



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

In the matter of:)
)
) ISCR Case No. 18-00763
)
Applicant for Security Clearance)

Appearances

For Government: Moira Modzelewsky, Esq., Department Counsel and
Nicole A. Smith, Esq., Department Counsel

For Applicant: *Pro se*
05/01/2019

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense's (DOD) intent to deny her eligibility for a security clearance to work in the defense industry. Applicant failed to mitigate the security concerns raised by his history of marijuana use, including after being granted a security clearance and access to sensitive compartmented information (SCI) in 2011. Clearance is denied.

Statement of the Case

On May 11, 2018, the DOD issued a Statement of Reasons (SOR) detailing security concerns under the drug involvement and substance misuse and personal conduct guidelines.¹ DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant's security clearance and recommended that

¹ The DOD acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive), and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on June 8, 2017.

the case be submitted to a Defense Office of Hearings and Appeals (DOHA) administrative judge for a determination whether to deny his security clearance.

Applicant timely answered the SOR and requested a hearing. At the hearing, convened on November 28, 2018, I admitted Government's Exhibits (GE) 1 and 2, without objection. Applicant testified at the hearing, as did two character witnesses. He did not offer any additional documents for consideration. DOHA received the transcript (Tr.) on December 7, 2018.

Findings of Fact

Applicant, 38, has worked for his employer, a federal contracting company, as a software engineer since August 2013. He worked for another federal contracting from 2011 to 2013. He initially completed a security clearance application in 2009 in anticipation of employment. However, the application was denied in January 2010 by another government agency (OGA), citing Applicant's history of marijuana use and his deliberate failure to disclose it on his security clearance application. Applicant reapplied for access to classified information in early 2011, this time disclosing his previous marijuana use. In February 2011, he signed OGA's security policy advisory about improper drug use, confirming his understanding that use of illegal drugs was strictly prohibited and that failure to observe the policy could constitute grounds for disqualification from access to OGA facilities and information. He completed a polygraph examination in March 2011 and expressed his willingness to comply with OGA's drug deterrence policy. In April 2011, OGA granted Applicant a top-secret clearance and access to SCI.²

Applicant completed his most recent security clearance application in January 2016, disclosing marijuana use in July 2014 and again in July 2015. He confirmed the details of his marijuana use in an October 2016 subject interview. In May 2017, OGA suspended Applicant's access to classified information and SCI.³

In August 2013, Applicant began working for his current employer as a senior software engineer. Although he was subject to urinalysis testing upon hiring, his employer does subject its employees to random urinalysis. In the summer 2014, he was promoted to a director position, supervising 33 people. Shortly after assuming his new position, Applicant used marijuana with his wife at the home of another couple. He used the drug again under the same circumstances a year later. He claims he did not report the marijuana use at the time of either incident because he did not know he had an obligation to do so. However, he acknowledged that he feared disclosure would result in the loss of his job. When OGA suspended Applicant's clearance in May 2017, his employer, moved him to another director level position that does not require access to classified information. While his employer acknowledges Applicant's lapse in judgment, they do not believe his actions were malicious or done with the intent to compromise

² GE 1 - 2.

³ Tr. 33, 38, 46-52.

national security. The company continues to endorse Applicant's ongoing access to classified information.⁴

Applicant's history of illegal drug use began in college. Applicant admits to using marijuana at least twice each semester between 1999 and 2002. He abstained from illegal drug use for the next six years because the drug no longer appealed to him. He began using the drug again between 2008 and 2009, while he was self-employed. He and his wife used the drug together, at least once per month, at home. In 2008, he also attempted to grow marijuana plants from seeds, citing an interest in horticulture. Applicant described his use in 2014 and 2015 as a single puff on a marijuana cigarette. He admits that each time he used marijuana, he recalled the OGA drug policy advisory. Applicant admits stress management has motivated his use of marijuana over the years. In September 2017, Applicant sought a substance abuse evaluation. Based on the in-person evaluation and the results of a battery of tests, the psychologist determined that Applicant did not have a substance abuse problem or any other mental-health problem that would significantly impair his judgment.⁵

In addition to the psychological evaluation, Applicant also attended two additional sessions with the psychologist. Applicant believes that he has learned how to better identify and handle his stress levels. He believes he has implemented habits to support his sobriety, such as regular exercise. Applicant's wife obtained a medical marijuana card from a friend who is a physician. He believes that she continues to use marijuana in their home at least once per month. Applicant claims that he does not intend to use marijuana in the future, and provided a signed statement to that effect.⁶

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 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.

⁴ Tr. 34-35; 58-59, 69-70; Answer.

⁵ Tr. 38-40, 42-46, 53-56, 66, 71-73; Answer.

⁶ Tr. 40-42, 54, 60-65, 68-69, 75; Answer.

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.

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

The illegal use of controlled substances can raise questions about an individual’s reliability and trustworthiness, 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.⁷ Applicant admits a history of marijuana use, with varying frequency, from 1999 to 2009 that resulted in his being denied a security clearance in 2010. He also admits to using marijuana on two occasions after being granted access to classified information and SCI in 2011. His conduct invokes drug involvement and substance misuse disqualifying conditions ¶ 25(a) and ¶ 25(f). Furthermore, Applicant used marijuana after signing the OGA drug policy advisory, which clearly stated that violation of the policy could result in the revocation of access to OGA facilities and information, both of which he required for his position at the time. Personal conduct disqualifying condition ¶16(f) applies. None of the drug involvement or personal conduct mitigating conditions apply.

OGA granted Applicant access to classified information in 2011 after he gave written and verbal assurances that he would not use illegal drugs in the future. He

⁷ See, AG ¶ 24.

voluntarily and willfully made this commitment. He then reneged on his promise and chose not to disclose his misconduct to OGA to protect his self-interests. This is not mitigated by the favorable facts in the record: the passage of time since his last known use of illegal drugs; his understanding and management of his triggers; the changes he made in his life to support sobriety; and the endorsement of his employer of his request for continued access to classified information.

Based on the record, I have significant reservations about Applicant's current security worthiness. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(d). The purpose of the security clearance adjudication is to make "an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk."⁸ Applicant engaged in conduct that supports a negative whole-person assessment of his judgment, reliability, and trustworthiness. His behavior also casts doubt on his ability to follow rules and regulations.

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, Drug Involvement and Substance Misuse:	AGAINST APPLICANT
Subparagraphs 1.a – 1.d:	Against Applicant
Paragraph 2, Personal Conduct	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Nichole L. Noel
Administrative Judge

⁸ AG ¶ 2(d).