



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



In the matter of:)
)
) ISCR Case No. 17-01811
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

08/20/2018

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant mitigated the security concerns under drug involvement and substance misuse, criminal conduct, and personal conduct. Continued eligibility for access to classified information is granted.

Statement of the Case

On June 3, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under H (drug involvement and substance misuse), J (criminal conduct), and E (personal conduct). The action was taken under Executive Order (Exec. Or.) 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) implemented by DOD on June 8, 2017.¹

¹ However, I also considered this case under the previous AG implemented on September 1, 2006, and my conclusions are the same using either set of AG.

Applicant responded to the SOR on June 16, 2017, and requested a hearing. The case was assigned to me on February 14, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 26, 2018, scheduling the hearing for April 10, 2018. I convened the hearing as scheduled.

I marked the Government's discovery letter, its exhibit list, and Applicant's exhibit list as Hearing Exhibits (HE) I, II, and III. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through P, which were admitted in evidence without objection. Without objection, I *sua sponte* amended SOR ¶ 1.b, pursuant to ¶ E3.1.17 of the Directive, to replace "2.a" with "1.a."²

At Applicant's request and with no objection from Department Counsel (DC), I left the record open until April 24, 2018. Applicant timely provided additional documentation, which I marked as AE Q and admitted in evidence without objection. I appended to the record, collectively as HE IV, Applicant's list of supplemental exhibits and an email from DC indicating she did not have any objection. DOHA received the hearing transcript (Tr.) on April 17, 2018.

Findings of Fact

In response to the SOR, Applicant admitted all of the allegations. At hearing, he denied intentionally falsifying his 2005 security clearance application (SCA) (SOR ¶¶ 3.a and 3.b). He is 56 years old. As of the date of the hearing, he had never been married and he did not have any children. He lived with his elderly father, for whom he provided care.³

Applicant earned a bachelor's degree in information technology networking in 2008. He has worked for various defense contractors since 1994. He has worked in information technology customer service for his current employer, a defense contractor, since 2005. He has held a DOD security clearance since 1996, and he requires a clearance for his job.⁴

Applicant used marijuana in 1980 and in July 2008 (SOR ¶ 1.a). He experimented with it as a teenager when he was in high school. He stopped using it around the time he graduated. He then used it again in 2008, when he held a security clearance (SOR ¶ 1.b). He was at a friend's 4th of July house party. He had consumed alcohol. An individual at the party offered him marijuana, and he was "[d]umb enough to try it." He acknowledged that he exercised poor judgment in doing so, because he knew he held a security clearance and that illegal drug use is prohibited while holding one. He testified that "[t]he whole incident and evening is the single worst, dumbest thing I've ever done in my life. I just regret the whole thing to be honest." Since the party, he had

² Tr. at 62-63.

³ Response to the SOR; Tr. at 19-20, 28-30, 57; GE 1, 2; AE G, P.

⁴ Tr. at 19-21, 30-31, 37; GE 1, 2, 4; AE A, B, C, G.

seen the individual who gave him the marijuana, but the individual was not a friend and had not again offered him marijuana. He has not used marijuana since 2008. He does not intend to use marijuana in the future. His friends and family are aware of his past marijuana use.⁵

In June 1986, Applicant was arrested and charged with driving under the influence (DUI) (SOR ¶ 2.a). He understood that he received probation before judgment (PBJ) and he was not convicted of DUI. He was not court-ordered to fulfill any requirements as part of the PBJ.⁶

In July 2008, after the party discussed above, Applicant was arrested and charged with DUI, possession of a deadly concealed weapon, driving while alcohol impaired, possession of marijuana, and possession of drug paraphernalia (SOR ¶ 2.b). He possessed a small amount of marijuana and a pipe, given to him by the individual at the party. He testified that he did not know what his intent was in taking the marijuana and pipe with him. He might have intended to take the marijuana home and use it on his own time. He acknowledged that he exercised poor judgment in doing so.⁷

Applicant pled guilty to DUI. The deadly weapon charge, which stemmed from the police finding a paper weight in his car under a seat, was dismissed. He testified that he could not recall the outcome of the drug-related charges. He listed on his February 2016 SCA that he received PBJ for the possession of drug paraphernalia charge and probation for the possession of marijuana charge. He was sentenced to probation for three years. The first year was supervised and the latter two years were unsupervised. He was subjected to and passed several drug tests during his first year of probation. He was also ordered to complete an alcohol class. He completed probation in 2011. He has not had any arrests since.⁸

At the time of his arrest, he was unsure whether he was required to report any criminal incidents to his facility security officer (FSO) or his employer. As of the date of the hearing, he understood that he had to report his 2008 arrest and conviction to his FSO. He had not yet done so because he was ashamed and afraid of losing his job. By the close of the record, he provided a letter from his FSO who stated that Applicant had reported his 2008 DUI. He also provided a letter from his manager who stated that he was aware of the allegations in the SOR. His family was aware of his 2008 DUI.⁹

Applicant testified that he rarely consumes alcohol. He consumed a beer on occasion, and last did so several months before the date of the hearing. He is subject to random drug testing at work, and he was subjected to one for the first time in August

⁵ Tr. at 22-26, 34-44, 49-51, 58-59; GE 1.

⁶ Tr. at 26-28, 34-38, 42-44; GE 1.

⁷ Tr. at 26-28, 34-38, 42-44, 53-61; GE 1, 3.

⁸ Tr. at 26-28, 34-38, 42-44, 53-61; GE 1, 3.

