



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



In the matter of:)
)
) ISCR Case No. 22-01660
)
Applicant for Security Clearance)

Appearances

For Government: Jenny Bayer, Esq., Department Counsel
For Applicant: *Pro se*

03/27/2024

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline E, personal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On November 10, 2022, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under 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 January 14, 2023, and requested a hearing before an administrative judge. The case was assigned to me on January 9, 2024. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 24, 2024,

scheduling the hearing for March 11, 2024, by Microsoft Teams. The hearing was held as scheduled. The Government offered exhibits (GE) 1 through 3. There were no objections to any exhibits, and they were admitted in evidence. Applicant testified and did not offer any exhibits. DOHA received the hearing transcript on March 22, 2024.

Findings of Fact

Applicant admitted all of the SOR allegations with explanations. His admissions are adopted as 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 31 years old. He earned a bachelor's degree in 2016. He married in 2020 and has two children, ages two and one. He has worked for his employer, a federal contractor since February 2020. (Tr. 17-18; GE 1)

In April 2021, Applicant completed a security clearance application (SCA). Section 21 - Illegal Use of Drugs or Drug Activity, asked in the last seven years if Applicant had illegally used any drugs or controlled substances. As part of the instructions for completing this section, it stated:

As to this particular section, this applies whether or not you are currently employed by the Federal government. The following questions pertain to the illegal use of drugs or controlled substances or drug or controlled substance activity in accordance with Federal laws, even though permissible under state laws. (GE 2)

He responded "No." Under Section 20 – Police Record, he disclosed that he had been arrested for marijuana possession in July 2019. He was stopped by the police and a small amount of marijuana was found in his car. He disclosed it did not belong to him. He said he was not under the influence of alcohol or drugs when he was arrested. He stated that he was released from custody the following day and was required to appear in court on a certain date. He stated in his SCA, "I was not charged with any misdemeanor or felony and case was dropped." (GE 2)

In October 2022, Applicant completed government interrogatories. In them he affirmed that the summarized results of interviews taken by government investigators in May 2021 and May 2022 were accurate, and he did not have any corrections. He swore or affirmed that the information furnished was correct to the best of his knowledge and belief. (GE 3)

During Applicant's May 2021 interview with a government investigator, he stated that he had never used or purchased illegal drugs. He was mature and did not use drugs and had no motivation for this type of conduct. He did not socialize or associate with individuals who use illegal drugs. Regarding his July 2019 arrest for possession of

marijuana, he explained to the investigator that the marijuana belonged to his friend¹ and he permitted him to keep the marijuana in his vehicle because Applicant did not want it in his house. When he was stopped by the police, he had forgotten the marijuana was in the car. He gave the police permission to search his car and they found less than two grams of marijuana. Applicant was arrested, posted bond, and went to court. He told the investigator he received 10 hours of community service, and the charge was dropped after he completed it. (GE 3)

In March 2022, Applicant completed another SCA. In response to Section 23, which asked if in the last seven years if Applicant had illegally used any drugs or controlled substances. He responded “No.” The same instructions were included regarding disclosing illegal use of drugs regardless if their use was legal under state law. Under the section regarding disclosing if he had ever been arrested, he included his July 2019 arrest for marijuana possession and the same explanation. (GE 3)

Applicant was interviewed by a government investigator in May 2022. He told the investigator that when he was arrested for possession of marijuana that was found in his car, it belonged to his friend. He did not want his drugs in his house. When he was stopped by the police, he was unaware that his friend had not retrieved his marijuana when it was discovered by the police. He told the investigator that after his arrest, he posted bond and received a court date. He said the judge gave him 10 hours of community service and the charges were dropped after he completed them. He told the investigator that he forgot his friend left marijuana in his car. He said he does not associate with people who use drugs, and he has no future intention to do so. (GE 3)

During the May 2022 interview, Applicant was asked by the government investigator for more information about his 2019 marijuana possession arrest. Applicant explained that the police told him that they smelled marijuana in the vehicle and had probable cause to search it. Applicant said he did not smoke it and it did not belong to him. He was asked by the government investigator if he had used marijuana in the last seven years. He said he had used marijuana in the last seven years but had not used it in the past three years. He said he was not a frequent user, and he was not addicted to it. He used it when he was with friends who were using it and it was given to him by his friends. He used it out of curiosity and to fit in when he was with others. He first tried marijuana when he was in college and used it infrequently, perhaps monthly. He would use it with friends. After college he moved to another state and might have used marijuana once a year. (GE 3)

Applicant was asked by the government investigator if he ever had a positive result on a drug test. He said that after his 2019 arrest for possession of marijuana, he asked the court for leniency. The judge asked him if he was willing to take a drug test, and he agreed. He said he had not used marijuana recently and did not believe his test would show a positive result due to passage of time. The result was positive for marijuana. He

¹ Applicant referred to his friend as a “cousin.” He explained they are not related but had known each other for a long time and this is how he referred to him.

was asked if he had used marijuana after his arrest and before the court date and drug test. He told the investigator he could not recall. He admitted using marijuana one to two days before his arrest. Because of the positive test result, the court required him to complete a drug awareness course and community service. Once he completed the requirements directed by the court, the charge was dropped.

