



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



In the matter of:)
)
) ISCR Case No: 18-02282
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

03/05/2019

Decision

Dam, Shari, Administrative Judge:

Applicant failed to mitigate the security concerns raised under the guideline for drug involvement and substance misuse, relating to his illegal use of marijuana and prescription drugs. He used marijuana after receiving a security clearance. Based upon a review of the pleadings and exhibits, national security eligibility is denied.

Statement of Case

On October 9, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline H (Drug Involvement and Substance Misuse). Applicant responded to the SOR on October 17, 2018, and requested his case be decided by an administrative judge on the written record without a hearing.

On November 18, 2018, Department Counsel submitted the Government’s written case. A complete copy of the File of Relevant Material (FORM), containing three Items, was mailed to Applicant and received by him on November 28, 2018. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. Applicant did not respond to the FORM or object to Items 1 through 3. Hence, all Items are admitted into

evidence. On February 7, 2019, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me.

Findings of Fact

Applicant admitted the five SOR allegations contained in Paragraph 1. (Item 1) His admissions are incorporated into these findings of fact.

Applicant is 24 years old, a college graduate, and unmarried. He has worked for a defense contractor since August 2017. He received an interim security clearance in October 2017. (Items 1, 2)

In August 2017, Applicant submitted a security clearance application (SF-86). In it he disclosed the following information related to past illegal drug use: he illegally used with varying frequency marijuana between June 2012 and January 2018; he purchased marijuana from September 2013 to April 2016; he used cocaine once in 2014; and he misused two prescriptions, Adderall and Vyvanse, from November 2013 to December 2014, while in college. During a background interview in March 2018, Applicant admitted that he illegally used marijuana in early January 2018, after having received an interim security clearance in October 2017. He said he used marijuana for social reasons and took the prescription drugs to help him study while in college. He used marijuana with friends. (Item 3)

During the March 2018 interview, Applicant stated he does not intend to use illegal drugs or marijuana in the future. (Item 3) There is no information indicating that Applicant has participated in treatment for substance abuse or other information confirming that he no longer illegally uses marijuana or other drugs; or that he no longer associates with people who use illegal drugs. No other relevant information was provided by Applicant.

Policies

The national security eligibility action was taken under Executive Order 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 for Determining Eligibility for Access to Classified Information* (AG), which became effective within the DOD on June 8, 2017.

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG 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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person applying for national security eligibility seeks to enter 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline H: Drug Involvement and Substance Misuse

AG ¶ 24 describes the security concerns related to this guideline:

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.

AG ¶ 25 sets out conditions that could raise security concerns and may be disqualifying in this case. Three are potentially applicable:

- (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 illegally used marijuana from 2012 to 2018 and purchased it from 2013 to 2016. He used marijuana after he received an interim security clearance in October 2017. He illegally used cocaine and prescription medication between 2013 and 2014. The evidence raised the above disqualifying conditions, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

AG ¶ 26 lists conditions that could mitigate security concerns raised under this guideline. They are as follows:

- (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; and
 - (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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

There is insufficient evidence to establish mitigation under any of the above mitigating conditions. Applicant's illegal drug use occurred from 2012 to 2018 and occurred with sufficient frequency to raise ongoing concerns about Applicant's current reliability, trustworthiness, and judgment. The evidence does not establish mitigation under AG ¶ 26(a). Applicant honestly disclosed and acknowledged his history of illegal drug and marijuana use. In March 2018, he said he did not intend to use illegal substances in the future. However, that statement is insufficient evidence to establish mitigation under AG ¶ 26(b) because there is no evidence to substantiate that he has taken actions to stop using marijuana or other illegal drugs; that he has established a pattern of abstinence; or that he no longer associates with friends with whom he used drugs. Applicant used prescription medications that were not prescribed for him. There is no evidence his misuse was related to an illness. AG ¶ 26(c) does not apply. Applicant has neither successfully participated in nor completed a substance abuse treatment program, as required to establish mitigation under AG ¶ 26(d).

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.

According to 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 applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant honestly and voluntarily disclosed to the Government his history of abusing marijuana and prescription drugs. He stated in March 2018 that he does not intend to use marijuana or other drugs in the future. While his disclosure and statement are some evidence that he is committed to not engaging in similar misconduct in the future, they are insufficient to conclude that he has successfully overcome his long-term use of illegal drugs. In August 2017, Applicant completed his SF-86, which put him on notice that any illegal drug use was a security concern. He was subsequently granted an interim security clearance and continued to illegally use marijuana. Although some of his conduct may be attributable to youthful indiscretion, Applicant's decision to use marijuana after he received an interim security clearance is recent, and raises questions about his present judgement and commitment to not use illegal drugs in the future. Overall, the record evidence leaves me with doubt as to Applicant's eligibility for a security clearance. He did not meet his burden to mitigate the security concerns arising under the guideline for drug involvement and substance misuse.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a through 1.e:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant access to classified information. National security eligibility is denied.

SHARI DAM
Administrative Judge