



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



In the matter of:)
)
) ISCR Case No. 17-00530¹
)
Applicant for Security Clearance)

Appearances

For Government: Robert Blazewick, Esq., Department Counsel
For Applicant: *Pro se*
11/03/2017

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H (drug involvement and substance misuse), but he mitigated the concern under Guideline E (personal conduct). Applicant's eligibility for access to classified information is denied.

Statement of the Case

On April 25, 2017, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. Applicant timely answered the SOR 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) on June 14, 2017. Applicant received the FORM on June 22, 2017, and had 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the Government's evidence, and he provided no response to the FORM. The Government's evidence, identified as Items 1 through 4, is admitted without objection. The case was assigned to me on October 20, 2017.

¹ Initially, the SOR language referred to an ADP case. However, after investigation, it was found to be an ISCR case. Department Counsel amended the SOR to reflect the fact that the case is an ISCR decision.

Findings of Fact²

Applicant is 25 years old. He graduated from high school in 2010 and obtained his undergraduate degree in 2014. He has been employed as a staff engineer by a federal contractor since May 2014. He reports inactive Air Force Reserve service from August 2010 to October 2010, and he received an honorable discharge. He has never married. Applicant has held a previous security clearance since August 2014.

On January 8, 2015, Applicant completed a Security Clearance Application (SCA),³ but did not disclose in section 24 (alcohol treatment) his treatment for alcohol poisoning on New Year's Eve 2012 in an emergency room. He disclosed during his 2016 interview that he used marijuana since completing his SCA, and in the future he may use marijuana if he went to a concert or special event. He stated "I went to a concert and didn't think about the clearance, and the second time was with his girlfriend and I was not thinking about it."⁴ In his Answer to the SOR dated May 3, 2017, Applicant admitted to the allegations in SOR ¶¶ 1.a-b.

Applicant denied allegations under Guideline E (personal conduct) in SOR ¶¶ 2.a, c, and d, with explanations. He denied falsifying his SCA because he misinterpreted the question in section 24 (counseling for alcohol), and denied that he drinks to intoxication once a month. He drinks maybe twice weekly. He stated that maybe he drinks to intoxication once a month and on such occasions does not allow himself to drive. He admitted that he was treated for alcohol poisoning once on New Year's Eve in 2012. Applicant denies associating with individuals who use illegal substances. He had a friend in college, but he no longer associates with that person. His girlfriend lives in an area where marijuana is legal. He has never been diagnosed with alcohol abuse or dependence.

Policies

DOD took action in this case 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 (AGs) implemented by DOD on September 1, 2006.

² Unless stated otherwise, the source of the information in this section is Applicant's January 8, 2015 Security Clearance Application (SCA) (Item 3) and his summary of clearance interview by a background investigator dated October-December 2016 (Item 4).

³ Item 3.

⁴ Item 4.

On December 10, 2016, the Director of National Intelligence signed Security Executive Agent Directive 4 (SEAD 4), implementing new AGs effective within the DOD on June 8, 2017.⁵ Accordingly, I have applied the June 8, 2017 AGs in this decision.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, 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(a), the adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is 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. Under Directive ¶ E3.1.15, 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.

⁵ Although I have decided this case under the adjudicative guidelines (AG) effective June 8, 2017, I also considered the case under the former AG effective on September 1, 2006, and my decision would be the same under either AG.

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 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;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used marijuana while holding a security clearance. The latest incident was in 2016. He stated that he may use marijuana in the future if attending a concert. He stated that he did not give his security clearance a thought at the time he was using marijuana. In his answer to the SOR, he stated that he would abstain in the future.

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.