Applicant was asked by the investigator why during his previous interview, he failed to disclose or discuss his marijuana use that occurred within the past seven years. He said he was not asked by the investigator about his marijuana use in his first interview. He explained that the marijuana found in his car did not belong to him. He is not a drug user, and he was not under the influence of drugs when he was arrested. He was further asked why he failed to disclose his marijuana use that was within the last seven years. He said he did not consider marijuana a drug and that he had never been a frequent user. His use was rare, especially post-college. He was asked if he was charged with possession of marijuana in the last three years, he must have known marijuana was illegal. Applicant explained that marijuana is legal in some states, so he still did not think of it as illegal. He said he did not intend to lie. He said he does not currently use marijuana and does not classify it as an illegal drug in his mind. He also said he wanted to protect himself. (GE 3)

The SOR alleged that Applicant deliberately falsified material facts in his April 2021 and March 2022 SCAs when he responded “No” to having used marijuana in the last seven years. The SOR also alleged that Applicant deliberately falsified material facts during his May 2021 interview with a government investigator when he stated that he had never used illegal drugs when in fact he used marijuana recreationally from 2010 to 2019. In his answer to the SOR for each allegation, he stated:

I admit, I have used marijuana within the last 7 years. After failing to initially disclose the information to the investigative officer, I then informed an investigative officer about seldomly smoking marijuana. However, I unwillingly made the mistake of not changing my answer in the application after the second conversation. I initially resisted the answer out of fear of [losing] my job but then realized I made a mistake. (Answer to the SOR)

Applicant testified that he “dibble-dabbled” with marijuana use especially while in college. He said he did not disclose his illegal drug use because in a lot of states it is now legal. He was asked if it was legal where he currently lived and last used it and he said “no.” He explained he had recently been hired for his job when he completed the SCA, and he was terrified of losing his job and being able to provide for his family. He thought if he answered “yes” he would lose his job. He said when he completed the second SCA it was a long process and he “negligently” hit the “next” button before confirming his response regarding his illegal drug use. He said he did not want to be seen as lying, and he did not intentionally lie. He said the truth was he did use marijuana and should have said so and should have updated his answer. It is not a part of his life and his environment. He said his past use does not define him. He admitted he failed to disclose his drug use

because he was afraid of losing his job. He then admitted his response was deliberate when he failed to disclose his past drug use. During his second interview in May 2022, he truthfully disclosed his past drug use. (Tr. 24-40)

Applicant explained that when he was interviewed, he said he did not view marijuana as a drug because certain states permit its use and others do not. He understood alcohol to be worse than marijuana, so he did not consider marijuana as a drug. He reiterated he failed to provide honest answers because he was afraid about being able to provide for his family. I find Applicant deliberately falsified material facts in his April 2021 and March 2022 SCAs by failing to disclose his past drug use. I find he deliberately falsified material facts when he told the government investigator during his May 2021 interview that he never used illegal drugs. (Tr. 30, 40-50)

Applicant testified that after his arrest for marijuana possession in 2019, he was required to take a drug course over a couple of day, which he completed. He was also required to perform community service, which he also completed. After completion of these requirements, the charge was dropped. (Tr. 51-57)

Applicant apologized for his actions. He stated that his conduct did not define his character, and he will not make this mistake again. (Tr. 67)

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€, 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 concerns 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:

- (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; and

(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.

I have considered all of the evidence. There is sufficient evidence to conclude that Applicant deliberately falsified material facts on his April 2021 and March 2022 SCAs when he responded that he had not used illegal drugs in the past seven years. He deliberately falsified material facts to a government investigator during his May 2021 interview when he said he had never used illegal drugs. The above disqualifying conditions apply.

The following mitigating conditions under AG ¶ 17 are potentially applicable to the disqualifying security concerns based on the facts:

(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.

I did not believe Applicant's actions were negligent when he failed to disclose his prior drug use or that he made a mistake by hitting the "next" button. He was aware of his past drug use and deliberately failed to disclose it on three separate occasions when he had a duty to be truthful. I did not find his explanations credible that marijuana was not illegal in some states, so he did not have a duty to disclose it because that is the way he thought about it. He had recently been arrested for possession of marijuana in a state where it was illegal. He tested positive for marijuana after his arrest. It was not until the fourth opportunity during his second interview with a government investigator that he finally disclosed his past conduct.

Applicant did not make a prompt, good-faith effort to correct his concealment and falsifications. His conduct is not minor and did not happen under unique circumstances that are unlikely to recur. His conduct casts doubt on his reliability, trustworthiness, and good judgment.

A security clearance investigation is not a forum for an applicant to split hairs or parse the truth narrowly. The government has a compelling interest in protecting and safeguarding classified information. That compelling interest includes the government's legitimate interest in being able to make sound decisions, based on complete and accurate information, about who will be granted access to classified information. An applicant who deliberately fails to give full, frank, and candid answers to the government

in connection with a security clearance investigation or adjudication interferes with the integrity of the industrial security program. Despite having more than one opportunity to set the record straight, Applicant repeatedly failed to do so by providing false information. The above mitigating conditions do not 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 have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant's deliberate failure to disclose information on his SCAs and provide truthful responses to a government investigator raises serious concerns. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising 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 F:	AGAINST APPLICANT
Subparagraphs 1.a-1.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 security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge