



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 17-01813
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Bryan J. Olmos, Esq., Department Counsel
For Applicant: Jacob T. Ranish, Esq.

06/29/2018

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant presented sufficient evidence to mitigate security concerns raised by his past alcohol-related problems. However, he did not present sufficient evidence to mitigate security concerns raised by his drug use while holding a security clearance and lack of candor about it during a past background investigation. Clearance is denied.

Statement of the Case

On June 22, 2017, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) alleging security concerns under the alcohol consumption, criminal conduct, and personal conduct guidelines. Applicant answered the SOR and requested a hearing. Applicant's hearing was originally scheduled for March 29, 2018 and then for May 10, 2018, but both times the hearing was continued at Applicant's request. On June 12, 2018, the hearing was held.¹ Applicant testified at the hearing and the exhibits offered by the parties were admitted into the administrative record without objection.² The transcript of the proceeding was received on June 25, 2018.

¹ Appellate Exhibits I – III (scheduling correspondence).

² Government Exhibits 1 – 6; Applicant's Exhibits A – O.

Findings of Fact

Applicant, 30, was hired by his current employer, a company partially owned by his father, after graduating from high school in 2007. He submitted his initial security clearance application in October 2007, and shortly thereafter was granted a security clearance. He earned a bachelor's degree in business management in 2013. He currently serves as a project manager on a number of federal government contracts. He is well respected by co-workers and friends for his honesty, reliability, and dependability.³

Alcohol-Related Problems

Applicant abused alcohol in his late teens and early 20s. He was involved in three alcohol-related criminal incidents between 2008 and 2010, resulting in a reckless driving conviction following the third incident in July 2010. Applicant was questioned by another federal government agency about all three incidents and the charges stemming from a 2008 incident involving his ex-girlfriend.⁴

In 2015, after breaking up with his girlfriend, Applicant went out drinking with friends. He was later stopped by police and arrested for driving while intoxicated (DWI). He reported the arrest and subsequent DWI conviction to his facility security officer (FSO). He completed the terms of his sentence, including obtaining substance abuse education and counseling.⁵

In 2017, Applicant voluntarily submitted to an alcohol evaluation by a licensed clinical social worker (LCSW), who is also a licensed substance abuse professional and certified substance abuse counselor. The LCSW determined that Applicant does not have a substance abuse disorder. Specifically, the LCSW diagnosed Applicant with "no use disorder." The LCSW did not see a need for further treatment.⁶ Applicant testified about the significant lifestyle changes he has made since the 2015 DWI, including maintaining a health-conscious lifestyle.⁷

Marijuana Involvement

Applicant used marijuana between April 2008 and September 2009 while holding a security clearance.⁸ His employer has a policy prohibiting employees from using illegal drugs.⁹ Applicant did not self-report his marijuana use to his FSO, which he acknowledges

³ Transcript (Tr.) 13-14; Exhibits 1, 3; Exhibits A, B.

⁴ Tr. 15-22, 30-33, 35, 44; Exhibits 4, 6; Exhibits C – E, J, L, N.

⁵ Tr. 15-22; Exhibits 3 – 5; Exhibits C – E, N.

⁶ Exhibit H.

⁷ Tr. 14-15, 22-25.

⁸ Tr. 28-29, 36.

⁹ Tr. 37.

he should have done.¹⁰ He reported the marijuana use on his 2016 security clearance application (SCA).¹¹ He submitted a written promise not to use marijuana or any other illegal drugs in the future on condition of revocation of his clearance.¹²

Applicant was asked on a March 2010 questionnaire for public trust position whether, in the past year, he had used illegal drugs, to include marijuana. Applicant falsely responded “No.”¹³ Applicant claims that he did not fill out and sign the 2010 questionnaire. He states that his former FSO completed and submitted the 2010 questionnaire without his prior knowledge.¹⁴ When questioned in 2010 by the other federal government agency about the matters he did not report on the questionnaire, Applicant provided a different explanation for omitting the information.¹⁵

At hearing, Applicant did not adequately explain why, if someone else supposedly completed his 2010 questionnaire using the information he previously provided on his 2007 SCA, the contact information for a listed reference is different on both forms. He acknowledges the listed reference is his best friend's mother and she has moved twice since he submitted his 2007 SCA.¹⁶

In 2010, Applicant was questioned by another federal government agency about not disclosing on the 2010 questionnaire his entire criminal record, including the criminal charges stemming from the 2008 incident involving his ex-girlfriend. He claims the other agency only wanted to know about certain specific charges that he omitted from the questionnaire. Applicant acknowledges that when he was detained by police in 2008 for allegedly harassing his former girlfriend, the police searched his car and found marijuana. He was then charged with stalking, using profane language, and marijuana possession. He did not report the marijuana possession charge in response to relevant questions on the 2010 questionnaire. He also did not report the marijuana possession charge and his use of marijuana from 2008 through 2009 when questioned by the other agency in 2010. He did not report his past marijuana involvement to the Government until submitting his 2016 SCA.¹⁷

¹⁰ Tr. 37-38.

¹¹ Tr. 34, 37; Exhibit 3.

¹² Tr. 30; Exhibit M.

¹³ Exhibit 2 at 19.

¹⁴ Tr. 25-34, 46-65; *but* see Answer (Applicant states he discussed information reported on the questionnaire with “the administrative office” before the questionnaire was submitted).

¹⁵ Exhibit N (Applicant's December 10, 2010 letter to the other government agency explaining omissions).

¹⁶ Tr. 46-65.

¹⁷ Tr. 30, 38-65; Exhibits 2, 3; Exhibits K, N.

Law, Policies, and Regulations

This case is decided under Executive Order (E.O.) 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 National Security Adjudicative Guidelines (AG), which became effective on June 8, 2017.

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information “upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges must remain fair and impartial, and carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In evaluating the evidence, a judge applies a “substantial evidence” standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1.¹⁸

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). See also Security Executive Agent Directive 4 (SEAD 4), ¶ E.4. Additionally,

¹⁸ However, a judge’s mere disbelief of an applicant’s testimony or statements, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on matters not alleged in an SOR, unless an applicant is provided adequate notice an issue raises a security concern. ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Non-alleged issues can only be used for specific limited purposes, such as assessing mitigation and credibility. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

the Supreme Court has held that responsible officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an 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.

Analysis

Guideline G (Alcohol Consumption)

A history of alcohol abuse raises a serious security concern, which is explained at AG ¶ 21:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

In assessing Applicant's case, I considered the disqualifying and mitigating conditions under Guideline G, including:

AG ¶ 22(a): alcohol-related incidents away from work, such as driving while under the influence, . . . regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder;

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment . . . ;

AG ¶ 23(a): so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment;

AG ¶ 23(b): the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations; and

AG ¶ 23(d): the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear

and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Security clearance assessments about a person require a judge to closely examine the person's conduct and circumstances, both past and present. Here, Applicant's history of alcohol-related problems, which have resulted in citations, arrests, and criminal charges, is well documented. AG ¶¶ 22(a) and 22(c) apply. However, Applicant provided sufficient evidence to mitigate the security concerns raised by his past alcohol problems. Following the 2015 DWI, Applicant committed himself to a different path and lifestyle. The recent substance abuse evaluation reflects the favorable changes Applicant has made over the past four years. Accordingly, in light of this evidence, I find that AG ¶¶ 23(a), 23(b), and 23(d) apply. Applicant met his burden of proof and persuasion in establishing sufficient reform and rehabilitation to mitigate the security concerns raised by his past alcohol problems. The Guideline G allegations are decided in Applicant's favor.

Guideline J, Criminal Conduct

Applicant's past alcohol-related criminal charges and the 2008 charges related to his harassment of his former girlfriend raise a security concern. *See generally* AG ¶ 30. Applicant demonstrated sufficient reform and rehabilitation to mitigate concerns raised by these past incidents, which for the most part occurred when Applicant was in his late teens and early 20s. The Guideline J allegations are decided in Applicant's favor.

Guideline E, Personal Conduct

Applicant's drug use while holding a security clearance and failure to disclose it on the 2010 questionnaire raise the personal conduct security concern, which is explained at 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.

In assessing Applicant's case, I considered the disqualifying and mitigating conditions under Guideline E, including:

AG ¶ 16(a): deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . or similar form used to conduct investigations . . . determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that . . . 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;

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(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.

Applicant's illegal drug use while holding a security clearance, as alleged in SOR 3.b, raises a serious security concern.¹⁹ Although Applicant's drug use occurred nearly 10 years ago while he was attending college, his dishonesty about his marijuana use during a previous background investigation, failure to self-report it until relatively recently,²⁰ and use of the drug contrary to his employer's policy²¹ undercuts the mitigating value of the passage of time and written promise to refrain from engaging in such conduct. Applicant failed to meet his burden of proof and persuasion in mitigating security concerns raised by his past drug use while holding a security clearance.²² AG ¶ 16(c) applies to Applicant's marijuana use while holding a security clearance. None of the mitigating conditions fully apply.

Applicant's failure to disclose his marijuana use on the 2010 public trust questionnaire, as alleged in SOR 3.d, also raises a serious security concern.²³ The security clearance process relies on the honesty and candor of all applicants. It begins with the answers provided in the clearance application and continues throughout the security clearance process. However, the omission of material information standing alone is not enough to establish that an applicant committed a deliberate falsification.

¹⁹ ISCR Case No. 16-03451 (App. Bd. Dec. 26, 2017) ("The purpose of a clearance adjudication is to evaluate an applicant's judgment and reliability. An applicant who has demonstrated an unwillingness to abide by rules and regulations regarding illegal drugs may be similarly unwilling to follow rules governing the protection of classified information.")

²⁰ ISCR Case No. 12-04813 at 4 (App. Bd. July 31, 2015) ("Willingness to advise an employer of one's own security significant conduct or circumstances is a signal responsibility of those with access to classified information. Failure to comply with his duty raises concerns about the person's fitness for a clearance.")

²¹ ISCR Case No. 07-00852 at 4 (App. Bd. May 27, 2008) ("Applicant having used marijuana despite his employer's policy against such activity, and his use after submitting his SCA, raise serious questions about his judgment and, therefore, his fitness for a clearance.")

²² See ISCR Case No. 13-01281 (App. Bd. Aug. 4, 2014) (notwithstanding difficult circumstances applicant was experiencing that contributed to his marijuana use marijuana and that such use was limited to five occasions between 2009 and 2010, adverse decision affirmed because applicant used marijuana while holding a security clearance). See also ISCR Case No. 16-03460 (App. Bd. May 24, 2018) (favorable decision involving young person who used marijuana while holding clearance reversed due in large measure to heightened security concerns raised by such conduct).

²³ ISCR Case No. 09-01652 at 7 (App. Bd. Aug. 8, 2011) (falsification is "an offense that strikes at the heart of the security clearance process.") See also SEAD-4, Appendix A, ¶ 2(i) (falsifications and misrepresentations during the investigative or adjudicative stages of the clearance process raise heightened concerns about a person's judgment, reliability, and trustworthiness).

Instead, in assessing intent, an administrative judge must examine all the relevant facts and circumstances surrounding the omission, including a person's age, level of education, work experience, and familiarity (or lack thereof) with the security clearance process. An omission is not deliberate if the person genuinely forgot the information, sincerely was unaware of the information, inadvertently overlooked or misunderstood the question, or earnestly thought the information did not need to be reported.²⁴ If after considering all the evidence, a judge finds that an alleged falsification was sufficiently proven then a grave concern about a person's suitability arises.

Here, Applicant tries to blame his former FSO for his failure to list his marijuana use on the 2010 questionnaire. He provided no credible evidence to support his position.²⁵ When questioned in 2010 by the other federal government agency about the matters he failed to report on the questionnaire, Applicant gave a different explanation than he does now for his omissions.²⁶ He also deliberately held back pertinent information about his illegal drug involvement when questioned by the other agency. Notably, he did not report his 2008 marijuana possession charge despite being asked by the other agency about the incident involving his ex-girlfriend that led to the discovery of the marijuana and the possession charge. Although eight years have passed since the falsification, Applicant's failure to take responsibility for it and his attempt now to blame someone else for his dishonesty undercuts the mitigating value of the passage of time. Also, in light of Applicant's continuing failure to take responsibility for his past conduct, his decision to finally reveal the information about his drug involvement on the 2016 SCA – years after the underlying conduct occurred – does not mitigate the security concerns at issue. AG ¶ 16(a) applies to Applicant's deliberate falsification of his 2010 questionnaire for public trust position. None of the mitigating conditions apply.²⁷

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. AG ¶ 2. An administrative judge should consider the whole-person factors listed at AG ¶¶ 2(d) and 2(f). I hereby incorporate my above analysis and highlight some additional whole-person factors.

²⁴ See *generally* ISCR Case No. 02-12586 (App. Bd. Jan. 25, 2005).

²⁵ I specifically considered Exhibit O. Although Applicant's signature on Exhibit 1 appears different than his signatures on the forms in Exhibit O, this evidence is not sufficient to meet Applicant's burden of proof and persuasion. See *generally* ISCR Case No. 10-08550 at 3 (App. Bd. March 20, 2012) ("Given Applicant's high level of education, the clarity of the question at issue here, and the absence of evidence corroborating Applicant's claim to have been acting on the advice of his FSO, the Judge's findings concerning the [deliberate nature of the] omissions are sustainable.")

²⁶ ISCR Case No. 12-01578 at 4 (App. Bd. Sep. 24, 2014) (In affirming judge's finding of deliberate falsification, the Board stated "A reasonable person could conclude that [applicant's] hearing testimony was a recent effort to minimize the gravity of his conduct.")

²⁷ The allegation in SOR 3.a is decided for Applicant for similar reasons noted under Guidelines G and J. The falsification allegation in SOR 3.c is decided for Applicant because it adds nothing from a security clearance suitability standpoint beyond that raised by the falsification allegation in SOR 3.d.

Applicant appears to have matured in some respects since the alcohol and other alleged criminal incidents. He is well respected by his coworkers and others. However, this and the other favorable record evidence are insufficient to mitigate the security concerns raised by his marijuana use while holding a clearance and dishonesty about his drug involvement during a past background investigation. Overall, the record evidence leaves me with doubts as to Applicant's present eligibility for a security clearance.²⁸

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 G:	FOR APPLICANT
Subparagraphs 1.a – 1.d:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraphs 2.a – 2.b:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a and 3.c:	For Applicant
Subparagraphs 3.b and 3.d:	Against Applicant

Conclusion

In light of the record evidence, it is not clearly consistent with the interests of national security to grant Applicant initial or continued eligibility for access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge

²⁸ I considered the exceptions listed in SEAD 4, Appendix C, but Applicant did not provide sufficient evidence to warrant application of the listed exceptions.