



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



In the matter of:)
)
) ISCR Case No. 22-00366
)
Applicant for Security Clearance)

Appearances

For Government: John C. Lynch, Esq., Department Counsel
For Applicant: Dalton H. Guthery, Esq.

06/28/2023

Decision

DORSEY, Benjamin R., Administrative Judge:

Applicant mitigated the drug involvement and substance misuse security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On May 2, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse). Applicant provided responses to the SOR dated July 11, 2022, and July 19, 2022, (identified collectively as "Answer") and he requested a hearing before an administrative judge. The case was assigned to me on April 6, 2023.

The hearing was convened as scheduled on June 13, 2023. At the hearing, I admitted Government Exhibits (GE) 1 through 4, and Applicant Exhibits (AE) A through H in evidence without objection. I received the transcript (Tr.) on June 21, 2023.

Findings of Fact

In the Answer, Applicant admitted all the SOR allegations with additional comments. His admissions are incorporated in my findings of fact.

Applicant is a 31-year-old employee of a government contractor. He has worked for his current employer since February 2016. He earned a high school diploma in 2010 and a bachelor's degree in December 2015. He has been married since December 2015. He has a two-year-old son, and he and his wife are expecting another child. (Tr. 21-22; GE 1-4; AE A-C, E)

From about September 2011 until March 2014, Applicant purchased and used marijuana with varying frequency in social settings while he attended college. In April 2017, in his Questionnaire for National Security Positions (2017 SF 86), he claimed that he had no intention to use illegal drugs in the future. He reaffirmed his intention to no longer use marijuana or other illegal drugs during his 2018 security interview. Notwithstanding his prior marijuana involvement, the DOD granted him access to classified information in about November 2018. Despite his stated intention to avoid illegal drug involvement, he used marijuana in January 2019, May 2019, and March 2021, while he was granted access to classified information. He used marijuana these three times socially with friends. He also purchased marijuana on at least one of these occasions. In his June 2021 Questionnaire for National Security Positions (2021 SF 86), he stated that he did not intend to use marijuana in the future, but that he might use it because he thought marijuana use should be legalized. He reiterated this sentiment during his June 2021 security interview, telling the DOD investigator that marijuana should be legal under federal law, and implying that he knew best about whether he could use it. He also acknowledged that he was violating his employer's drug use policy when he used marijuana. He last used marijuana in March 2021. He has not used or purchased any other illegal drugs. (Tr. 20-21, 25-33, 37-39; Answer; GE 1-4, AE A-C)

Applicant now claims that he is no longer open to using marijuana. He claimed that he has matured since he last used marijuana and last opined that he would be open to using it. He claimed that he is now ashamed of the statements he made regarding marijuana use in his 2021 SF 86 and during his June 2021 security interview. He credits the birth of his son and his overall maturation process with changing his perspective. He claimed that having a child, with another on the way, has led him to put his family first, and to look out for their best interests, instead of his own. He also claimed that he now understands that he must abide by the federal prohibition against marijuana use regardless of whether he agrees with it. He volunteered his illegal drug use in his 2017 SF 86 and his 2021 SF 86 and discussed it openly with the investigators during his security interviews in August 2018 and June 2021. (Tr. 20-22, 33-37; Answer; GE 1-4; AE A-C, H)

Applicant continues to associate with some of the individuals with whom he used marijuana in the past, but they have not used it in his presence since March 2021. He is unaware of whether they continue to use marijuana. His wife does not use marijuana and there is no marijuana in his house. He provided a signed statement of intent to

abstain from all drug involvement and substance misuse, acknowledging that any future misuse is grounds for automatic revocation of his security clearance eligibility. I observed him while he testified and found him to be sincere and credible. His reporting of derogatory information regarding his illegal drug use, including, paradoxically, his earlier openness to continuing to use marijuana in the future, bolsters his credibility. (Tr. 20-23, 33-39; Answer; GE 1-4; AE A-C, H)

In July 2022 and in February 2023, Applicant underwent hair-follicle drug tests for various controlled substances, including marijuana. He tested negative on both tests. He provided character-reference letters from his wife and his supervisor. His wife wrote that he is hard working, loyal, and responsible. She noted a change in his maturity level for the better after the birth of their son. His supervisor wrote that he is a top performer with good values. She considers him to be trustworthy and professional. (Tr. 22-23, 35, 39-40; Answer; AE D-G)

In the SOR, the Government alleged Applicant's intermittent marijuana use and purchase from September 2011 until March 2021 (SOR ¶ 1.a), his intermittent use and purchase of marijuana after being granted access to classified information in November 2018 (SOR ¶ 1.b), and his stated intention to continue to use marijuana in the future in his 2021 SF 86 (SOR ¶ 1.c).

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).

Any adverse information not alleged in the SOR cannot be used for disqualification purposes. It may be considered when assessing the application of mitigating conditions and for the whole-person analysis.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is set out in 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 notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (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;

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

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

Applicant illegally used and purchased marijuana with varying frequency from about 2011 until about 2021. He also illegally used and purchased marijuana while he had been granted access to classified information. In his 2021 SF 86, he stated that he was open to using marijuana in the future. All the above-listed disqualifying conditions are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially 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.

Applicant has not used or purchased illegal drugs for more than two years. While his illegal drug use and purchase in 2019 and 2021 was exacerbated by his holding a security clearance, I do not believe his drug misuse is likely to recur. I base my opinion on his two years of abstinence and his credible testimony that he will not use illegal drugs in the future. His candor in divulging derogatory information throughout the clearance process and his changed circumstances in starting a family fortify my opinion that he will not use or purchase illegal drugs again. AG ¶ 26(a) fully applies. While he

still associates with the individuals with whom he previously used marijuana, there is no evidence that those associates continue to use it. He provided the signed statement of intent to abstain contemplated in AG ¶ 26(b)(3). However, AG ¶ 26(b) is only partially applicable because there is no evidence that he has changed or avoided the environment where drugs were used. Regardless, as I have found AG ¶ 26(a) to be fully applicable and AG ¶ 26(b) to be partially applicable, I find that the drug involvement and substance misuse security concerns are 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 have considered Applicant's positive character-reference letters, his credible testimony, and his consistent open and honest reporting of derogatory information. I have incorporated my comments under Guideline H in my whole-person analysis.

Overall, the record evidence leaves me without questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the Guideline H security concerns.

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, Guideline H: FOR APPLICANT

Subparagraphs 1.a-1.c: For Applicant

Conclusion

It is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Benjamin R. Dorsey
Administrative Judge