



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



In the matter of:)
)
) ISCR Case No. 20-02987
)
Applicant for Security Clearance)

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: *Pro se*

03/04/2022

Decision

DORSEY, Benjamin R., Administrative Judge:

Applicant failed to mitigate the drug involvement and substance misuse and the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On May 4, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. Applicant responded on May 12, 2021, and requested a decision based on the written record in lieu of a hearing.¹

The Government’s written case was submitted on October 18, 2021. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was

¹ The May 27, 2021 date listed on the SOR postdates the signature date stamp on the SOR (May 4, 2021) and Applicant’s response to the SOR (May 12, 2021). As there are two automated signature date stamps that predate the manually listed date on the SOR, I find that the May 27, 2021 date listed on the SOR is a scrivener’s error and the correct date of the SOR is May 4, 2021.

afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on November 2, 2021. As of December 14, 2021, he had not responded. The case was assigned to me on February 9, 2022. The Government exhibits included in the FORM are admitted in evidence.

Findings of Fact

Applicant is a 45-year-old employee of a defense contractor. He has worked for his current employer since September 2009. He applied for and obtained a security clearance in 2010. He earned a bachelor's degree in December 2004 and took additional college courses in 2009 without earning another degree. Applicant has been married since May 2000 and has three children. (Items 3, 4, 5, 6)

Applicant used marijuana from March 2006 until December 2006 to attempt to relieve stress and headaches. During this 2006 timeframe, he used marijuana about four to six times per month. He claimed he stopped using marijuana in December 2006 because he did not believe that his marijuana use was helping with his stress. (Items 5, 6)

From April 2014 to February 2019, Applicant used marijuana for recreational purposes and to help alleviate stress and insomnia. He used marijuana about two to four times per week for a total of about 500 times over four and a half years. Applicant used marijuana with his wife, to whom he is still married, and with whom he still resides. He used marijuana while holding a security clearance throughout this period. There is no evidence that Applicant reported his 2014 to 2019 marijuana use to his employer. Applicant claimed that he will no longer use marijuana as he does not like the effects it has on him. (Items 3, 4)

Applicant reported his relevant marijuana use on the Questionnaire for National Security Positions (SF 86) he submitted in January 2020 and September 2009. He discussed his marijuana use when he was interviewed for his background investigation in April 2020 and December 2009. (Items 3, 4, 5, 6)

Under Guidelines H and E, the SOR alleged Applicant's illegal drug use from 2014 to 2019 while he held a security clearance. In his response to the SOR, Applicant admitted the Guideline H marijuana use allegation. He denied the Guideline E personal conduct allegation, stating that, while he may have shown "questionable judgment," he was open and honest about his marijuana use during the 2020 investigative process.² (Items 1, 2)

² Applicant's 2006 marijuana usage was not alleged in the SOR. As such, I will not consider it under the disqualifying factors, but I will consider it when applying matters of extenuation and mitigation.

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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(c), 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."

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

Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is set out in 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 notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable 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
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

From 2014 to February 2019 Applicant illegally possessed and used marijuana while he held a security clearance. Marijuana is a controlled substance and is illegal under federal law. The above disqualifying conditions are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially 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;
- (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;

Applicant's illegal drug use from 2014 to 2019 was frequent and occurred while Applicant was a mature adult. Throughout this period, Applicant held a security clearance. He presumably knew that using marijuana was an issue as he was questioned about it and other illegal drug use during his 2009 clearance process. While he last used an illegal drug in February 2019, this period of abstinence is significantly less than his period of use while holding a clearance.

Applicant volunteered his marijuana use in his 2020 SF 86 and during his 2020 subject interview. However, as Applicant began using marijuana again after earlier divulging his use to the Government, I find his more recent openness to hold minimal mitigation value. Similarly, the recurrence of Applicant's marijuana use in 2014 after stopping for almost eight years undermines his continued abstinence. Given the circumstances, Applicant has not abstained from illegal drug use for an appropriate period, and I am unable to conclude that illegal drug use is unlikely to recur. AG ¶ 26(a) is not established.

While Applicant acknowledged his past drug involvement and substance misuse, he failed to provide sufficient evidence of disassociation from drug-using associates and contacts. Applicant used marijuana with his wife, with whom he still resides. He provided insufficient evidence that his wife no longer uses marijuana. AG ¶¶ 26(b)(1) and 26(b)(2) are not established. While he certifies in his SF 86 that he will no longer use illegal drugs, Applicant does not provide a signed statement acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility. AG ¶ 26(b)(3) is not established.

None of the mitigating conditions are applicable, and Applicant's illegal drug use is not mitigated.

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. The following are potentially applicable in this case:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant's drug involvement is cross-alleged under Guideline E. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable because Applicant's conduct is sufficient for an adverse determination under the drug involvement and substance misuse guideline. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. The following mitigating conditions potentially apply in Applicant's case:

(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 is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

None of the above mitigating conditions apply. While Applicant has not used marijuana in three years, he used it repeatedly and consistently for four and a half years prior to that. Earlier in his life, after eight years of abstinence, he began using marijuana again, so he has a history of using marijuana after a period of abstinence. He used marijuana after he knew or should have known that the Government had concerns about its clearance holders using illegal drugs. These factors make me doubt that Applicant's marijuana use is unlikely to recur or that he has taken sufficient positive steps to reduce or eliminate his vulnerability to exploitation, manipulation, or duress. These factors also cast doubt on his reliability, trustworthiness, good judgment, and his ability and willingness to comply with laws, rules, and regulations.

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 the facts and circumstances surrounding this case. I have incorporated my comments under Guideline H and Guideline E in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not 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 section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Benjamin Dorsey
Administrative Judge