



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



In the matter of:)	
)	
)	ISCR Case No. 21-02559
)	
Applicant for Security Clearance)	

Appearances

For Government: Troy Nussbaum, Esq., Department Counsel
For Applicant: Dan Meyer, Esq.

06/21/2024

Decision

HYAMS, Ross D., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 11, 2020. On April 28, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines: H (drug involvement and substance misuse), I (psychological conditions), and E (personal conduct). Applicant answered the SOR on June 13, 2022, and requested a hearing before an administrative judge. The case was assigned to me on October 16, 2023.

The SOR was amended on January 25, 2023. Applicant answered the Amended SOR on February 26, 2023. A second amendment to the SOR was made on February 12, 2024, sixteen days prior to the hearing, and the answer to the new allegations was addressed at the hearing.

The hearing convened on February 28, 2024. Department Counsel submitted Government Exhibits (GE) 1-7, which were admitted in evidence without objection. Department Counsel also requested that I take administrative notice of a selection of pages from the Diagnostic and Statistical Manual of Mental Disorders Fifth Edition, which I marked as Administrative Notice Exhibit (AN) 1. Applicant submitted Applicant's Exhibit (AE) A, which was admitted in evidence without objection. Other documentation had been previously included with his SOR Answer.

Amendment to the SOR

During the hearing, Applicant testified about additional psychological treatment and a diagnosis that had not been previously disclosed. At the end of the hearing, Department Counsel moved to amend the SOR a third time to add a new allegation:

SOR ¶ 2.e – Applicant received mental health treatment at Facility C from August 2021 to present and was diagnosed with bipolar disorder.

The motion to amend the SOR was granted without objection, and Applicant admitted the allegation. (Tr. 118-119)

Findings of Fact

Applicant admitted SOR allegations ¶¶ 1.a, 1.b, 2.a, 2.c, and 2.e. He denied SOR allegations ¶¶ 2.b, 2.d, and 3.a. These admissions are incorporated into the findings of fact. Based on my review of the pleadings, evidence submitted, and testimony, I make the following findings of fact.

Applicant is 31 years old. He has worked as an imagery analyst for a government contractor since 2019. He graduated high school in 2010. He served on active duty in the Air Force from 2014-2019 and received a general discharge under honorable conditions. (Tr. 16-18; GE 1)

Under Guideline H, the SOR alleges in ¶ 1.a that Applicant failed a urinalysis test for marijuana in May 2018, while serving in the Air Force, and received an Article 15 and a general discharge for this conduct. It alleges in ¶ 2.b that Applicant used marijuana with varying frequency in May 2018 while holding a sensitive position. The SOR cross-alleges both of these allegations under Guideline E in ¶ 3.a.

Applicant was deployed to Afghanistan from December 2017 through April 2018, and served as a drone controller in combat operations. This position created a lot of pressure on him and made him feel personally responsible for the consequences of his work. He witnessed injury and death to servicemembers and civilians in wartime. He also experienced other instances of trauma while in Afghanistan, including a physical assault and loss of a family member to suicide. (Tr. 16-51)

When Applicant returned from his deployment, he went on leave for about two weeks and reported having post-traumatic stress. He was drinking to cope with his feelings and was offered marijuana by patrons of the bar he visited. He did not know these persons well at the time of the incident and has had no further contact with them after his leave ended in May 2018. In his interview with a government investigator in July 2020, he reported using marijuana a few of times in his parents garage that week as well. (Tr. 18-51; GE 4)

When Applicant returned to duty, he was given a urinalysis test and failed. After this incident, he attended the Air Force Alcohol and Drug Abuse Prevention Treatment Program (ADAPT), where he received substance abuse training and was taught strategies to prevent him from self-medicating. He had not used marijuana or illegal drugs before or after his marijuana use in May 2018. This drug use was an isolated event and was used as a form of self-medication. He stated he was not prepared for the gravity of his experiences in Afghanistan, struggled to adjust upon his return, and did not have a proper coping strategy. He requested retention in the Air Force, but nine months after the urinalysis he was separated. (Tr. 18-51)

Applicant asserted that he has been honest about his marijuana use and signed a statement of intent to not reuse illegal drugs. He provided a clean drug testing screen from July 2022. He reported that he has no temptation to use marijuana again, and his significant other and his entire social circle work in cleared positions and do not engage in drug use. (Tr. 18-51; Answer)

Under Guideline I, the SOR alleges the following:

