



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



In the matter of:)
)
) ISCR Case No. 21-02091
)
Applicant for Security Clearance)

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: *Pro se*
06/07/2022

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant did not mitigate the drug involvement while granted access to classified information 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 26, 2020. (Item 3) On November 5, 2021, the Defense Counterintelligence and Security Agency (DCSA) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement and substance misuse). (Item 1) Applicant answered the SOR on November 11, 2021, and requested a decision based upon the administrative record (Answer). (Item 2)

A copy of the file of relevant material (FORM), dated January 24, 2022, was provided to Applicant by letter dated January 27, 2022. Department Counsel attached as evidence to the FORM Items 1 through 6. Applicant received the FORM on February 14, 2022, and was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. He did not respond, nor did he submit any information. On April 12, 2022, the case was assigned to me.

Findings of Fact

Applicant is 31 years old and was married to his first wife from 2017 until they divorced in 2018. He remarried in 2019 and has no children. He received a bachelor's degree in May 2014, and a master's degree in December 2017. He has worked full time as a hardware engineer for his employer, Company A, since May 2014. He applied for a security clearance in February 2012, and reapplied for a security clearance in October 2020. (Item 3; Item 4; Item 5)

Applicant admitted using marijuana from September 2009 to August 2010, and then again from 2012 to at least August 2020, while granted access to classified information, as alleged in the SOR. (Item 1; Item 2)

In February 2012, Applicant completed his first SCA in anticipation of an internship with Company A, and he disclosed he used marijuana four times between September 2009 and August 2010. He further stated:

I don't intend to use marijuana in the future because I have grown up since then and learned to think like an adult. . . . It doesn't appeal to me because I have a great life and am almost out of college. I am ready to be a responsible working adult that contributes positively to American society. Friends have told me stories of how drugs ruined people's lives and I don't want that to happen to me or be part of that crowd.

While he was still in college, Applicant interned at Company A from May 2012 until August 2012 and from May 2013 until August 2013. Company A kept him on the company payroll starting in May 2012, and he worked one hour a week as an intern to maintain his security clearance until he graduated from college. After he graduated in May 2014, he was hired full time by Company A. (Item 3; Item 4; Item 5)

Applicant completed a second SCA in October 2020. He disclosed no use of drugs in this SCA. It was not alleged in the SOR that he falsified his SCA; therefore, this information will not be considered disqualifying, but it will be considered in determining if mitigation is applicable and under whole-person consideration. (Item 3)

During Applicant's February 5, 2021 interview with a government investigator, he admitted using illegal drugs during the previous seven years. He stated that he started using marijuana in 2012, and his use typically consisted of taking a few hits off of joints at least two to three times a year at parties. At the time of the interview, he did not intend to stop or reduce his marijuana use, as it was so infrequent; he did not feel the need to stop using illegal drugs; and if marijuana is present at parties, he will use it. (Item 5)

When questioned regarding using marijuana while holding a security clearance, Applicant initially told the investigator that he was under the impression that because marijuana is legal in his state of residence, he was not aware he was required to disclose his use on his SCA. Applicant also claimed that he was unaware that he could not use marijuana and hold a security clearance. Upon further questioning and confrontation, he

admitted he had received security briefings from his employer in which he was informed that he cannot use illegal drugs while holding a security clearance. Additionally, he admitted that he has never reported his marijuana use to his security manager, nor had he stopped using marijuana, despite knowing it was inconsistent with holding a security clearance. Finally, his company has a policy regarding the use of illegal drugs, including marijuana, despite local laws legalizing its use. (Item 5; Item 6)

In September 2021, Applicant was asked to adopt his February 2021 interview; he did so, but indicated that he used marijuana less than ten times between March 1, 2012 and August 2020, when he last used marijuana. As of September 2021, he intended to “continue to abstain from marijuana in all circumstances.” He did not live with anyone who uses marijuana, but he does know people who have medical cards and use medicinal marijuana. It is unclear from the record if Applicant still attends parties where individuals use marijuana. (Item 2; Item 5)

Applicant provided his 2020 year-end review from his supervisor. He is described as very organized, detail-orientated, and self-disciplined. He was a key contributor to program milestones and customer reviews. (Item 2; Item 5)

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’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.

Applicant'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 applicant'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.

In February 2021, Applicant told the investigator that starting in 2012, he used marijuana two to three times a year when he went to parties. In September 2021, when he was asked to adopt this statement, he reduced his marijuana use to a total of ten times between 2012 and August 2020. He did not indicate that the investigator mischaracterized his statement regarding the amount that he used marijuana. This appears to be a minimization of his illegal conduct. Regardless of the frequency of his use, he admittedly used marijuana at least ten times after he applied for his first security clearance in February 2012.

Applicant also told the investigator that he did not intend to stop or reduce his marijuana use, as it was so infrequent; he did not feel the need to stop using illegal drugs; and if marijuana is present at parties, he will use it. Applicant's claims in September 2021 that he had been abstinent since August 2020, and his intention to remain abstinent are unconvincing given his previous claims in his February 2012 SCA. Even if I accept his assertions that he has stopped using illegal drugs, they are insufficient to overcome the concerns with respect to his past drug involvement while holding a security clearance. 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 Guideline 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 for almost the entirety of the time he has held a security clearance and worked for his employer who has a policy against illegal drug use. 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**

Subparagraphs 1.a – 1.b: **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