



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



In the matter of:)	
)	
)	ISCR Case No. 23-01089
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

02/20/2024

Decision

Dorsey, Benjamin R., Administrative Judge:

Applicant mitigated the drug involvement and substance misuse security concerns. He did not mitigate the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On July 31, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. On August 8, 2023, Applicant responded to the SOR and requested a decision based on the written record in lieu of a hearing.

The Government’s written case was submitted on October 23, 2023. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was given 30 days to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on October 27, 2023, but did not respond to it. The case was assigned to me on January 30, 2024. The Government exhibits included in the FORM (Items 1-6) are admitted in evidence without objection.

Findings of Fact

Applicant is a 36-year-old employee of a defense contractor for whom he has worked since 2015. He received a high school diploma in 2006. He has been married since 2012 and has 11-year-old twins and a seven-year-old. (Items 2-5)

Applicant admitted all the allegations in the SOR without additional comment. I have incorporated his admissions in my findings of fact. I find that those allegations are established unless I have noted otherwise. Between about 2010 and 2013, Applicant abused the prescription opiate Hydrocodone by taking more of it than prescribed for pain relief following back surgery. He also illegally purchased Hydrocodone between 2010 and 2013. Contrary to the allegation in SOR ¶ 1.a, Applicant did not abuse Hydrocodone in 2021 because he used it as prescribed. In about 2004, he used marijuana once when he was about 17. He purchased marijuana in March 2019 and July 2021. Between July 2021 and September 2021, he used marijuana five to six times per day while he was granted access to classified information. He claimed that he used marijuana in 2021 to help with pain after a recent surgery and to avoid using Hydrocodone again. At all times relevant to this investigation, marijuana possession (and therefore its use) has been illegal. Marijuana and Hydrocodone are both controlled substances. He claimed that he has not used an illegal drug since September 2021 or misused a prescription drug since 2013. (Items 2, 3, 5, 6)

In approximately September 2021, Applicant was arrested and charged with felony possession of a controlled substance. He drove through a park while taking several “vape” hits of marijuana. He was stopped by police for excessive speed and was arrested after police smelled marijuana in his vehicle. He admitted that he had recently smoked it and was transported to a local jail where he spent the night. He was released the next day. The charges were ultimately dismissed however, he was required to undergo scheduled drug testing. (Items 2, 5, 6)

Applicant waited until about July 2022 to report his September 2021 arrest to his facility security officer (FSO). When his FSO asked why he waited so long to report the arrest, he said he waited because he was afraid to lose his job. (Items 2, 3, 5, 6)

In March 2019, Applicant was charged with possession of marijuana in a drug free zone after police found it in his car and in his pocket. The relevant court ultimately dismissed the charges. Applicant acknowledged purchasing and possessing marijuana but claimed that he was not using it at the time. He claimed that he bought it and was bringing it to his brother-in-law to use to treat nausea from chemotherapy. He reported this arrest to his FSO a few days afterward. (Items 2, 3, 5, 6)

In about February 2007, Applicant pleaded *nolo contendere* to felony driving under the influence of alcohol (DUI) after he drove while intoxicated over the legal limit. During his July 2017 security interview with a DOD investigator, he claimed that he was arrested on a misdemeanor DUI charge as opposed to a felony DUI charge. However, in his Response to the SOR, he admitted without additional comment that he was charged with felony DUI. The court granted him a deferred disposition. The court

required him to pay fines and his license was suspended for six months. The record is unclear as to the ultimate resolution of these charges. (Items 2, 5)

Despite being required to do so, Applicant failed to disclose purchasing and misusing Hydrocodone on his October 2016 Electronic Questionnaires for Investigations Processing (2016 e-QIP) and his July 2019 Electronic Questionnaires for Investigations Processing (2019 e-QIP). He certified that his statements on these e-QIPs were true, complete, and correct to the best of his knowledge and belief. In his Response to the SOR, he admitted without additional comment that he deliberately failed to disclose his misuse and purchase of opiates. During his March 2023 security interview, he told a DOD investigator that he did not disclose his Hydrocodone misuse because he was afraid that he would not be able to maintain his employment or find other employment. While there is evidence that he volunteered his Hydrocodone abuse in March 2023 prior to being confronted with it, he only did so years after he should have. He also divulged it only when explaining away his 2021 marijuana possession and arrest. (Items 1-5)

In March 2023, in Applicant's response to the Government's interrogatories, Applicant certified to the best of his knowledge and belief that he only ever used marijuana in 2021. This information is inconsistent with what he told the DOD investigator during his February 2020 security interview, when he said that he also tried marijuana in about 2004 when he was about 17. In his Response to the SOR, he admitted without additional comment that he deliberately failed to disclose all his marijuana use. He did not provide evidence to show that he volunteered this information prior to being confronted with it. (Items 1, 5)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines 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.”