SOR ¶ 2.a alleged Applicant had inpatient and outpatient mental health treatment at Facility A from July 2018 to October 2018, he was diagnosed with Bipolar II Disorder, and was prescribed medication to treat his condition. He reported that prior to his positive urinalysis, he started having suicidal ideations. He reported he had a suicidal ideation while deployed. He stated that life in the Air Force was too stressful, and when he returned from deployment, he had another suicidal ideation. He was initially put under 24-hour watch and sent to Facility A for out-patient care. He did that treatment for about three weeks. After a bad day, he was told to go to in-patient care, which lasted three weeks. When he was discharged from the inpatient program, he soon felt he needed to return to out-patient care, which lasted for about five more weeks, before he started care on base at facility B. (Tr. 58-111; GE 5)

SOR ¶ 2.b alleged Applicant received mental health treatment on base at Facility B from June 2018 to February 2019. There he was diagnosed with Borderline Personality Disorder, was prescribed medication to treat his condition, and was advised to continue mental health treatment. Applicant reported that he was given lots of medications while at Facility A. The doctors at Facility B changed one of his medications and gave him a different diagnosis. Applicant questioned these changes. He reported that he worked with several different doctors between the facilities and had received conflicting advice. He

wanted to have the right diagnosis and ensure the medication he was taking was right for him. (Tr. 58-111; GE 5, 6)

SOR ¶ 2.c alleged Applicant was evaluated by a DoD-connected psychologist in August 2021. The evaluator diagnosed him with Borderline Personality Disorder and Cluster B personality. The evaluator's report stated concern with Applicant's judgment, decision making, and ability to adhere to rules and regulations. The evaluator met with him for about two hours over a video-teleconference call. She found concern with his mental health history, use of alcohol, and failure to continue with counseling or treatment for issues other than ADHD. She believed these issues could cause impairment with Applicant's reliability, trustworthiness, and mental stability. She stated that his prognosis was poor. Applicant stated that his interactions with the evaluator were stressful, and he was nervous. He does not agree with her conclusions and relies on the advice of his current counselor. (Tr. 58-111; GE 2, 3)

SOR ¶ 2.d alleged that despite medical advice, Applicant failed to obtain ongoing and consistent mental health treatment and continue taking medications to treat his mental health conditions since February 2019. The basis of this allegation is undermined by the allegation and facts of SOR ¶ 2.e. Therefore, this allegation is found for Applicant. (GE 2)

SOR ¶ 2.e alleged Applicant received mental health treatment at Facility C from August 2021 to present and was diagnosed with bipolar disorder. Applicant testified that he had difficulty finding mental health providers after leaving the Air Force. When the COVID-19 pandemic started, providers were not seeing new patients, which made the situation harder to find someone. He was able restart mental health treatment in August 2021, and has had mental health counseling since that time. His initial treatment was for ADHD, but it evolved to address mood, anxiety, and depression. He has also taken medication to treat his condition. These medications include a mood stabilizer, an anti-psychotic, and he has an anti-anxiety medication for use as needed. He reported that counseling, setting routines, and a daytime work schedule have made these conditions manageable. His counselor is not providing psychotherapy, but rather helps him manage medication, reviews his journal and how he did over the preceding month. He reported that he had three psychotherapy sessions with another provider in 2022. (Tr. 18-111)

Applicant provided documentation showing that he has been working with his current counselor since January 2022. The counselor reported that he has attended his scheduled appointments, and has been committed to his treatment plan and taking his prescribed medications. She stated that his actions displayed responsibility and dedication to his health and wellbeing. (Tr. 18-51; AE A)

Applicant reported that he still experiences mood swings, but it's getting better over time. He cut out a lot of stressors, which has helped him. He acknowledged that he still has progress to make in his mental health wellness, but he no longer has extreme highs or lows. He also reported that he has been out of work from June through September 2023. He has used short term disability to work on his mental health and bi-polar issues.

As of the date of the hearing, he had not returned to work. He stated that he felt burned out from his job and had a lot of stress leading up to this hearing. His significant other had been deployed for three months, and he had spent time alone reflecting and making peace with his condition. He still has occasional thoughts of self-harm, but only quarterly. He meets with his counselor three times a month and feels ready to get back to work. (Tr. 58-116)

Applicant provided documentation showing that he was awarded a commendation medal for his work in Afghanistan. He also submitted four character letters from work colleagues, which state that he is reliable, trustworthy, and fit to hold a security clearance. He submitted a character letter from his significant other, who has known him for eight years, and has worked and lived with him. She states that she has never seen him under the influence of drugs or with drugs in his possession. She asserted that he is reliable, stable, and trustworthy, and fit to hold a security clearance.

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

AG ¶ 24 expresses the security concern regarding drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The Controlled Substances Act makes it illegal under federal law to manufacture, possess, or distribute certain drugs (Controlled Substances Act, 21 U.S.C. § 801, et seq. See § 844). All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. §§811, 812. Marijuana is classified as a Schedule I controlled substance, §812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment.

