



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



In the matter of:)
)
) ISCR Case No. 20-02289
)
Applicant for Security Clearance)

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: Daniel P. Meyer, Esq.
11/16/2022

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to deny his eligibility for a security clearance to work in the defense industry. Applicant mitigated the security concerns raised by four instances of marijuana use between 2015 and 2018. Before the investigation, he self-reported the drug use to his two business partners who are the chief executive officer (CEO) and facility security officer (FSO) of the company. He provided full and candid disclosures to the Government throughout the adjudicative process. Applicant does not have a substance abuse problem and is unlikely to use marijuana again in the future. Clearance is granted.

Statement of the Case

On November 2 2020, DOD issued a Statement of Reasons (SOR) detailing security concerns under the drug involvement and substance misuse guideline. The Agency acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on June 8, 2017.

Based on the available information, DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant's security clearance and recommended that the case be submitted to a Defense Office of Hearings and Appeals (DOHA) administrative judge to determine whether to grant or deny his security clearance.

Applicant timely answered the SOR and requested a hearing. At the hearing convened on February 22, 2022, I admitted as Hearing Exhibits (HE) I through III, respectively: (I) the case management order dated January 13, 2022; (II) the disclosure letter the Government sent to Applicant, dated May 28, 2021; and, (III) a case law summary prepared by Applicant's Counsel. I also admitted Government's Exhibits (GE) 1 through 6, without objection. DOHA received the hearing transcript (Tr.) on March 2, 2022.

Procedural Matters

Although Applicant provided an extensive answer to the SOR, he did not specifically answer the allegation presented in SOR ¶ 1.a. At the hearing, Applicant entered his answer on the record, admitting the allegation. (Tr. 9-10)

Findings of Fact

Applicant, 39, is the co-owner of a federal contracting company that has been in operation since 2011. As the Chief Operating Officer (COO), he is a key management personnel (KMP) and is required to maintain a security clearance for the company's facility security clearance. He was initially granted access to classified information in 2007 as a DOD civilian employee. He was reinvestigated again in 2012 for his company's facility clearance eligibility. In advance of his most recent security clearance periodic reinvestigation, he reported to his FSO that he used marijuana/THC products on four occasions between 2015 and 2018. The FSO filed an incident report in the Joint Personnel Adjudication System (JPAS). Applicant completed his most recent security clearance application in March 2019, disclosing his history of illegal drug use. Applicant's drug use serves as the basis for the SOR allegation. (Tr. 16-18, 39-40 46; GE 1-2)

Applicant lives in a state where marijuana is legal. In 2015, his wife, in preparation of a series of serious medical procedures, was investigating whether or not to use THC as an aid as she recovered from her upcoming surgeries. The couple used the drug together in December 2015. Ultimately, she decided against marijuana use during her recovery. Days later on New Year's Eve, he used the drug with friends. Applicant and his wife used the drug together on two more occasions, once in June 2016 and again in March 2018. Although he was required to maintain national security eligibility as a KMP for his company, he did not work directly for the company between December 2013 and October 2016. When he returned to full-time work with the company in 2016, he did not work in support of any federal contracts or on client-facing projects. (Tr. 20-23; GE 4; Answer)

When the company FSO contacted Applicant in December 2018 to alert him to his upcoming periodic reinvestigation, Applicant decided to contact a lawyer for advice on how to handle the potentially disqualifying information related to his drug use. Following the advice of his attorney, Applicant reported his drug use to the FSO, the company's CEO, a close friend, and five industry colleagues, all of whom wrote character letters on his behalf, citing his trustworthiness and integrity. Because he had to travel to appear at the hearing, Applicant also explained the reason for his trip to his young children who were concerned about his impending absence and accompanying stress level. He explained to them that he made a mistake and that he had to address it. (Tr. 21-22, 27-29; GE 3; Answer)

On his own, Applicant procured an evaluation from a certified substance abuse counselor. The counselor opined that Applicant did not meet the requirement under the DSM-5 criteria for substance use disorder and did not recommend any course of treatment. Applicant also submitted to two urinalysis tests in January 2019, which were negative for illegal substances. (Tr. 33-34; Answer)

Applicant has not used marijuana since March 2018. He submitted a signed statement of intent to refrain from drug use in the future. His wife witnessed the statement, indicating that she will support Applicant in his decision to abstain from future use of illegal drugs. (Tr. 32-33)

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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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

The SOR alleges disqualifying conduct under the drug involvement and substance misuse guideline. The government has established a *prima facie* case.

The illegal use of controlled substances . . . that cause physical or mental impairment . . . raises 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. (See AG ¶ 24).

Applicant, a KMP, self-reported using marijuana/THC products on four occasions between 2015 and 2018, while having a security clearance. His conduct requires the application of the following disqualifying conditions:

AG ¶ 25(a) any substance misuse; and,

AG ¶ 25(f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant submitted sufficient evidence to mitigate the alleged concerns. He took responsibility for his misconduct. His marijuana use was infrequent, recreational, and not indicative of a substance abuse problem. His last use occurred four years ago. Although his decision to use marijuana was a poor one, that decision does not reflect on his current reliability, trustworthiness, or reliability. His promise to abstain from illegal drug use in the future is credible. He executed a signed statement of intent to abstain, an intention that is supported by his wife. The following mitigating conditions apply:

AG ¶ 26(a) the behavior happened long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast do not on the individual's current reliability, trustworthiness, or good judgment; and,

AG ¶ 26(b) the individual acknowledges his drug involvement and substance misuse, provides evidence of actions taken to overcome this problem and has established a pattern of abstinence, including:

(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.

Based on the record, I have no doubts regarding Applicant's ongoing security worthiness. In reaching this conclusion, I have also considered the whole-person factors listed in AG ¶ 2(d). Applicant acknowledges his poor judgment in deciding to use illegal drugs while holding a security clearance. It is not the purpose of a security clearance case to punish or sanction a person for their past actions. Rather, it is a predictive risk assessment based on the past conduct. He is aware of the prohibition against such use as a clearance holder. By voluntarily disclosing his marijuana use, Applicant has shown that he is likely to self-report adverse information even when doing so may be against his personal, professional, and financial interests. Furthermore, his disclosures to a friend, business partners, industry colleagues, and the Government eliminates the conduct as a potential source of vulnerability or exploitation.

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, Drug Involvement and Substance Misuse:

FOR APPLICANT

Subparagraph 1.a:

For Applicant

Conclusion

In light of all of the circumstances presented in this case, it is clearly consistent with the national interest to grant Applicant's security clearance. Eligibility for access to classified information is granted.

Nichole L. Noel
Administrative Judge