



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



In the matter of:)	
)	
)	ISCR Case No. 21-00593
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: Pro se

June 20, 2023

Decision

Lokey Anderson, Darlene D., Administrative Judge:

Statement of the Case

On December 23, 2019; March 1, 2012; and February 14, 2015, Applicant submitted security clearance applications (e-QIPs). (Items 3, 4, and 5.) On June 9, 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. The action was taken 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) effective within the DoD after June 8, 2017.

Applicant responded to the SOR (Answer) on April 12, 2022. (Item 2.) He requested that his case be decided by an administrative judge on the written record. Department Counsel submitted the Government’s written case on June 17, 2022. A complete copy of the File of Relevant Material (FORM), containing six Items was received by Applicant on July 1, 2022. He was afforded an opportunity to file objections

and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. Applicant submitted no response to the FORM. DOHA assigned the case to me on May 24, 2023. Items 1 through 6 will hereinafter be referred to as Government Exhibits 1 through 6.

Findings of Fact

Applicant is 52 years old. He is married a second time, and has four children, ages 29, 25, 23, and 20. He holds a Master's degree. He is employed by a defense contractor as a Software Developer. He is seeking to obtain a security clearance in connection with his employment.

The Government alleges that the Applicant has engaged in the illegal use of controlled substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose, which can raise questions about an individual's reliability and trustworthiness, and his ability or willingness to comply with laws, rules, and regulations.

The SOR alleges that Applicant: a. used marijuana from about 1999 to November 2019, and intends to keep using marijuana; b. used marijuana while possessing a security clearance from January 2016 until November 2019; c. used hallucinogenic mushrooms while holding a security clearance in June 2018; and d. was charged with marijuana possession and placed on probation in 2000. Applicant admitted each of the allegations set forth in the SOR. (See Government Exhibit 3.)

Applicant served in the U.S. Army Reserves from 1989 through 1998, and received an honorable discharge. Following his military service, he obtained employment in the defense industry, working for a defense contractor as a civilian. Applicant began working for his current employer in December 2010. (Government Exhibit 3.)

In March 2012, Applicant completed a security clearance application and applied for a security clearance for the first time as a civilian. In the application he acknowledged that he had used marijuana from about March 1999 until July 2009, "a couple times a week". In response to the question concerning whether he intended to use marijuana in the future, he marked, "No." Applicant was not granted a security clearance. (Government Exhibit 5.)

Three years later, in February 2015, Applicant completed a security clearance application. In this application he stated that his marijuana use ended in June 2010, rather than July 2009, as he had stated in his 2012 application. Applicant stated that he did not intend to use marijuana again, and that it does not interest him like it used to. He also stated that he had distanced himself from friends who had encouraged the use of pot. Applicant was granted a security clearance. (Government Exhibit 4.)

In December 2019, Applicant completed another security clearance application. In this application Applicant stated that he had resumed using marijuana in September 2015. He also stated that between 2015 and 2018, he smoked marijuana with his friends about twice a year at social gatherings. He explained that after the state in which he resides legalized the use of marijuana in December 2018, he increased his marijuana consumption to a couple of times a week at social gatherings. Applicant further stated that he has not used marijuana since November 2019. In response to whether he intended to continue using marijuana, Applicant initially stated that he did not intend to use marijuana again, but then qualified his response by stating that he did not know if he could say that he would never use it again, outside of a rare social gathering, but doubted that he would use it again. (Government Exhibit 3.)

In January 2020, during Applicant's personal subject interview, Applicant told the investigator that he probably would use marijuana again since it was legal and socially acceptable in the state. Applicant further stated that he socializes and works with people involved in the use of marijuana that is legal in his state but illegal Federally. Applicant listed a friend and coworker that he uses marijuana with as one of his references in his 2019 security clearance application. Applicant's step-father, who Applicant visits a few times a year, also uses marijuana. (Government Exhibit 6.)

Regarding Applicant's use of hallucinogenic mushrooms in 2018 while holding a security clearance, Applicant also told the investigator that his friend and co-worker referenced above is the individual who provided him with the mushrooms and they used them at the coworker's house. (Government Exhibit 6.)

In his response to the SOR, Applicant stated that he understands that marijuana possession is a federal crime and he has no reservations about stopping his use of marijuana as long as he has a security clearance. (Government Exhibit 2.)

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. 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.

Directive ¶ E3.1.14, requires the Government to present evidence that establishes 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person who applies for access to classified information seeks to enter 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 protect or 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. None of the conditions are applicable:

- (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 demonstrate full mitigation. Applicant is a 52-year-old, educated, software developer, with a military background, who has worked in the defense industry for at least ten years and has held a security clearance for at least eight years. He has used marijuana and hallucinogenic mushrooms while possessing a security clearance, which is in violation of DoD policy and procedure. Furthermore, and most troubling is the fact that Applicant is and has been for some time struggling to determine whether he will stop using marijuana or continue to use it despite the fact that it is illegal under Federal law. Applicant knows or should know that the use of illegal drugs is prohibited by the Department of Defense. There is no exception to the rule or excuse for Applicant's misconduct. His actions do not show the requisite maturity, good judgment, reliability, and trustworthiness necessary to be eligible for access to classified information.

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. More time without drug use will show the Government that Applicant has matured and is sincere about his commitment to a drug-free lifestyle. At this time, Applicant has failed to provide sufficient evidence to demonstrate that he meets 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

Subparagraphs 1.a: through 1.d.

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 national security eligibility for a security clearance. Eligibility for access to classified information is denied.

Darlene Lokey Anderson
Administrative Judge