Applicant admits it was a mistake to use marijuana while holding a security clearance. He fully disclosed the incidents during his investigative interview. He said he might use again, but also said that he will pledge to abstain from ever using it again. He has not provided evidence that would allow mitigation under any of the mitigating conditions at this time. His marijuana use is too recent, and he seemed uncertain as to future use. He acknowledged not associating with an old college friend, but his girlfriend smokes marijuana. Applicant knew that he held a security clearance and the impact that use of an illegal drug would have on such a clearance. He did not provide any letter of intent to abstain in the future. It is insufficient to mitigate the well-established pattern of illegal-drug use, particularly while possessing a security clearance. His conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(b) is partially applicable.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

The 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. The following normally will result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing

security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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 information. This includes but is not limited to, considerations of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized - - release of sensitive corporate or government protected information;
- (2) any disruptive, violent, or other inappropriate behavior;
- (3) a pattern of dishonesty or rule violations;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

- (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing;
- (2) while in another country, engaging in any activity that is illegal in that country; and
- (3) while in another country, engaging in any activity that, while legal there, is illegal in the United States.

Applicant denied that he deliberately falsified his SCA by not responding "yes" to section 24 receiving treatment for alcohol use. His explanation was credible as he had too much to drink on New Year's Eve, 2012, and he was sent to the hospital for alcohol poisoning. He misinterpreted the question as meaning a referral for alcohol rehabilitation

on a long term basis. He has no diagnosis for alcohol abuse and the poisoning that occurred in 2012 was an isolated incident. There is no proof that he drinks to intoxication every month and he defined it as if he feels he would not allow himself to drive. During his interview he was honestly addressing questions that he was presented with and he no longer associates with his old college friend who used marijuana. The final allegations under personal conduct are the same as the ones alleged under drug or substance abuse. AG ¶ 16(a) and (e) could arguably apply and the focus shifts to a determination of which, if any of the mitigating conditions apply.

Under AG ¶ 17, conditions that could potentially mitigate security concerns include:

(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.

My analysis above under administrative guideline H is the same under this administrative guideline E, and are herein incorporated by reference. Applicant admitted to his use of marijuana while holding a security clearance. As to not reporting the 2012 alcohol poisoning, it is an isolated incident and Applicant has no alcohol diagnosis. I do not find that he falsified his SCA and that he has mitigated the personal conduct concerns under SOR 2.a. AG ¶¶ 17(c),(d) and (e) are enough to overcome Applicant's alleged alcohol incidents in SOR 2.b and 2.c. He has not mitigated the drug usage while holding a security clearance under Guideline H, but he has mitigated the falsification and allegations about alcohol. SOR ¶ 2.e cross-alleges under the personal conduct guideline the same conduct alleged under the drug involvement guideline. All of Applicant's conduct causing a security concern in SOR ¶ 2.e is explicitly covered under Guideline H, and that conduct is sufficient to warrant revocation of his security clearance under Guideline H. AG ¶¶ 16(c) and 16(d) do not apply. Applicant's involvement with marijuana affects his professional and community standing. However, this conduct does not create a vulnerability to exploitation, manipulation, or duress because security officials are aware of it. Guidelines H and E address identical issues involving judgment, trustworthiness, and reliability. Guideline E concerns in SOR 2.e constitute a duplication of the concerns under Guideline H, and accordingly personal conduct security concerns in SOR 2.e are found for Applicant.

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 Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines. Notably, Applicant has worked for a federal contractor directly supporting DOD's mission and he held a security clearance for a number of years. He admitted poor judgment for the use of Marijuana in 2016, while holding a security clearance. He does not associate with an old college friend who used marijuana, however he associates with his girlfriend, a marijuana user. He did not show good judgment.

Applicant did not intentionally falsify his 2015 SCA and the alcohol poisoning event is isolated and not recent. He disclosed his alcohol use to the investigator. His explanation for not answering "yes" to alcohol counseling is reasonable. I find insufficient evidence to find against Applicant for personal conduct. However, as to guideline H, there has not been sufficient time to mitigate the incidents and Applicant has not shown firm resolve not to use marijuana in the future. His girlfriend still smokes marijuana. There is insufficient evidence to conclude that Applicant has acknowledged the egregiousness of his drug involvement while holding a security clearance. He has not met his burden of persuasion. The record evidence leaves me with serious questions and doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under Guideline H.

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:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a. through 2e:	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 a security clearance. Eligibility for access to classified information is denied.

Noreen A. Lynch
Administrative Judge