



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



In the matter of:)	
)	
)	ISCR Case No. 19-00451
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
 For Applicant: Jeremy S. Scholtes, Esq.
 06/18/2020

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to revoke his eligibility for a security clearance to work in the defense industry. Applicant has a history of marijuana use to include drug use after being granted access to classified information. He also has a history of deliberately making false statements to the government about his history of marijuana use. He failed to mitigate the security concerns raised by his misconduct. Clearance is denied.

Statement of the Case

Acting under 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 DOD issued a Statement of Reasons (SOR) detailing security concerns under the drug involvement and substance misuse and personal conduct guidelines on March 26, 2019. DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant’s security clearance and recommended that 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 a decision on the written record. On April 18, 2019, Department Counsel requested a hearing under ¶ E3.1.7 of the Additional Procedural Guidance of the Directive and sent Applicant a letter informing him of the request. At the hearing, convened on August 28, 2019, I admitted Government's Exhibits (GE) 1 through 4, without objection. I also admitted the discovery letter as Hearing Exhibit 1. Applicant testified at the hearing, as did his wife. After the hearing, Applicant timely submitted Applicant's Exhibits (AE) A through C, which were admitted without objection. The cover letter is appended to the record as HE III. DOHA received the transcript (Tr.) on September 9, 2019.

Procedural Matters

On April 19, 2019, the Government served Applicant with three proposed amendments to the SOR. Applicant did not object. Accordingly, the SOR was amended as follows:

SOR ¶ 1.a is amended to allege that Applicant used marijuana on various occasions between at October 2012 and April 2017 while granted access to classified information.

Applicant admitted this allegation.

The SOR was further amended to add two allegations under ¶ 2. Personal Conduct, as follows:

SOR ¶ 2.b: Applicant deliberately falsified material facts during a February 6, 2018 interview with an authorized investigator from the DOD. Specifically, Applicant reported to the investigator that he only used marijuana on two occasions in the preceding seven years in March 2016 and April 2017.

SOR ¶ 2.c: Applicant deliberately falsified material facts in response to DOHA interrogatories he signed on February 22, 2019, reporting that he only used marijuana two times, once in March 2016 and once in April 2017.

Applicant denied both allegations. The proposed amendments and Applicant's answers are attached to the record as HE II.

Findings of Fact

Applicant, 36, has worked for his current employer, a federal contracting company, as a cyber-security expert since April 2019. His current position requires public trust eligibility. He completed his most recent security clearance application in February 2017, while employed at his previous job. Applicant was first granted access to classified information during his military service between in 2008 and 2012. The SOR

in this case arises from Applicant's use of marijuana while having access to classified information. (GE 1, 4)

At the hearing, Applicant described his history of marijuana use. He stated that he used the drug on six occasions. (Tr. 22) He first used marijuana in high school with his future brother-in-law in 1997. (Tr. 22-23). The second time he used marijuana was during his first year in college in 2001. (Tr. 23) Applicant testified that his third use of marijuana occurred in 2008, one month before he enlisted in the Army. (Tr. 24-25).

Applicant completed his first security clearance application in January 2008, signing and attesting that all of the disclosures were true. (GE 3) In response to questions seeking information about his illegal drug use in the seven years preceding the application, Applicant reported that he used marijuana on two occasions in January 2008. (GE 3) In the additional comments section of the question, Applicant indicated that he used marijuana, "just to try it." (GE 3) However, during his 2008 subject interview with a background investigator, Applicant denied any prior drug use. At the hearing, he claimed that his recruiter advised him to withhold the information. (Tr. 28) Applicant eventually admitted prior drug use during a second subject interview, which occurred in June 2008. (Tr. 28-29) Applicant admitted that because of the misinformation he disclosed during the first interview, he had difficulty obtaining a security clearance. He was eventually granted a SECRET clearance. He testified that after that experience, he understood the prohibition against using marijuana after being granted access to classified information. (Tr. 65)

Applicant testified that he did not use illegal drugs while he served on active duty in the Army. There is no evidence in the record to contradict this testimony. After separating from the military, he worked for a federal contracting company at a location in Afghanistan. The job required a security clearance. Applicant testified that his fourth use of marijuana occurred in October 2012, while he was home on a two-week vacation. (29) He returned to his job in Afghanistan, which ended in April 2013. He worked in private industry for another year before accepting a position with a federal contracting company in April 2014, which also required a security clearance. Applicant testified that he used marijuana for the fifth time in March 2016 while on a trip with a family member. (30-31) He did not report either the 2012 or his 2016 instances of marijuana use to his respective security officers.

On the February 2017 security clearance application, Applicant disclosed that he "smoked marijuana a few times in the past seven years." He listed his first use as occurring in October 2012 and his most recent use as being in March 2016. Regarding his intent to use marijuana in the future, Applicant wrote, "I no longer have any desire to smoke [m]arijuana. [I]t really no longer does anything for me." (GE 1)

During his subject interview in February 2018, Applicant admitted the he purchased and ingested an edible marijuana product in April 2017, while vacationing in a state where marijuana use is legal. (GE 2) At the hearing, Applicant admitted that he knew that the purchase and use of the drug in any form, including edibles, was prohibited for security clearance holders. (Tr. 34) He decided to use the drug, because

he thought it would be fun to do so in a state where consumption was legal. (GE 2) Applicant then told the background investigator that he did not intend to use marijuana again in the future. During the interview, Applicant also corrected his dates of marijuana use. He explained to the investigator that he was unsure why he listed October 2012 as his first date of use. He reported his first date of marijuana use as March 2016 with a date of last use occurring in April 2017. He did not disclose the April 2017 drug use to his security officer. (GE 2)

In February 2019, Applicant responded to a set of DOHA interrogatories regarding his use of illegal drugs. (GE 2) In response to the question, "Have you EVER used illegal any drugs or controlled substances? Use includes injection, snorting, inhaling, swallowing, experimenting with, or otherwise consuming any drug or controlled substance." Applicant responded affirmatively and listed that he used marijuana on two occasions, once in March 2016 and again in April 2017. In response to the question asking if the February 2018 interview summary prepared by the background investigator was accurate, Applicant indicated that it was not, noting:

The two instances of marijuana use are accurate as listed, however it states on page 11 that I plan on using marijuana again and that is not accurate. Also, my address was misspelled...