⁹ Tr. at 26-28, 34-38, 42-44, 53-61; GE 1, 3; AE Q.

2017. At his attorney's suggestion, he voluntarily underwent three drug tests, two in October 2017 and one in March 2018. He tested negative for drugs, to include cannabinoids. He signed a statement of intent to never use illegal drugs in the future, and that any violation may constitute grounds for revocation of his security clearance.¹⁰

Applicant denied intentionally falsifying his response to Section 23 of his October 2005 SCA, which inquired whether he had ever been charged with or convicted of any alcohol or drug-related offenses (SOR ¶ 3.a). He indicated that he did not list his 1986 DUI because he did not believe the PBJ that he received for the DUI fell within the scope of the question. He acknowledged that he answered the question incorrectly. He disclosed his 1986 DUI on his 2016 SCA.¹¹

Applicant also denied intentionally falsifying his response to sections 24a and 24b of his 2005 SCA (SOR ¶ 3.b). Section 24a inquired whether he had illegally used any controlled substance since age 16 or within seven years before the date of the SCA, whichever was shorter. Section 24b inquired whether he had ever illegally used a controlled substance while possessing a security clearance. He properly answered both sections. His high-school use of marijuana did not fall within the scope of section 24a. His use of marijuana in 2008, while holding a security clearance, did not occur until 2008, three years after the SCA. He disclosed his 1980 and 2008 usage of marijuana in his 2016 SCA.¹²

Applicant has not had any security violations. His character references included his manager, a *de facto* supervisor, coworkers, former coworkers, and friends. A number of them, to include his manager, indicated an awareness of the SOR allegations. Applicant testified that they were aware of his 2008 arrest and conviction. The references described him as having a positive attitude, and attested to his honesty, trustworthiness, and reliability.¹³

Policies

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

¹⁰ Tr. at 21-22, 33, 37-38, 53-54; AE E, F, N.

¹¹ Response to the SOR; Tr. at 28-30; GE 1, 2.

¹² Tr. at 28-30, 44-53; GE 1, 2.

¹³ Tr. at 30-33, 55-61; AE D, H, I, J, K, L, M, O, Q.

overarching 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 ¶ 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 Exec. Or. 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* Exec. Or. 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 used marijuana in 1980 and 2008. He was arrested and charged with possession of marijuana and drug paraphernalia in 2008, as he possessed marijuana and a pipe given to him by the individual at the July 4th party. He held a security clearance when he used marijuana in 2008, and he knew that illegal drug use is prohibited while holding a clearance. AG ¶¶ 25(a), 25(c) and 25(f) are established.

Conditions that could mitigate the drug involvement and substance misuse security concerns are provided 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;
- (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's use of marijuana occurred in high school and on one occasion, in 2008, when he made an extremely poor decision and used marijuana while he held a clearance. He disclosed his marijuana use on his 2016 SCA. He was also forthcoming about it at the hearing. Though he had seen the individual who provided him with the marijuana since the July 4, 2008 party, he did not consider the individual a friend. He

has not used any illegal drugs since. He signed a statement of intent to abstain from all drug involvement and substance misuse. I find that his behavior happened so long ago and was isolated. It does not continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 26(a) and 26(b) apply.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant was arrested and charged with DUI in 1986, and he received PBJ. He was arrested in 2008 and charged with DUI, deadly concealed weapon, driving while alcohol impaired, possession of marijuana, and possession of drug paraphernalia. He pled guilty to DUI and acknowledged in his 2016 SCA that he received probation for the drug charges. AG ¶ 31(b) is established.

I have considered all of the mitigating conditions under AG ¶ 32 and considered the following relevant:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant's criminal conduct occurred in 1986 and 2008. He completed his probation for his 2008 conviction in 2011. He has not had any arrests since. I find that so much time has elapsed since his criminal conduct occurred that it does not cast doubt on his current reliability, trustworthiness, and good judgment. Since 2005, he has established a good employment record with his current defense contractor. AG ¶¶ 32(a) and 32(d) apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant:

(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.

Applicant denied intentionally falsifying his response to Section 23 of his 2005 SCA, by failing to list his 1986 DUI. I found credible his testimony that he did not believe the PBJ that he received for this DUI fell within the scope of the question. Applicant properly answered both sections 24a and 24b of his 2005 SCA, as his high-school use of marijuana did not fall within the scope of section 24a and his 2008 use of marijuana did not occur until three years after the SCA. He disclosed his 1986 DUI, as well as his 1980 and 2008 usage of marijuana, in his 2016 SCA. I find that AG ¶ 16(a) is not established.

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, J, and E in my whole-person analysis.

Applicant credibly testified at the hearing. He has taken responsibility for his past drug involvement, to include his one-time use of marijuana in 2008 while holding a clearance. He incorrectly failed to disclose his 1986 DUI on his 2005 SCA because he believed that he did not need to do so since he received PBJ. He was candid, sincere, and remorseful.

Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the security concerns under drug involvement and substance misuse, criminal conduct, and 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 H: Subparagraphs 1.a - 1.b:	FOR APPLICANT For Applicant
Paragraph 2, Guideline J: Subparagraphs 2.a - 2.b:	FOR APPLICANT For Applicant
Paragraph 3, Guideline E: Subparagraphs 3.a - 3.b:	FOR APPLICANT For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Continued eligibility for access to classified information is granted.

Candace Le'i Garcia
Administrative Judge