



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



In the matter of:)
)
) ISCR Case No. 22-00015
)
Applicant for Security Clearance)

Appearances

For Government: Nicholas T. Temple, Esq., Department Counsel
For Applicant: *Pro se*
08/26/2022

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant did not mitigate the drug involvement and substance misuse security concern. He used illegal drugs while granted access to classified information. National security eligibility for access to classified information is denied.

History of the Case

Applicant submitted a security clearance application (SCA) on August 17, 2020. (Item 3) On February 18, 2022, 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 February 24, 2022, and requested a decision based upon the administrative record (Answer). (Item 2)

A copy of the file of relevant material (FORM), dated March 24, 2022, was provided to Applicant by letter dated March 25, 2022. Department Counsel attached as evidence to the FORM Items 1 through 4. Applicant received the FORM on April 12, 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 August 4, 2022, the case was assigned to me.

Findings of Fact

Applicant is 42 years old and divorced. He has a ten-year-old son and twin daughters who are almost four years old. He received an associate's degree in 2005, a bachelor's degree in 2010, and is currently working toward a degree in science. He has worked full time as a hardware engineer for his employer, Company A, since June 2015, and his most recent position is as the information technology (IT) director. He served on active duty in the U.S. Army from January 2011 until January 2015, when he was honorably discharged as a sergeant. He was granted a secret security clearance in approximately June 2011, and reapplied for a security clearance in August 2020. (Item 2; Item 3; Item 4)

Applicant admitted using marijuana multiple times between March and April 2019, while granted access to classified information, as alleged in the SOR. (Item 1; Item 2)

In Applicant's August 2020 SCA, he admitted to using marijuana between January 1997 and March 2019. "In 2019, I smoked marijuana (in plant form) several times from a tobacco pipe. I consumed it on the weekends to help with sleep and stress." He further explained that he thought using marijuana "would help with stress and relaxation but it caused paranoia and made [him] feel terrible." (Item 3 at 32-33)

During Applicant's August 2021 interview with a government investigator, he admitted to using marijuana for the first time in January 1997, while he was in high school; however, he discontinued using it until March 2019. At that time, he went on vacation to a state in which recreational marijuana use is legal. He paid \$50 for marijuana from a vendor and brought it home with him. At that time, all marijuana possession in his residential state was illegal, including possession of marijuana for medical use, and misdemeanor possession of marijuana for personal use could result in a \$6,000 fine and a one-year jail term. Following his vacation, he used the marijuana he had purchased one to two times a weekend, at home, by himself, before going to bed over the course of two to three weekends. Due, in part, to conflict with his wife, he disposed of the remainder of the marijuana. His marijuana use caused strain in his marriage and was one of the contributing factors of his 2020 divorce. As of the date of his interview, no one other than his ex-wife is aware of his illegal marijuana use and possession, including his supervisor and security officer. (Item 4)

When questioned regarding using marijuana while holding a security clearance, Applicant told investigator that he was aware that marijuana use while holding a security clearance was illegal. Additionally, he discontinued his use of marijuana, in part, due to being concerned that he would fail a work-place urinalysis. Marijuana use also caused him to have paranoia, his heart to race, and he thought he was going to die. (Item 4)

In Applicant's February 2022 Answer to the SOR, he reiterated that he does not intend to use marijuana in the future. He used marijuana due to being at a low point in his life. His marriage was struggling, he was feeling overwhelmed financially, and he was disappointed that his career as an artist had not occurred. He also indicated he had

“sought out help with a counselor” but did not provide additional details or substantiating documentation. (Item 2)

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 possess and use marijuana, an illegal drug, multiple times, while holding a secret security clearance or granted access to classified information, 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 and his employer.

In August 2021, Applicant told the investigator in March 2019, he used marijuana, multiple times, while holding a security clearance. He knew this use was against DOD security policy, his possession of marijuana violated state and federal law, and he was concerned he would be subjected to a workplace urinalysis.

Applicant disclosed his illegal marijuana use in his 2020 SCA and during his August 2021 interview, and has indicated that he does not intend to use marijuana again in the future. However, he chose as a 39-year-old, married, father of three to purchase marijuana and use it illegally to inappropriately deal with the stress in his life. His assertions that he has stopped using illegal drugs are insufficient to overcome the concerns with respect to his past drug involvement while holding a security clearance or being granted access to classified information. At this time, he did not demonstrate a lengthy enough period 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 or being granted access to classified information. 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 or be granted access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H: AGAINST APPLICANT

Subparagraph 1.a: 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