



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



In the matter of:)
)
) ISCR Case No. 21-01327
)
Applicant for Security Clearance)

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: *Pro se*

03/09/2022

Decision

DORSEY, Benjamin R., Administrative Judge:

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

Statement of the Case

On November 24, 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. Applicant responded on November 29, 2021, and requested a decision based on the written record in lieu of a hearing.

The Government’s written case was submitted on December 9, 2021. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on December 20, 2021. Applicant responded to the FORM on December 22, 2021 and provided argument and documents to support his clearance worthiness. I have marked these documents as Item 6. The case was assigned to me on February 28, 2022. The Government exhibits

included in the FORM and Applicant's exhibits in his response to the FORM are admitted into evidence without objection.

Findings of Fact

Applicant is a 34-year-old employee of a defense contractor. He earned a bachelor's degree in June 2010. He applied for and obtained a security clearance in 2011. He has worked for his current employer since September 2019. Applicant has never been married but lives with a cohabitant. He has no children. (Items 3, 4, 5)

In 2009, Applicant used marijuana once. He abstained from illegal drugs for approximately six years. Then, from June 2015 to January 2021, Applicant consumed marijuana edibles for recreational purposes and to help him relax and sleep. He used marijuana about once every two months for a total of about five times over five and a half years. Applicant used marijuana at home while alone or with his cohabitant. He used marijuana while holding a security clearance throughout this period. There is no evidence that Applicant reported his 2015 to 2021 marijuana use to his employer. (Items 3, 4, 5)

Applicant reported his relevant marijuana use on the Questionnaire for National Security Positions (SF 86) he submitted in February 2021. He discussed his marijuana use and purchase when he was interviewed for his background investigation in March 2021. In his SF 86 and during his interview, he stated his intent to continue to use marijuana in the future. (Items 3, 5)

Under Guideline H, the SOR alleged Applicant's illegal consumption and purchase of marijuana edibles from 2015 to 2021, while he held a security clearance. The SOR also alleged Applicant's stated intent to continue to use marijuana. In his response to the SOR, Applicant admitted he illegally used marijuana while possessing a clearance, denied the marijuana purchase allegation, and denied that he would continue to use marijuana in the future. He claimed that while he held a security clearance when he used marijuana, he was not actively using his clearance throughout this period. He claimed that he never purchased marijuana or other illegal drugs, and that he no longer intends to use illegal drugs in the future. He asserted that he was confused about the propriety of using marijuana with a clearance because it is legal under state law where he resided.¹ (Items 1, 2)

In Applicant's response to the FORM, he made legal arguments and asserted a willingness to undergo random drug testing. He provided a December 2021 negative drug test, a positive character reference from his cohabitant, and a signed statement of intent to abstain from all illegal drug and substance misuse. He also provided documents that he claimed support his legal arguments. (Item 6)

¹ Applicant's 2009 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, mitigation, and whole person analysis.

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 Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

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;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant's admissions and the Government's exhibits established that from 2015 to January 2021, Applicant purchased, possessed, and used marijuana while he held a security clearance. The Government's exhibits also established that Applicant

initially expressed his intent to continue using marijuana, but then changed his mind. 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 about every two months from 2015 to 2021 was frequent and occurred while Applicant was a mature adult. Throughout this period, Applicant held a security clearance. He knew that using marijuana was illegal and a security concern as he was questioned about it and other illegal drug use during his 2011 clearance process. While he last used an illegal drug in January 2021, this period of abstinence is significantly less than his period of use while holding a clearance.

Applicant volunteered his marijuana involvement in his SF 86 and during his background interview. However, in both, despite being on notice that marijuana involvement is a security concern, he asserted that he planned to continue to use marijuana. Applicant changed his position on future marijuana use only after receiving an SOR. I find that this timing undermines the veracity of his more recent assertion that he will not use it in the future. 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, for the reasons provided in my analysis of AG ¶ 26(a), he failed to establish a pattern of abstinence. He also failed to provide sufficient evidence of disassociation from drug-using associates and contacts. Applicant stated in his subject interview that, at times, he was with his cohabitant in his home while he used marijuana. It is unclear whether she

used marijuana with him, and, if so, whether she continues to use. It is Applicant's burden to provide proof of mitigation. As he has not affirmatively proven whether his cohabitant used or continues to use marijuana, AG ¶¶ 26(b)(1) and 26(b)(2) are not established. AG ¶ 26(b) is not established.

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

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 in my whole-person analysis.

The adjudicative guidelines give me the authority to grant conditional eligibility "despite the presence of issue information that can be partially but not completely mitigated, with the provision that additional security measures shall be required to mitigate the issue(s)." I have not done so as I have concluded that it is not appropriate in this case for the aforementioned reasons.

The adjudicative guidelines also give me the authority to recommend approval of a security clearance with a warning if I decide that the security concerns are not serious enough to warrant a recommendation of denial of eligibility. Pursuant to the analysis herein, I have not done so, as I found that the security concerns are serious enough to deny eligibility.

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.

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-1.c: 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