At the hearing, he claimed that the interview summary contained further inaccuracies, but that he did not correct them when given the opportunity in response to the February 2019 interrogatories because he was more concerned about the details of his most recent marijuana use. He also explained that he did not intentionally falsify his interrogatory responses regarding the number of times he used marijuana because he had disclosed them previously and considered them to be a part of his adjudicative record. (Tr. 44-48)

In response to questions from Department Counsel at the hearing, Applicant testified that his use of marijuana in high school may have been over the course of one or two instances, but no more. (Tr. 59) He also admitted that he used marijuana more than once in college. He estimated that he used the drug ten times between 2001 and early 2002. (Tr. 59-60). He confirmed his one-time use in 2008 before entering the military (Tr. 61-62). Applicant admitted his 2012 marijuana use while he was on a short vacation from his overseas job, and that it was possible he used the drug over the course of two days, not one as previously reported. (Tr. 66) When asked about the conflicting disclosures in the 2017 security clearance application in which he reported that he had used marijuana a few times in the past seven years, but only listed two instances of use, Applicant stated that he understood the concerns raised by the inconsistency, but could not explain his choice of wording. (Tr. 68-69)

Applicant testified that his use of marijuana while having a security clearance was a mistake. He reiterated his intent not to use the drug in the future, citing the changes in his life caused by becoming a father in 2018. Applicant's wife testified at the hearing, describing Applicant as trustworthy and reliable. She echoed Applicant's statements about marijuana use being incompatible with their new roles as parents.

Applicant submitted two character letters that described him as a reliable and trustworthy professional. Applicant also testified that since 2015 he has been working in the cybersecurity field. He believes that having a clearance is integral to his success in the field and that would preclude any future marijuana use. (Tr.53-59, 77, 80-94)

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.

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. (See, AG ¶ 24.) The record establishes that Applicant has a history of drug use, dating back almost 20 years (1997 – 2017). He admitted using marijuana on at least three occasions after being granted access to classified information in 2008. His most recent use occurred in April 2017, two months after completing his most recent security clearance application in which he stated his intent not to use marijuana in the future. Drug involvement and substance misuse disqualifying conditions ¶ 25(a), “any substance misuse,” and ¶ 25(f), “any illegal drug use while granted access to classified information...” apply.

The favorable information in the record including: Applicant’s lifestyle changes in support of abstinence, the positive character testimony from his wife, and the two character references, do not mitigate the drug involvement concern. Applicant’s illegal drug use is not mitigated by the passage of time and continues to reflect negatively on his ongoing security worthiness. His use of illegal drugs while having a security clearance shows a lapse in judgment that cannot be considered minor. He acted in disregard of federal law and of the voluntary fiduciary relationship he entered into with the government when he became a clearance holder. Although he has stated he will not use marijuana in the future, his past actions indicate otherwise. As a result, his promise to abstain from marijuana use in the future carries little weight. None of the drug involvement and substance misuse mitigating conditions apply.

Applicant’s drug use is also cross-alleged under the personal conduct guideline. His use of illegal drugs shows questionable judgment and an unwillingness to comply with rules and regulations, which raises concerns about his reliability, trustworthiness and ability to safeguard classified information. (See AG ¶ 15) Personal conduct concerns also stem from Applicant’s statements regarding his history of marijuana use. Applicant’s hearing testimony is inconsistent with the disclosures he made on two security clearance applications, during two background interviews, in response to DOHA interrogatories, and his answer to the SOR. The number of inconsistent statements over the last ten years is sufficient evidence of Applicant’s intent to mislead the government about the extent of his marijuana use. The evidence supports a finding that AG ¶ 16(a), “deliberate . . . falsification of relevant facts from any personnel security questionnaire . . . or form used to conduct investigations . . . [or] determine national security eligibility . . .” and ¶ 16(b), “deliberately providing false or misleading information, concerning relevant facts to an . . . investigator . . . involved in making a recommendation relevant to a national security eligibility determination,” apply.

None of the personal conduct mitigating conditions apply. Applicant’s falsifications are not minor. He has a long history of making false statements to the

government that are material to a determination of his security worthiness. Concerns about his judgment, trustworthiness, reliability, and honesty are ongoing. 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). Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. (*Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988.)) The evidence supports a negative whole-person assessment indicating that Applicant lacks the judgment, reliability, and trustworthiness required of those granted access to classified information.

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
Subparagraph 1.a:	Against Applicant
Paragraph 2, Personal Conduct:	AGAINST APPPLICANT
Subparagraph 2.a – 2.c:	Against Applicant

Conclusion

In light of all of the circumstances presented in this case, it is not clearly consistent with the national interest to continue Applicant's security clearance. Eligibility for access to classified information is denied.

Nichole L. Noel
Administrative Judge