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 the applicant or proven by Department Counsel.” The applicant 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 EO 10865 provides that adverse 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 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. 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 notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (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.

Applicant illegally used and possessed marijuana in 2004. He also illegally purchased and possessed marijuana in 2019, and he illegally purchased, possessed, and used marijuana from July 2021 until September 2021. From July 2021 to September 2021, he used marijuana while he was granted access to classified information. He also misused and illegally purchased Hydrocodone from about 2010 until about 2013. The above disqualifying conditions are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following 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;
- (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; and
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended.

Applicant has mitigated his misuse and purchase of Hydrocodone. It has been over ten years since he last abused it, misused it, or illegally purchased it. While he was using it in 2021 after another surgery, there is no evidence that he was using it other than as prescribed. All the above-listed mitigating conditions are applicable to his Hydrocodone abuse, misuse, and illegal purchase.

It has been about two and one-half years since Applicant was involved with marijuana. Other than his one-time use in about 2004, the circumstances surrounding his marijuana involvement have been to alleviate pain relief for himself and his brother-in-law. Although he used marijuana frequently during a three-month period in mid-2021 while he held a security clearance, that use was confined to a relatively short period when he was managing post-surgery pain and trying to avoid over-reliance on Hydrocodone. Given this period of abstinence, he no longer relies on marijuana involvement for those issues. Available evidence shows that his marijuana involvement occurred under circumstances that are unlikely to recur (his own illness and his brother-in-law's illness). I find that his period of abstinence since September 2021 is sufficient in relation to the limited and somewhat unusual circumstances of his marijuana involvement. AG ¶ 26(a) and AG ¶ 26(b) fully apply.

Guideline E, Personal Conduct

The security concern 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 guideline notes several conditions that could raise security concerns under AG ¶ 16. The following 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(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 government official; and

(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 had a 2007 felony DUI charge. This charge and his illegal drug involvement were insufficient for an adverse adjudication under another Guideline, but they support a whole-person assessment of questionable judgment, unreliability, or unwillingness to comply with rules and regulations, indicating that he may not properly safeguard classified or sensitive information. He also deliberately failed to disclose his illegal drug involvement on multiple e-QIPs, and his response to Government interrogatories. All the above disqualifying conditions are applicable.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. The following mitigating conditions potentially apply in Applicant's case:

(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;

(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.

It has been about 17 years since Applicant's DUI charge, and there is no indication that he has continued to drink and drive. For similar reasons that I included in my analysis under Guideline H, I find that his drug involvement and substance misuse happened under unique circumstances and is unlikely to recur. I find that AG ¶ 17(c) is fully applicable to the 2007 DUI and the cross-alleged Guideline H allegations, and those allegations are mitigated.

Applicant arguably corrected his omission or concealment of his illegal Hydrocodone involvement to a DOD investigator prior to being confronted with the facts. However, he did so years after it occurred, and only when it benefitted him to justify his marijuana involvement. Therefore, his correction was not prompt or made in good faith. He also did not correct his falsification of the full extent of his marijuana involvement in his response to Government's interrogatories. AG ¶ 17(a) does not apply.

Deliberately omitting required information during the security clearance process is not minor. Instead, this action strikes at the heart of the process, which relies on candid and honest reporting. Applicant engaged in this deceitful and misleading activity multiple times over two separate investigations. He also repeated it in 2023 when he did not reveal the full extent of his marijuana involvement in his response to the

Government's interrogatories. Therefore, he has not shown that his behavior was infrequent, happened under unique circumstances, or is unlikely to recur. AG ¶ 17(c) does not apply.

While Applicant ultimately acknowledged his intentionally dishonest behavior, he has provided no evidence of counseling or other steps he has taken to alleviate this behavior. Moreover, for the reasons I provided in my analysis of AG ¶ 17(c), I cannot find his behavior is unlikely to recur. AG ¶ 17(d) does not apply.

Applicant has taken some positive steps to reduce vulnerability to exploitation, manipulation, or duress. He eventually told the DOD investigator about his Hydrocodone and marijuana involvement, and he eventually told his FSO about his marijuana involvement and possession charges. AG ¶ 17(e) partially applies but does not overcome his repeated deceitful and untrustworthy personal 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(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 have incorporated my comments under Guidelines H and E in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude he mitigated the drug involvement and substance misuse security concerns but not the 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:	FOR APPLICANT
Subparagraphs 1.a-1.f:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	For Applicant
Subparagraphs 2.c-2.g:	Against Applicant

Conclusion

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.

Benjamin R. Dorsey
Administrative Judge