



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



In the matter of:)
)
) ISCR Case No: 19-03768
)
Applicant for Security Clearance)

Appearances

For Government: Patricia Lynch-Epps, Esquire, Department Counsel
For Applicant: *Pro se*
05/03/2021

Decision

WHITE, David M., Administrative Judge:

Applicant failed to mitigate the security concerns raised under the guideline for drug involvement and substance misuse, relating to his purchase and use of marijuana with varying frequency from October 2013 to May 2019, and his expressed intent to continue using marijuana in the future. Based upon a review of the pleadings and exhibits, national security eligibility is denied.

Statement of Case

On March 4, 2020, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H (Drug Involvement and Substance Misuse). Applicant responded to the SOR on March 19, 2020, and requested that his case be decided by an administrative judge on the written record without a hearing.

On December 18, 2020, Department Counsel submitted the Government’s written case. A complete copy of the File of Relevant Material (FORM), containing five Items, was mailed to Applicant on December 18, 2020, and received by him on January 4, 2021. 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 5 within the time provided, nor did he request an extension of time to do so. Hence, all Items are admitted into evidence. On March 25, 2021, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me.

Findings of Fact

Applicant admitted the three SOR allegations contained in SOR Paragraph 1, without further elaboration or explanation. (Item 2) His admissions are incorporated into these findings of fact.

Applicant is 24 years old. He is unmarried and has no children. He earned a bachelor's degree in May 2019. He has no military or federal civil service, and has never held a security clearance. He began his current employment as an analyst with a defense contractor in May 2019, and is seeking national security eligibility in connection with that position. (Item 3.)

Applicant completed his Questionnaire for National Security Positions (SF-86) on May 9, 2019. In response to questions in Section 23 regarding illegal use of drugs or drug activity, he disclosed that he had used THC/marijuana/cannabis three to four times per week, from October 2013 to May 2019, for medical use to treat insomnia and anxiety instead of using a prescription drug, which had formerly given him unpleasant side effects. He further declared that he intended to continue using the drug in the future because it was legal in the local jurisdiction where he lived and it improves his health. (Item 3.)

On July 1, 2019, Applicant was interviewed by an investigator for the Office of Personnel Management (OPM). He confirmed the accuracy of his SF-86 statements concerning drug use, and added that he also smoked the marijuana because he had depression and ADHD. He said that he had undergone counseling for three to four years during high school for depression, anxiety, ADHD, and insomnia, and his counselor was supportive of his marijuana use for these medical conditions. He did not report any counseling after his 2015 graduation from high school. He said he had purchased marijuana from dispensaries, smoke shops, and a college friend. He also obtained it from friends when they shared and smoked it together. (Item 4.)

Concerning his intention to continue using marijuana, as expressed in his SF-86, Applicant confirmed that his prior statements were accurate, and that he continued to use marijuana as described during May and June 2019. He told the investigator that he was aware that it is illegal to use illegal drugs or controlled substances while employed with the Federal government and that he respects the law. He stated that he would stop using marijuana if he needed to for his job with the defense contractor or to get a security clearance, and claimed that he could not be blackmailed or coerced due to his drug use. (Item 4.)

The record contains no evidence concerning Applicant's job performance, trustworthiness, character in a professional setting, or track record with respect to handling sensitive information and observation of security procedures. I was unable to evaluate his credibility, demeanor, or character in person, since he elected to have his case decided without a hearing.

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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (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 *a/so* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

[Note: Department Counsel’s ARGUMENT section of the FORM contains a number of typographical errors, and erroneously cites the superseded 2006 adjudicative guidelines in footnote 9. Her substantive discussion, however, addressed accurate contents of the current SEAD 4 AG. I found no basis for concern that these errors confused or otherwise prejudiced Applicant’s right to due process, and accordingly find they were harmless.]

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. Three are established in this case:

(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

(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant purchased and used marijuana, or other cannabis-derived THC products, on a regular basis from October 2013 until at least June 2019, and expressed his intention to continue doing so. His statement to the OPM investigator, that he would stop using marijuana if he needed to for his job or to get a security clearance, does not constitute a clear and convincing commitment to discontinue his ongoing substance misuse. The evidence raised the above disqualifying conditions, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

AG ¶ 26 lists three conditions that could mitigate security concerns raised under this guideline:

(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;

(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; 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.

The record evidence does not support any of the listed mitigating conditions. Applicant's illegal drug use began when he was 16 years old, and continued on a regular basis with no record evidence to indicate that it ever stopped. He took no action to overcome the problem, and failed to recognize or acknowledge that he needed to. No mitigation under AG ¶¶ 26(a) or 26 (b) was established. Applicant has neither sought nor participated in any drug treatment, rehabilitation, or aftercare program; and no medical professional supplied a favorable prognosis. There is no evidence 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. Applicant's lengthy, and apparently ongoing, pattern of illegally purchasing and using controlled substances leaves me with significant doubts as to his eligibility for a security clearance. His statement to the OPM investigator that he would stop using illegal drugs if he needed to for his job or to obtain a security clearance is neither convincing nor mitigating. His regular violations of Federal criminal law for his personal benefit and enjoyment preclude a reasonable conclusion that he could be relied upon to comply with security-related requirements for the protection of classified and sensitive information that he might find to be inconvenient or burdensome. 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.c

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.

DAVID M. WHITE
Administrative Judge