

The hearing was held as scheduled. Department Counsel withdrew SOR subparagraph 1.b, and moved to admit five exhibits which I identified as Government's exhibits (GE) 1 through 5. I admitted GE 1 and 2, and GE 4 and 5. As for GE 3, Applicant's counsel objected to a section of an investigative interview under the subheading "Illegal use of drugs." (GE 3 at 2) I sustained the objection, admitting GE 3 and redacting the section to which Applicant's counsel objected. Also at the hearing, I considered the testimony of Applicant, together with three character witnesses.

At the close of the hearing, Department Counsel moved to amend the SOR, adding one allegation under Guideline E (subparagraph 3.a) as follows:

You falsified material facts on an electronic questionnaire for investigation processing, executed by you on April 22, 2008 in response to Section 24, "Your use of illegal drugs and drug activity. In the last seven years, have you illegally used any controlled substances?" You answered "No," and thereby deliberately failed to disclose your marijuana uses from 2000 to 2008.

I granted the motion over Applicant's counsel's objection. (Tr. 121-122) The transcript (Tr.) was received on September 22, 2022.

Findings of Fact

Applicant is a 40-year-old single man. He earned a GED in 2000. (Tr. 100) He is a software developer who has been working for various federal contractors since 2006. (Tr. 38, GE 1 at 13-19) He has been working for his current employer since 2016, and he has held a security clearance since 2008. (Tr. 77, 108; GE 1 at 13)

Applicant is highly respected on the job. A project director characterizes him as a "very competent software developer," and "a top performer." (Tr. 58) According to a program manager, Applicant is one of the company's "go-to guy[s]," and is a strong problem solver whose ratings always either exceeded expectations or were outstanding. (Tr. 23) Since beginning the job, Applicant has been promoted twice. Currently, he is a lead developer. (Tr. 117)

When Applicant was in his early twenties, he managed money irresponsibly, using credit cards to purchase items he did not need, and spending money on eating out frequently. (Tr. 50) He sometimes applied for and received loans before previous loans were satisfied. (Tr. 51) Fortunately for Applicant his career was stable, as he worked for the

same employer between 2006 and 2014, gradually receiving raises. (Tr. 51) By 2014, he was earning \$60,000 per year.

In 2014, however, the company that employed Applicant dissolved. (Tr. 84) Although he did not experience a lengthy unemployment, he worked for a contractor that paid him annual income that was almost two-thirds less than he earned from his previous employer. (Tr. 86) Although Applicant supplemented his income with various part-time jobs, his income was “not even close” to the income he earned before his employer’s company dissolved in 2014. (Tr. 87)

Consequently, Applicant’s debts became delinquent. Most significantly, he was behind on his \$78,000 student loan for which he had used to attend flight school. (Tr. 82) Shortly after getting his current job and relocating, Applicant filed for Chapter 7 bankruptcy. He found that even with the new job, he was struggling to stay caught up on his debts. (Tr. 92) Ultimately, \$70,000 of debt was discharged including his delinquent student loan. (Answer, attachment 1 at 3; Tr. 93)

As part of the bankruptcy proceedings, Applicant had to undergo credit counseling. (Tr. 95) He learned to limit credit card use to emergencies and to satisfy credit card debt the month it is incurred without carrying forward balances. (Tr. 95) Currently, Applicant earns \$126,000 annually. (Tr. 97) The only recurring debt he has is a car loan with a balance of less than \$2,000. (Tr. 97)

SOR subparagraph 2.a alleges that Applicant used marijuana between June 2009 and January 2017. Although Applicant indicated that he used marijuana during this time frame on his 2018 security clearance application, he denied the corresponding SOR allegation. (GE 1 at 33; Answer at 5-6) Instead, he testified that he used marijuana beginning in high school in 2000 and stopped in 2008 and was attempting to disclose this use - which he had failed to disclose earlier on a 2008 security clearance application – when he provided the wrong dates on the most recent application. (Tr. 100-101) In addition, he acknowledged that his 2018 security clearance application responses “caused unnecessary confusion and concern for the Government.” (Answer at 6)

