



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



In the matter of:)
)
) ISCR Case No. 19-01981
)
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Pro se

January 28, 2020

Decision

Lokey Anderson, Darlene D., Administrative Judge:

Statement of the Case

On January 22, 2019, Applicant submitted a security clearance application (e-QIP). (Government Exhibit 1.) On August 5, 2019, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline H, Drug Involvement and Substance Misuse; and Guideline E, Personal Conduct. 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 (AG) effective within the DoD after June 8, 2017.

Applicant answered the SOR on August 23, 2019, and requested a hearing before an administrative judge. The case was assigned to me on October 4, 2019. The Defense Office of Hearings and Appeals issued a notice of hearing on November 6, 2019, and the hearing was convened as scheduled on December 5, 2019. The Government offered two exhibits, referred to as Government Exhibits 1 and 2 which

were admitted without objection. The Applicant offered three exhibits, referred to as Applicant's Exhibit A through C, which were admitted without objection. Applicant testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on December 12, 2019.

Findings of Fact

Applicant is 39 years old. He is married and has two children. He has a bachelor's degree in aerospace engineering. He is employed by a defense contractor as an Engineer. He is seeking to obtain a security clearance in connection with his employment.

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.

Applicant has a history of illegal drug use that includes the use of marijuana from about January 2016 to January 2019, while granted a security clearance. Applicant admits each of the allegations set forth in the SOR, except allegation 1.c. He began working for his current employer in 2004. He obtained a security clearance in 2009. Applicant is an engineering supervisor who oversees nine or ten employees. He states that he is up to date on all security training. With the exception of one minor security infraction where he committed a confidential level spill, his security record is unblemished.

Applicant married in 2003. He explained that his wife had a medical marijuana card and purchased marijuana at a dispensary to help her sleep. Applicant tried it and found it helpful in improving his sleep. Applicant understood at the time he used the marijuana that even though it became legal in the state, it was still against Federal law and clearly prohibited by the DoD. Applicant testified that he has undergone numerous DoD security briefings and mandatory training offered by his employer. He decided to reveal his marijuana use to the Government when marijuana became legal under state law, which he believed to be in January 2016. At that time, his security officer reminded him that marijuana was still against Federal law. Applicant chose to continue to use marijuana regardless of the Federal law. He states that he thought it would only be a small blemish on his record. He stated that he did not understand the serious ramifications, and did not realize that he could lose his security clearance because of it. Applicant stated that the last time he used marijuana was the night before his hearing. (Tr. p. 34.)

Applicant explained that he and his wife continue to use marijuana. Even his children know that he uses marijuana. Applicant states that he is willing to stop using marijuana if he has to, but his preference would be to continue using it if he could. (Tr. p. 35.) He states that he is also willing to subject himself to random drug testing. (Tr. p. 36.)

Applicant further explained that he does not and has never used marijuana while at work. He states that at work, he is always clear-headed and his use of marijuana on his personal time has not negatively impact his work product in any way. Applicant states that he is an avid runner, who participates in numerous running events around the country. He is committed to training, eating, and sleeping correctly. (Tr. p. 39.) He testified that he ran the Boston Marathon in April, all while smoking marijuana. (Tr. p. 40.) He states that he was not “high” during the run, but he did smoke marijuana. He believes that marijuana is a performance enhancer for him, and he has had a faster recovery time when he smokes marijuana.

Applicant testified that he believes he is an excellent candidate for a security clearance. He is educated, financially responsible, a native-born American citizen, has no foreign contacts, has never been arrested, is athletic and healthy, and comes from a long line of military veterans, as both his father and step-father are Navy and Army veterans respectively. (Applicant’s Exhibit C.)

Performance reviews of the Applicant for the periods from 2006 through the present reflect that he either “highly meets” or “exceeds” his job requirements in every category. (Applicant’s Exhibit A.)

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 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 three 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; and

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

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 conditions are applicable. Applicant is an experienced engineer who has worked in the defense industry for over fifteen years. He is a supervisor who holds a security clearance, who uses marijuana, and has used it for the past three years. His most recent use of marijuana occurred the night before his security clearance hearing. He understands that it is against Federal law, and is cognizant of DoD policies that prohibit its use, but has chosen to use it nevertheless. There is no excuse for this misconduct, and his actions do not show the requisite good judgment, reliability and trustworthiness necessary to be eligible for access to classified information.

Guideline E- Personal Conduct

The security concern for Personal Conduct is set out in AG ¶ 15:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. One is potentially applicable in this case:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which when combined with all available information, 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. This includes, but is not limited to, consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information; and
- (2) a pattern of dishonesty or rule violations.

There are mitigating security concerns under AG¶ 17. However, none of them are applicable here.

(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; and

(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.

Applicant's use of marijuana while holding a security clearance shows poor judgment, unreliability and untrustworthiness. To use marijuana the night before the hearing shows complete disregard for the process, and a high degree of immaturity and poor judgment. None of the mitigating conditions are applicable here.

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 H in my whole-person analysis. Applicant is a well-educated, experienced engineer whose job it is to supervise others in the work place. He holds a security clearance and uses marijuana in his personal time. His most recent use of marijuana took place the night before his security clearance hearing. Regarding his illegal drug use, there is nothing more to say. At this time, Applicant has failed to provide sufficient evidence to demonstrate that he meets the qualifications for a security clearance.

Overall, the record evidence leaves me with 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 Drug Involvement and Substance Misuse, and Personal Conduct 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 H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 1.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