



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



In the matter of:)
)
) ISCR Case No. 20-01603
)
Applicant for Security Clearance)

Appearances

For Government: Jeffrey Kent, Esq., Department Counsel
For Applicant: *Pro se*

08/08/2022

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant did not mitigate the security concerns involving drug involvement and substance misuse. Eligibility for access to classified information is denied.

Statement of the Case

On September 21, 2020, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse). The action was taken under Executive Order (Exec. Or.) 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) implemented by DOD on June 8, 2017.

Applicant responded to the SOR on July 6, 2021 (Answer), and requested a hearing before an administrative judge. The case was assigned to another administrative judge on November 30, 2021, and reassigned to me on December 14, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing (NOH) on December

16, 2021, scheduling the hearing for January 13, 2022. I granted Applicant's request for a continuance, due to him contracting COVID-19, and DOHA cancelled his hearing on January 10, 2022. Applicant waived the 15-day hearing notice requirement and DOHA issued a notice of video teleconference (VTC) hearing on January 19, 2022, re-scheduling the hearing for January 21, 2022. I convened the VTC hearing as scheduled. (Tr. at 5-, 9-106)

At the hearing, I admitted Government Exhibit (GE) 1 and 2 in evidence, without objection. Applicant testified. He did not call any witnesses or submit any documentation. At Applicant's request, I kept the record open until February 7, 2022, for him to submit documentation. By that date, he submitted documentation that I collectively marked as Applicant's Exhibit (AE) A and admitted in evidence, without objection. DOHA received the hearing transcript (Tr.) on January 28, 2022. (Tr. at 15-20, 73-76, 81-82)

Findings of Fact

Applicant admitted SOR ¶ 1.a and denied ¶ 1.b in his Answer. He is 41 years old, single, and does not have any children. (Answer; Tr. at 7, 11-12, 23, 52; GE 1)

Applicant graduated from high school in 1999 and earned an associate degree in 2006. He worked for a previous DOD contractor from approximately 2007 to 2014. As of the date of the hearing, he worked as a principal designer for his employer, another DOD contractor, since approximately November 2017. He has never held a security clearance. (Tr. at 5, 7-9, 23, 29-30, 33; GE 1)

The SOR alleged that Applicant used marijuana approximately once or twice a month from about May 1999 to September 2020 (the date of the SOR), and he intended to continue to use marijuana (SOR ¶¶ 1.a, 1.b). Applicant first experimented with marijuana in the summer of 1999, before his senior year of high school. He used it a handful of times, knowing that it was illegal. He listed in his November 2019 security clearance application (SCA) that he used marijuana from May 1999 to September 2019. He indicated, during his January 2020 background interview, that he used marijuana one to two times monthly, from 1999 to December 2019, and he acknowledged that his December 2019 marijuana use occurred after he submitted his SCA. (SOR; Answer; GE 1, 2; Tr. at 15, 20, 23-24, 32-45, 53-68)

Applicant testified that after first experimenting with marijuana in 1999, he did not use marijuana again until he was in college, between 2004 and 2006, using it "once in a while on the weekend." He testified that he did not use marijuana from 2006 to 2015, when he worked for a DOD contractor, because he did not want to jeopardize his employment. He testified that after he used marijuana in college, he did not use marijuana again until 2016, when he used it to self-medicate after his father had a stroke. He used marijuana once to twice monthly for anxiety relief, as a sleep aid, and to relax. He obtained marijuana for his personal use from a friend and he used it alone or with a friend. He stated in his June 2020 interrogatory responses that he no longer personally possessed marijuana and he used it recreationally, on occasion, with friends who purchased it. (SOR; Answer; GE 1, 2; AE A; Tr. at 15, 21, 24-25, 27-45, 53-70)

Applicant testified that he had not used marijuana since November 2017, when he began working for his employer, because he did not want to jeopardize his employment. He testified that he erred, in his SCA and during his January 2020 background interview, when he listed and indicated that he last used marijuana in 2019. He also testified that he did not thoroughly read the January 2020 background interview summary when he adopted its accuracy in his June 2020 interrogatory responses. He also testified that he erred when he admitted SOR ¶ 1.a in his Answer. He testified, "I just didn't understand what I was doing . . .," as this was the first time he had undergone the security clearance process. He maintained he was just trying to be honest and stated that he should have sought advice from his Facility Security Officer (FSO). (SOR; Answer; GE 1, 2; AE A; Tr. at 15, 21, 24-25, 27-45, 53-70)

In October 2013, Applicant was charged with misdemeanor marijuana possession. A police officer pulled him over for a tinted license plate, the officer smelled marijuana, and Applicant admitted to the officer that he had marijuana in his car. During his January 2020 background interview, he indicated that he obtained the marijuana from a friend because he needed it to sleep while he was visiting his parents. At the hearing, he testified, however, that he did not obtain the marijuana for his personal use. Rather, he was simply transporting the marijuana for his sibling who was going through a divorce. He intended to offer the marijuana to his sibling as a way for his sibling to relax. He testified that he had never used marijuana with his sibling. He hired an attorney, appeared in court, took an online drug education class, and paid a fine of a couple hundred dollars to have the charge expunged from his record. (SOR; Answer; GE 1, 2; Tr. at 25-27, 45-52)

Applicant stated in his 2019 SCA that he would not use marijuana if he were required to stop. He indicated during his January 2020 background interview that he planned to use marijuana once monthly because it was fun. When he was asked during his second background interview on February 7, 2020 about his discrepant statements regarding his future intent with marijuana, he indicated that he did not plan to use marijuana in the future. He stated in his Answer and testified that he made his previous statements about his future intent with marijuana under the idea that marijuana was legal or being made legal under state law. Upon further research, he testified that he understood marijuana remained illegal under federal law, and he intended to comply with both state and federal laws and abstain from marijuana use in the future. He signed a statement of intent in February 2022, in which he stated that he would abstain from any drug involvement and substance misuse and acknowledged that any future involvement or misuse would be grounds for revocation of his national security eligibility. (SOR; Answer; GE 1, 2; AE A; Tr. at 21-22, 31-32, 37-38, 68-73)

Applicant testified that he manages his anxiety by living an active and healthy lifestyle. He indicated during his January 2020 background interview and in his June 2020 interrogatory responses that he associates with an individual who uses illegal drugs, and he clarified during his testimony that this individual is a friend who has a prescription for the medical use of marijuana. He testified, however, that he no longer socializes with individuals who use marijuana, as he changed his social circle in approximately 2016. If he were to find himself in a situation where marijuana was being used, he testified that

he would remove himself. He testified that he is not subject to random drug tests by his employer. He was voluntarily drug tested by his doctor in January 2022 and the test did not show any illegal drug use. (GE 2; AE A; Tr. at 21, 43-44, 68-73)

Policies

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(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."

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 Exec. Or. 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* Exec. Or. 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 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. *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 notes the following applicable conditions that could raise security concerns under AG ¶ 25:

- (a) any substance misuse . . . ;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and,
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used marijuana from 1999 to 2020. In 2013, he was charged with misdemeanor marijuana possession after he admitted to a police officer that he had marijuana in his car. He made conflicting statements about his intention to use marijuana in the future on his SCA and during his two interviews with background investigators. AG ¶¶ 25(a), 25(c), and 25(g) are established.

Conditions that could mitigate the drug involvement and substance misuse security concerns are provided under AG ¶ 26. The following 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 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 testified that he has no intention to use illegal drugs in the future. He submitted a signed statement of intent in February 2022 that he would abstain from any drug involvement and substance misuse and that violation of such would be grounds for revocation of his national security eligibility. He also testified that he no longer socializes with people who use illegal drugs. However, both the record evidence and Applicant's testimony continue to raise doubts about Applicant's reliability, trustworthiness, and judgment. I did not find Applicant to be candid or credible at the hearing. He has not taken responsibility for his lengthy past drug use from 1999 to 2020. His testimony, that he last used marijuana in 2017, was inconsistent and in contradiction of the record evidence, to include his own admissions. I find that AG ¶¶ 26(a), 26(b)(1), 26(b)(2), and 26(b)(3) are not established.

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. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the security concerns involving drug involvement and substance misuse.

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.b:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Candace Le'i Garcia
Administrative Judge