



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



In the matter of:)	
)	
)	ISCR Case No. 21-01312
)	
Applicant for Security Clearance)	

Appearances

For Government: Erin Thompson, Esq., Department Counsel
 For Applicant: *Pro se*
03/22/2022

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant did not mitigate the drug involvement while holding a security clearance security concerns. National security eligibility for access to classified information is denied.

History of the Case

Applicant submitted a security clearance application (SCA) on November 30, 2020. On July 16, 2021, the Defense Counterintelligence and Security Agency (DCSA) issued a Statement of Reasons (SOR) alleging security concerns under Guidelines H (drug involvement and substance misuse). Applicant answered the SOR on July 20, 2021, and requested a hearing before an administrative judge (Answer). The case was assigned to me on December 2, 2021. On January 11, 2022, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for January 28, 2022. I convened the hearing as scheduled via video teleconference on Microsoft Teams.

I marked the January 13, 2022 case management order as Hearing Exhibit (HE) I; Department Counsel’s exhibit list as HE II; and Department Counsel’s November 16, 2021 discovery letter as HE III. Government Exhibits (GE) 1 and 2 were admitted without objection. Department Counsel objected to Applicant Exhibit (AE) B¹ based upon

¹ AE A is the Office of Management and Budget’s (OMB) portion of the Code of Federal Regulations (CFR) 5, Chapter III, §1312.23, Access to information.

relevancy and materiality. I overruled her objection and admitted AE A through O, and Applicant testified. I received the complete transcript (Tr.) on February 4, 2021, and the record closed.

Findings of Fact

Applicant is 49 years old and was married to his first wife from 2005 until they divorced in 2015. He remarried in 2018. He has an eleven-year-old daughter from his first marriage and three teenage stepchildren who are ages 14, 17, and 18. Applicant studied electrical engineering during college, achieving over 120 credit hours, but did not graduate with a degree. He has worked for his current employer (Company A) since March 2003, and he currently works as an engineering manager. Applicant was granted a secret security clearance in approximately 2010. (GE 1-2; Tr. 10-11, 23-26, 33-35)

Applicant admitted using marijuana from February 2015 to April 2020, as alleged in the SOR, but denied using marijuana after having ever been granted access to classified information. He denied ever having access to classified materials, stating in his answer to the SOR, "For as long as I have held a clearance I have never asked our [facility security officer] FSO to establish a need to know and as such have never been granted access to classified materials." (Answer; AE A; Tr. 47)

Applicant testified that he first used marijuana in 1993, during his junior year of college. He used it every other week or monthly until he started working for Company B in 1996 or 1997, when he stopped using marijuana because it no longer benefited his life. He next used marijuana once in approximately 2006, shortly after he married his first wife. While she regularly used marijuana, he did not, as he could be subjected to drug testing by his employer, for whom he continues to work. Applicant stated that he disclosed this one-time use in his 2010 SCA. The Government did not offer this document as evidence. (Tr. 25-28, 35-37, 39)

On November 30, 2020, Applicant submitted his SCA and disclosed that he used marijuana four to six times between February 2015 and April 2020. He claimed he used marijuana due to his divorce and not having his daughter during the holidays. When Applicant was interviewed by a government investigator in December 2020, he confirmed that he used marijuana four to six times in the previous seven years, and that most of the use occurred by smoking it through a pipe, although he did consume an edible on one occasion. He used marijuana recreationally, at home, while he was relaxing, and his wife obtained it from a friend. He did not clarify which wife had obtained the marijuana. (Answer; GE 1 at 62-63; GE 2; Tr. 28-30)

At the hearing, Applicant testified that he used marijuana approximately two times in 2015, once with his first wife and once with a friend. He testified that his next use occurred over the holidays in 2019 with his second wife, and he attributed his use to anxiety and the stress of dealing with a blended family. Applicant also consumed an edible form of marijuana provided to him by his current wife in April 2020. He attributed his most recent usage to stress and anxiety related to the COVID-19 pandemic. Applicant did not

purchase the marijuana that he used, his wives and a friend provided it for him. (Tr. 28-30, 39-40)

