



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



In the matter of:)
)
) ISCR Case No. 22-00771
)
)
Applicant for Security Clearance)

Appearances

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

January 26, 2023

Decision

Lokey Anderson, Darlene D., Administrative Judge:

On December 13, 2021, Applicant submitted a security clearance application (e-QIP). (Government Exhibit 1.) On May 10, 2022, 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. 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 May 16, 2022, and requested a hearing before an administrative judge. The case was assigned to me on August 16, 2022. The Defense Office of Hearings and Appeals issued a notice of hearing on August 19, 2022, and the hearing was convened as scheduled on October 11, 2022. The Government offered two exhibits, referred to as Government Exhibits 1 and 2, which were admitted without objection. The Applicant offered no exhibits at the hearing. Applicant testified

on his own behalf. The record remained open following the hearing, until close of business on October 26, 2022, to allow the Applicant to submit additional supporting documentation. Applicant submitted four exhibits, marked as Applicant's Post-Hearing Exhibits A through D, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on October 24, 2022.

Findings of Fact

Applicant is 27 years old. He is unmarried and has no children. He has a Bachelor's degree, and is currently working towards his Masters degree. He holds the position of Mechanical Engineer. He is seeking to obtain a security clearance in connection with his employment.

Guideline H - Drug Involvement and Substance Misuse

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.

Applicant began working for his current employer in March 2019. He is applying for a security clearance for the first time. As part of the application process, he completed the security clearance application (SF-86) dated December 13, 2021. In the application, he admitted illegal drug use.

Applicant has used marijuana from about 2013 to at least January 2022, with varying frequency. He began smoking marijuana during his first year of college. (Tr. p. 23.) During this period, he struggled in school, and was depressed. He continued smoking marijuana, mainly in social settings with friends. He testified that he usually smokes marijuana once every two or three months. (Tr. p. 24.) He stated that he used it less than 20 times a year or less than 100 times in the last seven years. (Government Exhibit 1.) He testified that he believed that it was legal to use. He usually obtained it for use from his friends. On one occasion, in 2017/2018, he purchased marijuana at a dispensary in a state where he believed it to be legal under state law. (Tr. p. 26.)

After being hired by his current employer in March 2019, Applicant continued to use marijuana. He states that he is not aware of his company's drug policy. (Tr. p. 28.) None of his supervisors or management is aware of his illegal drug use. (Tr. p. 28.) When he was hired, he was advised to read the Employee Handbook, but he did not take the time to do so. He also received regular annual briefings about company policies and procedures. He is not subject to random urinalysis. In January 2022, he stopped using marijuana when he learned that federal law prohibits the use of marijuana.

Applicant explained that he last used marijuana in January 2022, after completing his security clearance application. He was celebrating his Birthday, and

received marijuana as a Birthday gift from a friend. (Tr. p. 29.) He used it to celebrate and decompress. In response to interrogatories he completed as part of his security clearance background investigation, Applicant initially stated that he intended to continue using marijuana even after being issued a security clearance. (Government Exhibit 2.) He explained that he held this belief because of his stubbornness and unwillingness to take full responsibility for the current role he is in.

Applicant shared that he has been seeing a therapist to help him take responsibility for his actions. Applicant's father is battling dementia and Applicant has recently been required to help the family by taking his sister to school and other things. Applicant was not happy about having to take on these additional responsibilities. His therapist is helping him gain a better understanding of how to be responsible. (Tr. pp. 30-34.)

He is also learning how to believe in himself more, take responsibility for his actions and to fully engross himself in any role where he is needed. Applicant states that he is now a role model at work, where he is mentoring the new hires and providing guidance to them on the programs and practices used at work. He wants to continue in this role and to one day become a program/project manager in the defense industry where a security clearance is required. (Applicant's Answer to SOR.)

Applicant submitted copies of his employer's drug policy and code of conduct. They indicate strict compliance with a substance free workplace. (Applicant's Post-Hearing Exhibits A and B.)

Applicant's mid-year assessment and year-end assessment are favorable. (Applicant's Post-Hearing Exhibits C.)

A letter from Applicant's therapist shows that he has been receiving rehabilitative counseling and mentorship skills since October 2021. He is making progress toward building his confidence, consistency, and emotional intelligence while exploring past mistakes and drug use. He is showing commitment to redemption and rehabilitation. (Applicant's Post-Hearing Exhibit D.)

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
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

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 has deliberately used marijuana for the past ten years, from 2013 to at least January 2022. He was hired by a defense contractor in March 2019, he applied for a security clearance in December 2021, and during this period he continued to use marijuana. In April 2022, he stated that he intended to continue to use marijuana after being granted a security clearance. His mindset at this time demonstrates immaturity and poor judgment. In May 2022, in his answer to the SOR, he stated that he intends to stop using marijuana altogether in

order to achieve his career goals. However, at the hearing, in October 2022, he stated that he plans to continue to associate with his friends with whom he used marijuana. (Tr. p. 37.) His judgment remains questionable. Even if Applicant has abstained from the use of marijuana since January 2022, his extended history of illegal drug use is criminal behavior and demonstrates poor judgment and unreliability. Marijuana is illegal under Federal law, and is clearly prohibited by the DoD under any circumstances. Applicant's actions are not mitigated.

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 Guideline H in my whole-person analysis. An individual who holds a security clearance is expected to comply with the law at all times. Applicant is a 27-year-old man. He has not demonstrated the level of maturity needed in order to access classified information. Applicant should know the requirements associated with holding a security clearance and should know that marijuana use is against Federal law and not tolerated. Under the circumstances, 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. At this time, 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 security concern.

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

Subparagraph 1.a., and 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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Darlene Lokey Anderson
Administrative Judge