



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



In the matter of:)
)
) ISCR Case No. 20-03168
)
Applicant for Security Clearance)

Appearances

For Government: Allison Marie, Esq., Department Counsel
For Applicant: *Pro se*
04/18/2022

Decision

BENSON, Pamela, C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H (Drug Involvement and Substance Misuse), and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted security clearance applications (SCA) on January 29, 2018, and April 13, 2020. On March 1, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H and Guideline E. 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 on June 8, 2017.

Applicant answered the SOR on April 21, 2021, and requested a hearing before an administrative judge (Answer). The case was assigned to me on July 21, 2021. The

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 28, 2022, setting the hearing for March 15, 2022. The hearing was held as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5; Applicant testified, but did not offer any documents. I admitted all proffered exhibits into evidence without objection. DOHA received the hearing transcript (Tr.) on March 24, 2022, and the record closed.

Findings of Fact

Applicant admitted all of the allegations in his Answer to the SOR. (¶¶1.a-d, and 2.a.) After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 64 years old. He was previously married from about 1978 to 1990, and he married his current spouse in 2013. He has an adopted son, age 31. He served active duty in the U.S. Air Force from August 1977 until his honorable discharge in January 1982. He earned a bachelor's degree, with a focus in electronic systems, in 1982. In 2009, he received a certification in systems engineering, and in 2017, a master's degree in business administration. He is currently employed by a federal contractor since mid-2021 as a principal solutions engineer. Applicant was granted a secret DOD security clearance in November 2018. His employer has sponsored Applicant for a top secret security clearance in order that he may perform specific job duties. (Tr. 9-10, 16-20; GE 1)

In his January 2018 SCA, Applicant disclosed that he had previously used marijuana intermittently from June 1973 to September 2013, approximately a few times a year. He listed that he did not intend to use marijuana in the future because he did not like marijuana and his lifestyle had changed when he remarried in 2013. (Tr. 19-21; GE 2)

In Applicant's April 2020 SCA, he disclosed that he continued his use of marijuana a couple times a year from 2013 to December 2019. He also listed that he had smoked marijuana with friends after a mass shooting took place in August 2019. At the hearing, Applicant testified that he continued to use marijuana due to certain emotional triggers; such as the anniversary of 9/11, and after a mass shooting took place near his residence in 2019. He and his friends have consistently visited a historic area of bars and restaurants for more than 30 years where the mass shooting occurred, and they were traumatized by the event. From August 2019 to December 2019, he used marijuana more frequently with friends and family to deal with the trauma. In December 2019, he purchased marijuana at a bar in this historic district. (Tr. 21-25; GE 1)

On May 8, 2018, Applicant participated in a background interview with an authorized DOD investigator. Applicant provided details about his use of marijuana up to January 2013. He explained that his lifestyle changed after he remarried in 2013 and

he stopped playing in a band. Applicant reported that he had no intention of using marijuana again in the future. (GE 5)

On May 4, 2020, Applicant participated in another background interview. He admitted marijuana use, on a yearly basis, from June 1973 to December 2019. He clarified, however, that he used marijuana on a “weekly” basis from August 2019 through December 2019. He used marijuana more frequently with friends following the mass shooting near his residence. He stated that he purchased marijuana from a stranger in late 2019. He reported that he did not intend to use marijuana in the future. (Tr. 27; GE 4)

During the March 2022 hearing, Applicant admitted that he had most recently used marijuana a “handful” of times between his May 2020 interview and early 2022. He had also purchased marijuana once since 2019. Applicant acknowledged that he was aware, at the time of his conduct, that using and purchasing illegal drugs while possessing a security clearance was prohibited. In January 2021, Applicant submitted a statement of intent to abstain from future marijuana use; however, Applicant candidly testified that he had used marijuana as recently as early 2022 and it was unlikely he would abstain from using marijuana in the future. He has never participated in a drug counseling or treatment program. (Tr. 24-29; GE 3)

Policies

When evaluating an applicant’s suitability for a security clearance, 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 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 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining 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 that an applicant may deliberately or inadvertently fail to 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 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 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.

AG ¶ 25 provides three conditions that could raise a security concern and may be disqualifying in this case: “(a) any substance misuse (see above definition);” “(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase,;” and “(f) any illegal drug use while granted access to classified information or holding a sensitive position.” The record establishes AG ¶¶ 25(a), 25(c), and 25(f).

The guideline also includes conditions that could mitigate security concerns arising from drug involvement and substance misuse. The following mitigating conditions under AG ¶ 26 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; and

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions to overcome the 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 being 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 apply. Applicant's last use of marijuana occurred in early 2022 while he possessed a DOD security clearance. He failed to abstain from marijuana involvement despite acknowledging using or purchasing illegal drugs is conduct in violation of Federal law. He has not changed his environment or disassociated from friends and family who use marijuana. In January 2021, he submitted a "statement of intent" to abstain from all drug involvement and substance misuse in the future, but he testified that he had continued to use marijuana until early 2022. He candidly admitted that it was unlikely he would abstain from using marijuana in the future. Applicant failed to mitigate the drug involvement and substance misuse security concerns.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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. . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(e) personal conduct... that creates a vulnerability to exploitation, manipulation, or duress, such as

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

(g) association with persons involved in criminal activity.

Guideline H allegations ¶¶ 1.b and 1.d are cross-alleged under Guideline E ¶ 2.a. Each of them is established by the record evidence. Applicant has continued to use and purchase marijuana while in possession of a security clearance, despite acknowledging such conduct is in violation of Federal law. He has not disassociated with friends or family members who use marijuana. AG ¶¶ 16(e)(1), and 16(g) apply.

AG ¶ 17 provides conditions that could mitigate security concerns in this 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 it 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 mitigating conditions apply to Applicant's continued use and purchase of marijuana while possessing a DOD security clearance. Applicant's marijuana use, despite knowing such use violated Federal law, continues to cast doubt on his reliability, trustworthiness, and good judgment. The personal conduct security concerns are 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 the 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 H and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant's use of marijuana while holding a security clearance places a heavy burden on him to establish mitigation. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See Dorfmont, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

After considering the record as a whole, to include the circumstances surrounding Applicant's use and purchase of marijuana, I conclude that Applicant has not met his heavy burden of proof and persuasion due to the recency of his last use of marijuana while holding a DOD security clearance. He is uncertain whether he will be able to abstain from marijuana use in the future, which continues to cast doubt on his reliability, trustworthiness, and good judgment. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H and Guideline E.

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
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT

Subparagraph 2.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 security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge