



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



In the matter of:)
)
) ISCR Case No. 19-02901
)
Applicant for Security Clearance)

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: *Pro se*

08/01/2022

Decision

DAM, Shari, Administrative Judge:

Applicant failed to mitigate the security concerns raised under the Drug Involvement and Substance Misuse guideline. National security eligibility is denied.

Statement of the Case

On April 7, 2017, Applicant completed and signed a security clearance application (SCA). On March 3, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H, Drug Involvement and Substance Misuse. On March 24, 2021, Applicant answered the SOR and requested a hearing (Answer).

On April 7, 2021, the case was assigned to me. Scheduling of this case was delayed due to COVID-19 issues. On April 4, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Microsoft Teams Video Teleconference Hearing, setting the case for May 4, 2022. The hearing was held as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through GE 3 into evidence. They were admitted without objection. Applicant testified, but did not offer any exhibits. At the end of the hearing, the record closed. On May 25, 2022, I received the transcript of the hearing (Tr.).

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations contained in SOR ¶¶ 1.a through 1.f. His admissions are accepted as findings of fact.

Applicant is 35 years old and divorced since 2021. He lives with his girlfriend. He has two children with his former wife and a child with his girlfriend. In 2018, he earned an associate's degree, and in 2021, a bachelor's degree in business administration. He is enrolled in a master's degree program. He has been working for a defense contractor for the past six years. He is a supervisor. (Tr. 14-17)

Applicant has a history of illegally using cannabis. In November 2003, Applicant was arrested and charged with possession of cannabis. This charge was dismissed, but he was required to complete 50 hours of community service and one year of supervision. In April 2005, he was arrested and charged with driving under the influence (DUI) of drugs, possessing cannabis, improper display license plate, and registration expiration. The charges were dismissed after proving he was not under the influence of cannabis and no cannabis was found in his car. In December 2005, he was arrested and charged with possession of cannabis and drug paraphernalia. This charge was dropped. (Tr. 22-24; GE 2 at 9, 11; GE 3)

In February 2010, Applicant was arrested and charged with felony cultivation of cannabis plants, manufacturing/delivering cannabis, and possession of cannabis. He pleaded guilty to production of cannabis, a felony. He was fined \$9,323, placed on probation for two years, and ordered to perform 200 hours of community service. (Tr. 24; GE 2 at 10; GE 3)

In his April 2017 security clearance application (SCA), Applicant disclosed his 2003 and two 2005 misdemeanor charges and his 2010 felony conviction, all of which involved the illegal use and possession of cannabis. (GE 1 at 30-32) He wrote in his SCA that he "quit smoking completely when I pursued a position with a [defense contractor] last year." (GE 1 at 34) In his August 2018 background interview about the information in his SCA (more than a year after submitting his SCA), Applicant discussed in detail his criminal activity involving cannabis. He told the investigator that he only used cannabis on special occasions and would stop using it if necessary to obtain a security clearance. (GE 2 at 14) In his November 2019 Interrogatories, Applicant stated that he used cannabis on a regular basis and intended to use it in the future. He said he used it with his girlfriend. (GE 2 at 2-3)

While testifying, Applicant admitted that he purchased and used cannabis with varying frequency from about August 2001 through November 2019. He used it the week before his hearing. He uses it a couple times a week as a leisure activity to relax. He believes that holders of security clearances are permitted to use marijuana. He said he is not addicted to it, and could stop if necessary to keep his job. (Answer to SOR; Tr. 18-20, 27)

Applicant said he no longer associates with the people with whom he was involved at the time of his arrests. He does not use cannabis with any person other than his girlfriend (now wife), who has a medical marijuana card. (Tr. 18-9, 25-26) He stated he did not use marijuana for a couple years prior to 2009. (Tr. 20-22)

Applicant stated that he was unaware that as an employee for a defense contractor, he was prohibited from using cannabis as it is illegal under federal law. He thought that because his state legalized cannabis that the federal government did too. He said he is not subject to drug testing at his job. (Tr. 27-30)

Policies

This national security eligibility action was taken under Executive Order 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), which became effective within DOD on June 8, 2017.

When evaluating an applicant's national security eligibility, 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 AG ¶ 2, describing 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 states 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.

Finally, as emphasized in 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

AG ¶ 24 describes the concerns related to 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 sets out two conditions that could raise a security concern and may be disqualifying in this case:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant has a long history of illegally possessing and using cannabis. He admitted that from 2001 to 2019, he purchased and used cannabis, except for a couple years prior to 2009. He was arrested three times for illegally using and possessing it. In 2010, he pleaded guilty to manufacturing cannabis, a felony. The evidence establishes the above two disqualifying conditions.

AG ¶ 26 lists conditions that could mitigate security concerns raised under this guideline:

(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.

There is insufficient evidence to establish the above mitigating conditions. Applicant has a 20-year history of illegally using and possessing cannabis, with limited intervals of not using it prior to 2009. He asserted that he does not have an addiction to it. Although he no longer associates with the drug-using associates with whom he was criminally involved, he continues to regularly use it with his wife. He has not credibly asserted that he no longer intends to illegally use cannabis nor has he established a pattern of abstinence.

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), “[t]he ultimate determination” of whether to grant 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 pertinent facts and circumstances surrounding this case. Applicant has been working as a supervisor for a defense contractor for the past six years. In his April 2017 SCA, he disclosed his criminal history, which involved illegally using, possessing, and manufacturing cannabis. He stated in his SCA that he quit smoking cannabis when he applied for a position with a defense contractor. During his August 2018 interview, he asserted that he was using it occasionally, but would stop using it, if necessary for obtaining a security clearance. In his 2019 interrogatories, he said he and his wife were using it on a regular basis. During his testimony, he said he used it the week before his hearing. He stated that he did not know using cannabis was illegal under federal law. After reviewing his contradictory statements during this security clearance process, which indicated that he stopped or intended to stop using cannabis, I believe that Applicant knew or should have known that using cannabis while working for a federal contractor was prohibited. He did not mitigate the security concerns raised under the guideline for drug involvement and substance misuse.

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.f:	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 eligibility for access to classified information. National security eligibility is denied.

Shari Dam
Administrative Judge