Applicant contends that he did not disclose his marijuana use between 2000 and 2008 on his security application in 2008 because the company’s facility security officer at his then-job told him that he did not have to disclose it if he had no intention of using it again. (Tr. 103-104) After talking to other facility security officers over the years, Applicant came to understand that he should have disclosed his early 2000s marijuana use on his 2008 security clearance application. (Tr. 109) Applicant contends that when he “came clean” about his marijuana use on his 2018 security clearance application, he meant to indicate that the use occurred from roughly 2000 to 2008, not 2009 to 2017, as he inadvertently indicated. (Tr. 102)

Applicant used marijuana in cigarette form. He used it to help him sleep. He stopped using it because it made him feel anxious instead of tired. (AE B at 9) He has no intention of using it in the future. (AE B at 10)

SOR subparagraph 2.b alleges that Applicant used marijuana when he possessed access to classified information. He answered “no” to this allegation because although he has possessed a security clearance before, he has never had access to classified information or data systems. (Tr. 77-78, 90) He has no good explanation as to why he “stupidly answered in the affirmative [on the 2018 security clearance application] when the truthful answer was negative.” (Answer at 6)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall 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 ¶ 1(d) 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, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

Under the whole-person concept, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). They are as follows:

- (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.

Analysis

Guideline F: Financial Considerations

Under this concern, “failure to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified or sensitive information.” (AG ¶ 18)

Applicant’s history of financial problems triggers the application of AG ¶ 19(a) “inability to satisfy debts,” and AG ¶ 19(c), “a history of not meeting financial obligations.” Applicant’s financial problems began in 2014 after his then-employer went out of business. Although Applicant was never unemployed, he earned less than one-third of what he had earned previously. In 2016, Applicant initiated an effort to resolve his debts by filing for Chapter 7 bankruptcy protection in 2016. As part of the bankruptcy process, Applicant received financial counseling.

In 2018, the court discharged Applicant’s debts, including the student loan debt, alleged in the SOR. Currently, Applicant earns \$126,000 annually, more than double what he earned before he developed financial problems. (Tr. 97) The only recurring debt he has is a car loan with a balance of less than \$2,000. I conclude that the following mitigating conditions under AG ¶ 20 apply;

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- (b) the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce, or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances; and
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

In sum, Applicant has mitigated the financial considerations security concerns.

Guideline H, Drug Involvement

Under this guideline, “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

purposes. (AG ¶ 24) Applicant's use of marijuana triggers the application of AG ¶ 25(a), "any substance misuse."

As the Appeal Board noted, "eligibility for access to classified information and the granting of access to classified information are not synonymous concepts; [rather] they are separate concepts." (ISCR Case No. 20-03111 at 3 (App. Bd. August 10, 2022)) Although Applicant's use of marijuana coincided with a time-period when he held a security clearance, there is no record evidence that he possessed access to classified information, as alleged in subparagraph 2.b. Consequently, I resolve subparagraph 2.b in Applicant's favor.

Applicant's testimony that he did not use marijuana between 2009 and 2017 despite indicating this on his security clearance application is not credible. As such, it undercuts the probative value of his contention that his marijuana use will not recur in the future. I have not considered his false statement at his hearing for disqualification purposes. Rather, I have considered his false statement in my mitigation and whole-person analysis. I conclude Applicant has failed to mitigate the drug involvement security concerns.

Guideline E, Personal Conduct

Under this guideline, "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." (AG ¶ 15) Applicant admitted to falsifying his 2008 security clearance application by not disclosing marijuana use. Consequently, AG ¶ 16(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," applies.

Applicant disclosed the falsification before being confronted by an investigative agent about it. However, he disclosed the falsification approximately ten years after he completed the security clearance application. AG ¶17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts," is only partially applicable. Regardless of when Applicant reported the misconduct, it constitutes a "positive step to reduce or eliminate vulnerability to exploitation or duress." (AG ¶ 17(e)) I conclude Applicant has mitigated the security concern generated by his falsification of the 2008 security clearance application.

Whole-Person Concept

Applicant is a good worker who is well-respected by his superiors and his colleagues. However, his testimony that he mistakenly indicated the wrong dates of marijuana use on his 2018 security clearance application was not credible. Consequently, I conclude Applicant has failed to mitigate the 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 F:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	WITHDRAWN
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

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

Marc E. Curry
Administrative Judge