As a result of Applicant's 2015 divorce, his subsequent marriage, and the stress of blending children from two families, he started to attend counseling in 2014 to address his anxiety. He has continued to attend counseling sporadically for the past seven years and sought other avenues such as exercise, meditation, and social interactions to address his stress and anxiety, but he continued to use marijuana occasionally until April 2020. (AE F-G; Tr. 20, 24, 32-33, 51)

Applicant's employer has never drug tested him, but his employer could test him at any time. He stated that company policy is that employees are not to be impaired while they are at work, but he is unsure if there is a policy against illegal drug use and marijuana use. In Applicant's state of residence, medicinal and recreational marijuana use is illegal. He did not report his 2015 to 2020 marijuana use to his supervisor or FSO, but he knew his use was inconsistent with holding a DOD security clearance. At the hearing, during his interview, and in his 2020 SCA, Applicant stated that he does not intend to use marijuana in the future. (GE 1; GE 2; Tr. 31-32, 37-42)

Applicant's provided documentary and testimonial evidence of the important projects he supports in his role at his company. He also provided evidence of his stable financial record and excellent performance record. (AE C-D; H-O; Tr. 18-22, 43-46)

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

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

Applicant admitted he used marijuana four to six times between February 2015 and April 2020. He applied for and was granted a secret security clearance in approximately 2010. That he did not actually access classified materials during the time that he used marijuana is irrelevant as to whether his behavior is disqualifying under the Directive.

Applicant's admissions and the record evidence established the following disqualifying conditions under AG ¶ 25:

- (a) any substance misuse (see above definition); and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The burden shifted to Applicant to prove mitigation of the resulting security concerns. AG ¶ 26 provides conditions that could mitigate security concerns in this case:

- (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.

Appellant's decision to use marijuana, an illegal drug, multiple times, while holding a secret security clearance, cannot be considered a minor lapse in judgment, but rather a pattern of behavior that reflects his unwillingness to follow rules and regulations. Security clearance decisions are not limited to conduct during duty hours. Off-duty conduct, especially where it reflects poor judgment, provides a rational basis for the government to question an appellant's security worthiness. (*See, e.g., Cole v. Young*, 351 U.S. 536, 550 n.13 (1956); *Croft v. Department of Air Force*, 40 M.S.P.R. 320, 321 n.1 (1989)). Applicant's behavior showed a disregard for the law, regulations, and the fiduciary relationship he voluntarily entered into with the Government.

Applicant used marijuana at least twice in 2015, once in 2019, and once in 2020. He used marijuana with both of his wives and with a friend. The record shows that he did not disclose his drug involvement to the Government until he completed an SCA in November 2020. He did not report his 2015 to 2020 marijuana involvement to his employer or security officer. He acknowledged that his employer has a policy against illegal drug use, and he was subject to drug testing.

Applicant credibly testified that he intends to no longer use marijuana; however, he was in his mid-forties when he resumed his use of marijuana, and he sporadically used for a five-year period with both of his wives. All of his drug involvement occurred while he was working for his current employer, after he had completed a security clearance application, and held a security clearance. Therefore, Applicant's assertions that he has stopped using illegal drugs were insufficient to overcome the concerns with respect to his past drug involvement. At this time, he did not demonstrate a lengthy enough pattern of abstinence, given the circumstances under which he chose to use marijuana. Applicant failed to establish mitigation under AG ¶¶ 26(a) and 26(b).

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 Guidelines E and H in my whole-person analysis. I also considered Applicant's favorable character evidence, including his letters of recommendation.

Applicant chose to use marijuana while working for his current employer and holding a secret security clearance. He used marijuana while he was in his mid-forties, during both of his marriages, while he was a father, and when he was a manager at his company. There has not been a sufficient passage of time to overcome the concerns with his drug involvement. I conclude Applicant has not met his burden of proof and persuasion. He did not mitigate the drug involvement or substance misuse security concerns or establish his eligibility to maintain a security clearance.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security of the United States to grant or continue Applicant's national security eligibility for access to classified information. Eligibility for access to classified information is denied.

CAROLINE E. HEINTZELMAN
Administrative Judge