Applicant admitted using marijuana while on leave from the Air Force in May 2018, and testing positive in a urinalysis when he returned to duty, which led to an Article 15 and eventual discharge from the Air Force. AG ¶¶ 25(a), 25(b), and 25(f) apply.

I have considered the mitigating conditions under AG ¶ 26. 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; and

(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 is grounds for revocation of national security eligibility.

AG ¶ 26(a) applies. Applicant used marijuana a few times over a weeklong period, more than six years ago. He did not use marijuana before or after that time. At that time, he had just returned from a combat deployment where he experienced trauma and had post-traumatic stress. He admitted that he was inappropriately self-medicating and made a mistake. He attended substance abuse training at the Air Force ADAPT program and marijuana use has not recurred. This no longer casts doubt on his current reliability, trustworthiness, or good judgment.

AG ¶ 26(b) applies. Applicant provided sufficient evidence to find that he disassociated from drug using associates and contacts, and changed the environment where marijuana was used. He provided a signed statement to abstain from all drug involvement and substance misuse.

Guideline E, Personal Conduct

AG ¶ 15 details the personal conduct security concern:

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...

I have considered the disqualifying conditions under AG ¶ 16 and the following is 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.

The SOR cross-alleges the Guideline H allegations in SOR ¶¶ 1.a and 1.b under Guideline E in SOR ¶ 3.a. These allegations are considered under AG ¶¶ 16(c).

I have considered the mitigating conditions under AG ¶ 17. The following is potentially applicable:

(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; and

AG ¶ 17(c) applies. Applicant used marijuana a few times over a weeklong period, more than six years ago. He did not use marijuana before or after that time. He had just returned from a combat deployment where he experienced trauma and had post-traumatic stress. He admitted that he was inappropriately self-medicating and made a mistake. He attended substance abuse training at the Air Force ADAPT program and marijuana use has not recurred. This no longer casts doubt on his current reliability, trustworthiness, or good judgment.

Guideline I, Psychological Conditions

AG ¶ 27 articulates the security concern for psychological conditions:

Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (e.g., clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline and an opinion, including prognosis, should be sought. No negative inference concerning the standards in this guideline may be raised solely on the basis of mental health counseling.

I have considered the disqualifying conditions for psychological conditions under AG ¶ 28 and the following are potentially applicable in this case:

(a) behavior that casts doubt on an individual's judgment, stability, reliability, or trustworthiness, not covered under any other guideline and that may

indicate an emotional, mental, or personality condition, including, but not limited to, irresponsible, violent, self-harm, suicidal, paranoid, manipulative, impulsive, chronic lying, deceitful, exploitative, or bizarre behaviors;

(b) an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness;

(c) voluntary or involuntary inpatient hospitalization; and

(d) failure to follow a prescribed treatment plan related to a diagnosed psychological/psychiatric condition that may impair judgment, stability, reliability, or trustworthiness, including, but not limited to, failure to take prescribed medication or failure to attend required counseling sessions.

The record establishes the concern that Applicant's behavior and diagnosed conditions could impair his judgment, stability, reliability, and trustworthiness. He was directed to obtain mental health treatment and was involuntarily hospitalized. At times, he has failed to follow a prescribed treatment plan or continue with any mental health treatment. He continues to work on his mental health issues. AG ¶ 28(a), (b), (c), and (d) apply.

I have considered the mitigating conditions under AG ¶ 29. The following are potentially applicable:

(a) the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;

(b) the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional;

(c) recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by, the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation;

(d) the past psychological/psychiatric condition was temporary, the situation has been resolved, and the individual no longer shows indications of emotional instability; and

(e) there is no indication of a current problem.

AG ¶¶ 29(a), (b), (c), (d), and (e) do not apply. Applicant did not provide sufficient evidence to show that his condition is under control or in remission, or that he is now stable. His counselor provided a short letter praising his efforts in his mental health treatment plan, but she did not provide a formal prognosis. Applicant did not provide sufficient evidence to rebut the Government's evidence regarding his mental health condition. There is sufficient evidence to find that a mental health concern still exists.

Applicant has skills and experience in an area of national security that is important to the government. His desire to continue to serve in a civilian role is admirable. The record shows that Applicant is working to establish stability and find the best methods to manage his mental health. Once his condition is managed and he has a track record of stability, he will be eligible to reapply for a clearance.

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 considered his military service, his service to the government as a civilian contractor, and his character letters. I have incorporated my comments under Guidelines H, E, and I in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility for a security clearance. He did not provide sufficient evidence to mitigate the security concerns under Guideline I. The security concerns under Guidelines H and E are mitigated.

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.b:	For Applicant
Paragraph 2, Guideline I:	AGAINST APPLICANT
Subparagraphs 2.a-2.c, 2.e:	Against Applicant
Subparagraph 2.d:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Ross D. Hyams
Administrative Judge