



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



In the matter of:)	
)	
)	ISCR Case No. 21-02152
)	
)	
Applicant for Security Clearance)	

Appearances

For Government:
Dan O’Reilly, Esquire, Department Counsel

For Applicant:
Pro se

August 4, 2022

Decision

GLENDON, John Bayard, Administrative Judge:

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on October 30, 2020. (Item 3.) On November 5, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H (Drug Involvement and Substance Misuse). (Item 1.) The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines effective within the Department of Defense after June 8, 2017.

Applicant answered the SOR in writing (Answer) on December 9, 2021, and requested his case be decided on the written record in lieu of a hearing. (Item 2.) In his Answer Applicant admitted the three SOR allegations with explanations. On March 7, 2022, Department Counsel submitted the Department's written case. A complete copy of the File of Relevant Material (FORM), consisting of Items 1 to 6, was provided to Applicant, who received the file on April 5, 2022.

Applicant was given 30 days from receipt of the FORM to raise objections and submit material in refutation, extenuation, or mitigation. On or before May 5, 2022, Applicant timely submitted an undated reply to the FORM (Reply). Department Counsel did not object to the admission of Applicant's submission. The Reply is admitted into evidence. In his Reply, Applicant asserted no objections to the Government's evidence (Items 1 to 6) attached to the FORM. Department Counsel's Items 1 through 6 are admitted into evidence. The case was assigned to me on June 15, 2022. Based upon a review of the pleadings and exhibits, national security eligibility for access to classified information is denied.

Findings of Fact

Applicant is 27 years old and has never married. He has no children. He earned his bachelor's degree in June 2017. Applicant was unemployed after graduation until he was hired in March 2018 by a Defense Department contractor to work as an engineer. He is a first-time applicant for a security clearance. He seeks national security eligibility and a security clearance in connection with his employment. (Item 3 at Sections 12, 13A, 17, 18, 25.)

Paragraph 1 (Guideline H, Drug Involvement and Substance Misuse)

The Government alleged in the SOR that Applicant is ineligible for a security clearance because of his illegal use of a controlled substance, marijuana. The three SOR allegations are supported by Applicant's admissions in his Answer and in his Reply. The allegations are also evidenced by Applicant's statements in his e-QIP, his answers to interrogatories, and his comments made during an interview with an investigator from the Office of Personnel Management held on January 5, 2021. (Items 3, 4, and 5.)

The details regarding the three SOR allegations and Applicant's admissions are as follows:

1.a. After graduating from high school and while in college, Applicant experimented with using marijuana approximately ten times. He did not use any marijuana after graduating from college in 2017 until about November 2019. Since that time, Applicant has used marijuana on a daily basis in the late evenings to help reduce low back pain he has experienced since he had a skiing accident. As noted, he began working for his current employer in March 2018. His employer has a policy titled "Drug and Alcohol Free

Workplace and Testing.” Under this policy, the company prohibits employees from reporting for work “with illegal drugs in their systems.” The policy provides no exception for using marijuana for medical purposes. About one month before Applicant signed his e-QIP, he obtained a medical marijuana card from a physician in his state of residence and work. (Item 3 at 28; Item 4 at 2; Item 5 at 4 and 8; Item 6 at 2.)

1.b. Applicant continued to use marijuana after he signed his e-QIP on October 30, 2020, and that use has continued up until at least the date of the Reply. (Item 4 at 2; Item 5 at 3-4, 8.)

1.c. In his e-QIP Applicant responded affirmatively to a question about his intention to use marijuana in the future. He noted further: “I would strongly prefer this method of pain relief [using marijuana] over Narcotics.” He concluded stating: “if this [his use of medical marijuana with a state medical marijuana card] is problematic, please let me know”. He was reported as stating during his background interview that he would like to continue to use marijuana for his back pain, but he would cease using it immediately if his use of marijuana was an issue with his employer or his security clearance. In his response to interrogatories, he wrote that he intends to continue his daily use of marijuana “if acceptable” and was “willing to cease as necessary.” In his Reply, Applicant wrote: I would like to reiterate that I have repeatedly stated I would be willing to cease medical cannabis use at the department’s request, to secure a security clearance. This is not my preference because that may make prescription opiates necessary in the evening.” (Item 3 at 28; Item 4 at 2; Item 5 at 4; Reply.)

Policies

When evaluating an applicant’s suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant’s national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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, “Any 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 national security eligibility. 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 or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (Guideline H, Drug Involvement and Substance Misuse)

The security concerns relating to the guideline for drug involvement and substance misuse are set out in AG ¶ 24, which reads as follows:

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.

AG ¶ 25 describes two conditions that could raise security concerns and may be disqualifying in this case:

- (a) any substance misuse (see above definition); and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant has used marijuana with varying frequency since June 2013 to at least the date of the Reply. He wishes to continue in the future unless the Defense Department “requests” that he stop. He has failed to clearly and convincingly commit to discontinue his substance misuse. These facts establish the three SOR allegations and provide *prima facie* support for the application of the foregoing disqualifying conditions. Accordingly, the burden shifts to Applicant to mitigate the Government’s security concerns.

AG ¶ 26 includes two conditions in that could mitigate the security concerns arising from Applicant’s drug involvement and substance misuse:

- (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 the problem, and has established a pattern of abstinence, including, but not limited to:
 - (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.

The record evidence does not establish either of the above mitigating conditions. Applicant seeks to attribute his most recent drug use to a need for the medical benefits he believes his marijuana provides him. He has not submitted any information to show that he is attempting to pursue an alternative pain management therapy. His statement that his only alternative to marijuana is narcotics or opiates is naïve and reveals his lack of efforts to seek professional medical advice about pain management. Due to the serious risk of addiction to either narcotics or opiates, they are not available for long-term pain management. Applicant’s current use of marijuana casts doubts on his reliability, trustworthiness, and judgment.

Applicant’s statement in his Reply that he would “cease medical cannabis use at the department’s request, to secure a security clearance” reverses the order of the steps necessary to establish mitigation of his past drug use. He needs to provide evidence of actions taken to change his past illegal behavior, establish a track record of abstinence,

and provide a written statement that he intends to abstain from all drug involvement and substance misuse with the acknowledgment that any future involvement or misuse would be grounds for the revocation of his national security eligibility. Applicant has not established mitigation of the security concerns raised by his historical use of marijuana and his current daily use of marijuana. Paragraph 1 is found against Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's potential for national security eligibility 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 national security eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I have considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Further comments are warranted. Applicant's history of drug use spans a number of years and continues up until the present. I have considered Applicant's age in the context of his experimental use of marijuana while in college. I have also considered his claim that his use of marijuana at the present time is for medical purposes. I am not persuaded by his argument that he has no practical alternative pain management strategy. I have taken into consideration Applicant's position that he should be deemed trustworthy because of the honesty he has shown by being transparent about his drug use during the security clearance process while others have lied about their drug involvement. His current use of a drug he knows to be illegal under Federal law, however, undercuts his claim of being trustworthy enough to hold a Federal security clearance and comply with Federal information security procedures. Most significantly, Applicant has not mitigated the concerns raised by his use of marijuana by providing evidence of "permanent behavioral changes" with respect to his use of marijuana. Overall, the record evidence creates questions and doubts as to Applicant's suitability for national security eligibility and a security clearance at the present time.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:

AGAINST APPLICANT

Subparagraphs 1.a through 1.c:

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's national security eligibility for a security clearance. Eligibility for access to classified information is denied.

JOHN BAYARD GLENDON
Administrative Judge