



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



In the matter of:)
)
) ISCR Case No. 20-00528
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Department Counsel
For Applicant: *Pro se*

August 31, 2022

Decision

Lokey Anderson, Darlene D., Administrative Judge:

On November 26, 2018, Applicant submitted a security clearance application (e-QIP). (Government Exhibit 1.) On March 12, 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 Misuse; and Guideline E, Personal Conduct. The action was taken under Executive Order 10865 (EO), *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), effective within the DoD after June 8, 2017.

Applicant answered the SOR on March 22, 2021, and requested a hearing before an administrative judge. The case was assigned to me on April 12, 2022. The Defense Office of Hearings and Appeals issued a notice of hearing on May 11, 2022, and the hearing was convened as scheduled on July 19, 2022. At the hearing, the Government offered two exhibits, referred to as Government Exhibits 1 and 2, which were admitted

without objection. The Applicant offered no exhibits. He called two witnesses and testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on July 29, 2022.

Findings of Fact

Applicant is 30 years old. He is unmarried with no children. He has a high school diploma and a few college credits. He holds the position of Help Desk Administrator. He is seeking to obtain a security clearance in connection with his employment.

Guideline H - Drug Involvement and Substance Misuse **Guideline E – Personal Conduct**

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; and that he has engaged in conduct involving questionable judgment, which can raise questions about an individual's reliability and trustworthiness.

After graduating from high school, Applicant joined the U.S Army for an eight year commitment, from July 2009 to February 2015, six years of active duty service, and then from February 2015 to May 2017, two years of reserve duty. On active duty, Applicant underwent a number of urinalysis, and understood military rules and regulations that strictly prohibit the use of illegal drugs. Applicant held a security clearance throughout his military career.

At the end of his six-year active duty service, Applicant was required to finalize his paperwork and met with a recruiter to get his orders to go into the reserves. Applicant does not know if he signed the wrong paperwork, or if the recruiter explained something incorrectly to him, but apparently, Applicant signed a new reserve contract for eight years without realizing it.

Applicant testified that during the entire two years he spent in the reserves he repeatedly asked his command if he could be released after completing his two years, and was denied. Applicant did not like the reserves, as it was not a good fit for him. He was told by his Commander and Sergeant that since he signed the contract he was obligated to complete it regardless of his personal circumstances.

At this point, Applicant decided that the most expedient way to break his contract and be released from the Army was to use marijuana. Applicant purchased marijuana and used it on three separate occasions between March 2017 and May 2017, before a drill weekend knowing that he was subject to a urinalysis that it would come back positive. After the first positive urinalysis, Applicant was counseled and received an Article 15. After failing two more drug tests, Applicant was administratively separated from the U.S. Army in May 2017. Applicant received a general discharge under

honorable conditions for testing positive for tetrahydrocannabinol, commonly known as marijuana.

Applicant knew that he would be released from the military and his security clearance would be revoked for using marijuana. However, he did not consider future consequences. Applicant stated that he has not used marijuana since May 2017, and he has no intentions of ever using it again. Applicant states that he did not enjoy the use of marijuana and had never used it before this situation. He understands that although marijuana is legal in some states, it is prohibited and illegal while employed for the DoD and while possessing a security clearance.

Applicant's direct supervisor testified that Applicant is a good performer on the job and has learned quickly. She states that for the most part Applicant has been reliable. Applicant has had a problem being on time to work. Applicant told her that he is not a morning person. Before getting Human Resources involved, she discussed the problem with him. After Human Resources was made aware of the problem, and Applicant received a written warning, the problem has improved. (Tr. pp. 49-50.)

Applicant's father, who is retired Air Force, after 26 years, testified that his son has changed since his time in the reserves. Since April 2018, Applicant has been living with his parents, and working on improving himself. He got a job and has passed their drug tests. He is taking care of his health and doing everything that he was told to do by his family and his employer. His father considers him to be an outstanding person now. (Tr. p. 16.)

Applicant states that he now knows that he made a bad decision to use marijuana.

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. 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. 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 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 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 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 three 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; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The guideline at AG ¶ 26 contains conditions that could mitigate security concerns:

- (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 deliberately used marijuana, while serving in the military and possessing a security clearance, for the purpose of testing positive on his urinalysis in order to be discharged from the military. Applicant states that he is no longer using marijuana. His actions are not mitigated.

Guideline E- Personal Conduct

The security concern for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect

classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. One is potentially applicable in this case:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a while-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of;

(2) any disruptive, violent or other inappropriate behavior; and

(3) a pattern of dishonesty or rule violations.

The guideline at AG ¶ 17 contains conditions that could mitigate security concerns. One of the conditions is potentially applicable:

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant used marijuana while possessing a security clearance, and while serving in the U.S. Army reserves. Applicant knew that the use of marijuana is against Federal law, and military policies. Applicant also knew that the use of marijuana is illegal while possessing a security clearance. His conduct shows immaturity, poor judgment, unreliability and untrustworthiness.

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 did not follow the rules. Instead, he chose to live his life to his convenience, and disregarded the law. While in the reserves, to break his contract, Applicant deliberately used marijuana in order to test positive on his urinalysis to be released from his obligation. This was also immature, irresponsible, inappropriate behavior, that shows questionable judgment. Under the particular facts of this case, Applicant does not show the maturity level, integrity, and

reliability necessary to access classified information. At this time, Applicant does not meet the eligibility qualifications for a security clearance.

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 Guidelines H and E 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. Applicant understands the requirements associated with holding a security clearance and knows that marijuana use is not tolerated. Applicant 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. Applicant does not meet the qualifications for a security clearance.

Overall, the record evidence leaves me with 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, and Personal Conduct 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
Subparagraphs 1.a. and 1.b.	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.	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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Darlene Lokey Anderson
Administrative Judge