



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



In the matter of:)
)
) ISCR Case No. 19-01750
)
)
Applicant for Security Clearance)

Appearances

For Government: Kelly M. Folks, Esq., Department Counsel
For Applicant: *Pro se*

November 18, 2019

Decision

Lokey Anderson, Darlene D., Administrative Judge:

On September 26, 2018, Applicant submitted a security clearance application (e-QIP). (Government Exhibit 3.) On June 14, 2019, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline J, Criminal Conduct; and Guideline H, Drug Involvement and Substance Misuse. The action was taken 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*, effective within the DoD after June 8, 2017.

Applicant answered the SOR on July 5, 2019. He requested that his case be decided by an administrative judge on the written record without a hearing. (Item 2.) On August 22, 2019, Department Counsel submitted the Government’s written case. A complete copy of the File of Relevant Material (FORM), containing six Items, was mailed to Applicant on August 23, 2019, and received by him on September 4, 2019. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the

FORM. Applicant responded to the FORM. Applicant did not object to Items 1 through 6, and they are admitted into evidence, hereinafter referenced as Government Exhibits 1 through 6. The Government also requested that the administrative judge take judicial or administrative notice of the criminal Code of Virginia, Sections 18.2-250.1 for Possession of Marijuana; and Section 54.1-3466, Possession or Distribution of Controlled Paraphernalia. There was no objection by Applicant, and accordingly, administrative notice of these two sections of the Virginia Criminal Code was taken.

Findings of Fact

Applicant is 23 years old, and unmarried. He has a high school diploma. He is employed by a defense contractor as a maintenance electrician. He is seeking to obtain a security clearance in connection with his employment.

Guideline J – Criminal Conduct

The Government alleges that Applicant has engaged in criminal activity that creates doubt about a person's judgment, reliability, and trustworthiness and calls into question a person's ability or willingness to comply with laws, rules, and regulations.

Guideline H - Drug Involvement and Substance Misuse

The Government alleges that the Applicant has used controlled substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose, which can raise questions about an individual's reliability and trustworthiness.

After graduation from high school, in July 2014, Applicant began working in an apprenticeship at a Navy shipyard as a maintenance electrician. (Government Exhibit 3.) In 2016, he applied for a security clearance, which was granted. (Government Exhibit 4.) Applicant states that in October 2017, he was riding as a passenger in his car with two friends when the police stopped the car for speeding. The officer smelled THC and reported seeing marijuana residue in the console of the vehicle. The officer asked to search the vehicle and found a small bag of THC in the back seat area. Initially neither Applicant nor his friends admitted ownership of the THC. The officer told Applicant and his friends that he would ticket all of them unless someone took responsibility. Applicant then admitted ownership of the THC, not because it was his, but because the car was his, and he did not want to sit on the side of the road all day. Applicant claims that the THC was actually his friend's. The officer issued Applicant a summons and when Applicant appeared in court he was charged with Misdemeanor Possession of Marijuana. (Government Exhibit 1.) In November 2017, Applicant was found guilty of Possession/Distribution of Controlled Drug Paraphernalia and ordered to pay a fine and costs. (Government Exhibits 5 and 6.)

Applicant claims that he did not know that he was pleading guilty to a drug charge because he did not have an attorney. He instead thought that he was pleading guilty to a traffic violation. (Government Exhibit 6.) The court records indicate otherwise. (Government Exhibit 5.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). 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 AG ¶ 2 describing 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.

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.

Directive ¶ E3.1.14, requires the Government to present evidence that establishes 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person who applies for access to classified information 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 access to classified information. 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 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 J: Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

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 a condition that could raise a security concern and may be disqualifying. The following is potentially applicable:

(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 claims that the marijuana was not his when he received a citation for Possession of Marijuana. This argument does not fly. It does not follow logically that a person would take responsibility for illegal conduct just because that conduct occurred on their property. Furthermore, given the fact that Applicant held a security clearance at the time of the citation, even assuming that Applicant was not using the marijuana and the marijuana was not his, he should never have been around illegal drugs in the first place. Applicant should have avoided any environment where illegal drugs were used, and they should never have been permitted in his car. It is also puzzling why Applicant was riding as a passenger in his own car at this time the THC permeated the car. Applicant is young and immature and used poor judgment. Under the circumstances, the aforementioned disqualifying conditions have been established.

Four Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

(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;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person’s life;

(c) no reliable evidence to support that the individual committed the offense; 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.

The evidence in this case does not establish mitigation. Applicant's conviction for Possession or Distribution of Controlled Paraphernalia is recent, as it occurred just two years ago. He was not pressured by anyone to engage in this illegal conduct, nor is there any real evidence of successful rehabilitation. Applicant's conduct shows immaturity and creates doubt concerning his judgment, reliability, and trustworthiness, and ability or willingness to abide by law, rules, and regulations. None of the mitigating conditions establish full mitigation.

Guideline H: Drug Involvement and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Misuse is set forth at 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 at AG ¶ 25 contains two conditions that could raise a security concern and may be disqualifying:

(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.

The guideline at AG ¶ 26 contains conditions that could mitigate security concerns. None of the conditions are 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.

None of the mitigating factors demonstrate full mitigation. Applicant has not presented convincing evidence to show that he has stopped using illegal drugs, or that he has dissociated himself from his drug using friends, or that he has changed his environment. Nor has he provided a signed statement of intent to abstain from all drug use in the future. At this time, his actions do not show the requisite maturity, good judgment, reliability and trustworthiness necessary to be eligible for access to classified information.

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 facts and circumstances surrounding this case. I have incorporated my comments under Guideline J and Guideline H in my whole-person analysis. Applicant's recent charge in October 2017, with Possession of Marijuana, a misdemeanor, followed by his conviction in November 2017, when he was found guilty of Possession/Distribution of Controlled Drug Paraphernalia, a misdemeanor, is inconsistent with being cleared for access to classified information. More time is needed without criminal conduct or drug involvement to sufficiently guarantee the Government that the Applicant is mature and responsible enough to access classified information. Based upon the facts here, Appellant does not meet the qualifications for a security clearance.

To hold a security clearance is a privilege and not a right. While holding a security clearance one is expected to show honesty, responsibility and good judgment at all times. Applicant has not demonstrated a positive pattern of conduct and the level of maturity needed for access to classified information. At this time, he is not an individual with whom the Government can be confident to know that he will always follow rules and regulations and do the right thing, even when no one is looking. Right now, he is not qualified for access to classified information, nor is it certain that sensitive information will be properly protected.

Overall, the record evidence leaves me with many questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Criminal Conduct and Drug Involvement and Substance Abuse security concerns.

Formal Findings

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

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	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 national security eligibility for a security clearance. Eligibility for access to classified information is denied.

Darlene Lokey Anderson
Administrative Judge