



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 21-00957
)
)
Applicant for Security Clearance)

Appearances

For Government: Eric C. Price, Department Counsel
For Applicant: Pro se

May 27, 2022

Decision

Lokey Anderson, Darlene D., Administrative Judge:

On April 28, 2019, and January 6, 2020, Applicant submitted security clearance applications (e-QIPs). (Items 3 and 4.) On October 7, 2021, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline H, Drug Involvement and Substance Abuse. 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*, effective within the DoD after June 8, 2017.

Applicant answered the SOR on November 8, 2021. He requested that his case be decided by an administrative judge on the written record without a hearing. (Item 2.) On January 28, 2022, Department Counsel submitted the Government’s written case. A complete copy of the File of Relevant Material (FORM), containing nine exhibits, was sent to the Applicant and received on February 8, 2022. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant failed to

respond to the FORM. DOHA assigned the case to me on April 12, 2022. Items 1 through 9 are admitted into evidence and hereinafter referred to as Government Exhibits 1 through 9.

Findings of Fact

Applicant is 43 years old. He is married and has four children. He has a Master's degree. He is employed by a defense contractor as a Cloud Architect. He is seeking to obtain a security clearance in connection with his employment.

Guideline H - Drug Involvement and Substance Misuse

The Government alleges that the Applicant has used controlled substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose, which can raise questions about an individual's reliability and trustworthiness.

Applicant has no prior military service. He began working for his current employer in May 2019. He was granted an interim Top Secret security clearance on May 7, 2020. (Government Exhibit 9.)

Applicant admits each of the allegations set forth under this guideline. Applicant has a long history of marijuana use. From about 2004 until at least August 2021, Applicant used and purchased marijuana with varying frequency. He also used marijuana while possessing a security clearance from May 2020 to at least August 2021. In about March 2020 and August 2021, Applicant stated that he intended to continue using marijuana as prescribed to him by his licensed physician. (Government Exhibits 2 through 9, except Government Exhibit 6.)

In 2010, Applicant was diagnosed with eye disease. Applicant stated that over the years, he has had many care providers that have tried multiple ophthalmic medications to help his condition, but that his attacks subsided and his eye pressure stabilized only after he started using medicinal marijuana in 2018. Applicant indicates that since August 2018 to at least January 2021, he has been under the care of Cheryl Williams, MD., of Herban Medical Solutions. Applicant was prescribed medicinal marijuana for glaucoma and degenerative eye condition. Applicant used the marijuana daily. Applicant provided documentary evidence from his physician approving treatment of his eye conditions with cannabis on August 22, 2018, with renewals in September 2019, and September 2020. (Government Exhibit 5.)

In his interrogatories dated August 2, 2021, Applicant answered, "Yes", to the question that asked him if he has decided to stop using substances prohibited under Federal law. (Government Exhibit 6.) This recent statement of intent fails to clearly and convincingly demonstrate Applicant's commitment to discontinue his marijuana use, especially when weighed against his previous statements that he intended to continue

using marijuana because of its medical benefits. (Government Exhibits 2 through 9, except Government Exhibit 6.)

While marijuana use may have been legalized under certain state laws, it remains illegal under Federal law that governs the requirements to qualify for access to classified information. Marijuana use is strictly prohibited under Federal law. It is also against DoD policy and defense contractor regulations.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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.

Directive ¶ E3.1.14, requires the Government to present evidence that establishes 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person who applies for access to classified information 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 access to classified information. 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 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 relating to the guideline for Drug Involvement and Substance Misuse is set forth at 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 at AG ¶ 25 contains four conditions that could raise a security concern and may be disqualifying:

- (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.

The guideline at AG ¶ 26 contains conditions that could mitigate security concerns. None of the conditions are 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 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.

None of the mitigating factors are applicable. Applicant has used marijuana numerous times, over a seventeen-year period, from 2004 to at least 2021. He used it before being hired by a defense contractor, after being hired by a defense contractor, and after being granted a security clearance, disregarding DoD policy and Federal law. He used it multiple times for about a fourteen-month period, after having been granted a security clearance. Applicant should know that the use of marijuana is against Federal law and prohibited by the Defense Department in any form or fashion. Applicant's willful disregard for complying with laws, rules, and regulations raises significant questions about his judgment, reliability and trustworthiness.

Considered in totality, Applicant's conduct precludes a finding of good judgment, reliability, and/or the ability to abide by rules and regulations. To be entrusted with the privilege of holding a security clearance, applicants are expected to abide by all laws, regulations and policies that apply to them. Applicant has chosen to live his life to his convenience, and has disregarded the law. Knowing that the use of marijuana is illegal, Applicant has disregarded the law and used it anyway. Under the particular facts of this case, Applicant does not show the requisite character or judgment of someone who has the maturity, integrity, good judgment, and reliability necessary to access classified information. At this time, Applicant does not meet the qualifications for access to classified information.

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 facts and circumstances surrounding this case. I have incorporated my comments under Guideline H in my whole-person analysis. An individual who holds a security clearance is expected to comply with the law at all times. Applicant has not demonstrated the level of maturity needed for access to classified information. This is not an individual in whom the Government can be confident to know that he will always follow rules and regulations and do the right thing, even when no one is looking. In this case, Applicant is not subject to random drug tests and so no one knows when he has marijuana in his system. This is dangerous and unacceptable. Applicant has not mitigated the security concerns raised by his conduct. He is not qualified for access to classified information, and does not meet the qualifications for a security clearance.

Overall, the record evidence leaves me with many questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Drug Involvement and Substance Misuse security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a through 1.d.	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 national security eligibility for a security clearance. Eligibility for access to classified information is denied.

Darlene Lokey Anderson
Administrative Judge