



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



In the matter of:)
)
) ISCR Case No. 17-04198
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: Ryan C. Nerney, Esq.

09/28/2018

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the security concerns under Guidelines E (personal conduct) and H (drug involvement and substance misuse). Eligibility for access to classified information is denied.

Statement of the Case

On March 7, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E and H. Applicant responded to the SOR on April 9, 2018, and requested a hearing before an administrative judge.

The case was assigned to me on May 16, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 22, 2018, scheduling the hearing for July 11, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified, called two witnesses, and submitted Applicant's Exhibits (AE) A through K, which were admitted without objection. The record was held open for Applicant to

submit additional information. He submitted AE L through N, which were admitted without objection.

Findings of Fact

Applicant is a 32-year-old employee of a defense contractor. He has worked for his current employer since March 2016. He served on active duty in the U.S. military from 2004 until he was honorably discharged in 2011. He seeks to retain a security clearance, which he has held with some breaks since 2004. He has a bachelor's degree, which was awarded in 2014, and a master's degree, which was awarded in 2016. He has never married, and he has no children.¹

Applicant smoked marijuana regularly before he joined the military. He smoked marijuana once while he was in the military in 2005. He did not use marijuana again while in the military. He resumed smoking marijuana after his discharge, including while holding a security clearance.²

Applicant reported his marijuana use on Questionnaires for National Security Positions (SF 86), which he submitted in March and August 2014. He wrote that between December 2011 and August 2013 he used marijuana "[n]o more than 10 times total." He wrote that he did not intend to use marijuana in the future, noting: "[d]rug use is not conducive to government or clearance employment. My ideal job and clearance level do not tolerate further use." Applicant's marijuana use included while he was working in Afghanistan and when he was in Amsterdam. He reiterated his intent to refrain from illegal drug use during background interviews in May and October 2014.³

In November 2015, Applicant ate food (marijuana edibles) that he knew contained marijuana. He smoked marijuana in January 2016. He reported his marijuana use on his April 2016 SF 86, and he discussed it during his background interview in March 2017. He told the investigator that he liked marijuana more than alcohol, and he would have continued smoking marijuana if it was permitted at his current job and he did not have a security clearance.⁴

Applicant has not used marijuana since January 2016. He stated that he has matured and realizes that his past marijuana use was unacceptable. He testified that he will never use illegal drugs again. He avoids individuals who use drugs and places where drugs are used. He signed a statement of intent not to use any illegal drugs in the future, with an acknowledgement that any future illegal drug use would be grounds to revoke his national security eligibility.⁵

¹ Tr. at 41-43, 81-82; GE 1-4; AE A-E.

² Tr. at 44-55; Applicant's response to SOR; GE 1-4.

³ Tr. at 50-54; GE 2-4.

⁴ Tr. at 52-55; Applicant's response to SOR; GE 1, 4.

⁵ Tr. at 57-63; Applicant's response to SOR; AE H, I, L-N.

Applicant deployed while in the military and for his civilian job. Two witnesses testified, and he submitted documents and letters attesting to his excellent job performance in the military and in his civilian job. He is praised for his honesty, moral character, work ethic, trustworthiness, leadership, dedication, honor, judgment, and integrity. He is recommended for a security clearance. In contrast to the strong character evidence, Applicant was arrested and subsequently convicted for alcohol-related driving offenses in 2011 and 2014.⁶

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.

⁶ Tr. at 13-40, 43; GE 1-4; AE C, F, G, J. The alcohol-related driving offenses were not alleged in the SOR and will not be used for disqualification purposes. They may be considered to place Applicant's character evidence in context, in the application of mitigating conditions, and when conducting the whole-person analysis.

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

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 possessed and smoked marijuana while holding a security clearance. The above disqualifying conditions are applicable.

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; 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 or misuse is grounds for revocation of national security eligibility.

Applicant has not used marijuana since January 2016. He stated that he has matured and realizes that his past marijuana use was unacceptable, and that he will never use illegal drugs again. He signed a statement of intent not to use any illegal drugs in the future, with an acknowledgement that any future illegal drug use would be grounds to revoke his national security eligibility. I found Applicant to be honest and credible. However, I also believe he was sincere in 2014 when he stated that he would not use illegal drugs again, and then did so. Applicant's conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. His well-established pattern of illegal drug use is not mitigated. AG ¶ 26(a) is not applicable, and AG ¶ 26(b) is partially applicable.

Guideline E, Personal Conduct

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

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

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

(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;

(3) while in another country, engaging in any activity that, while legal there, is illegal in the United States;

Applicant's illegal marijuana use is cross-alleged under Guideline E. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable because Applicant's conduct is sufficient for an adverse determination under the drug involvement and substance misuse guideline. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are 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;

(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.

Applicant has not used illegal drugs since January 2016. The discussion above under drug involvement and substance misuse applies equally here. Applicant is commended for his honesty, which reduces his vulnerability to exploitation, manipulation, and duress. Nonetheless, the conduct continues to cast doubt on his current reliability, trustworthiness, and good judgment. Personal conduct security concerns remain despite the presence of some mitigation.

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 E and H in my whole-person analysis. I also considered Applicant's honorable military service and strong character evidence, which is somewhat countered by his arrests and subsequent convictions for alcohol-related driving offenses in 2011 and 2014.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the security concerns under Guidelines E and 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 E:	Against Applicant
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline H:	Against Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

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

Edward W. Loughran
Administrative Judge