



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



In the matter of:)
)
) ISCR Case No. 23-02092
)
)
Applicant for Security Clearance)

Appearances

For Government: Andrew Henderson, Department Counsel
For Applicant: *Pro se*

02/02/2024

Decision

Lokey Anderson, Darlene D., Administrative Judge:

On January 6, 2023, Applicant submitted a security clearance application (e-QIP). (Government Exhibit 1.) On September 18, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudications Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline H, Drug Involvement and Substance Abuse. 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*, effective within the DoD after June 8, 2017.

Applicant answered the SOR on October 20, 2023, and requested a hearing before an administrative judge. The case was assigned to me on November 21, 2023. The Defense Office of Hearings and Appeals issued a notice of hearing on December 5, 2023, and the hearing was convened as scheduled on January 9, 2024. At the hearing, the Government offered three exhibits, referred to as Government Exhibits 1 through 3, which were admitted without objection. The Applicant offered two exhibits, referred to as Applicant’s Exhibits A and B, which were admitted without objection. He also testified

on his own behalf. The record remained open until close of business on January 31, 2024, to allow the Applicant to submit additional supporting documentation. Applicant submitted one Post-Hearing Exhibit, consisting of five documents, referred to as Applicant's Post-Hearing Exhibit A, which was admitted without objection. DOHA received the transcript of the hearing (Tr.) on January 22, 2024.

Findings of Fact

Applicant is 37 years old. He is married and has one young child. He has a Bachelor's degree in Electrical Engineering. He is employed by a defense contractor as a Lead Electrical 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, which can raise questions about an individual's reliability and trustworthiness.

Applicant has a history of illegal drug use involving marijuana and/or other THC products from 2006 through July 2023. He began using marijuana as a sophomore in college in 2006. In 2009, campus security caught him using marijuana and he got into trouble. In 2010, he applied for a job and was hired contingent on passing the drug test. The drug test involved both a urine test and a hair test. Applicant failed the hair test because marijuana was detected. (Tr. p. 27, and Applicant's Exhibit B.) Applicant was not hired by the company. At this point, Applicant decided to move to California for more freedom, and where he could obtain marijuana, and have life be more lenient. (Tr. p. 28.)

Applicant continued to use marijuana consistently, with varying frequency, from daily, weekly, to monthly. (Tr. p. 28.) He was employed as an Electrical Engineer for company A, from 2012 to 2016. He does not recall if they had a drug policy, but they did not drug test him. In 2016, he began working for company B, a defense contractor, as an Electronic Engineer. He completed a security clearance application dated July 5, 2016. The application asked if in the past year he has used any illegal drugs, and he responded, "NO." This response was not truthful. Applicant was subsequently drug tested and passed. (Government Exhibit 3.) After he was hired, he continued using marijuana with varying frequency. (Tr. p. 30.) He was aware of the company's no drug tolerance policy. (Tr. p. 31.) He stated, however, that the way he sees it, he never used drugs at work or showed up under the influence of marijuana. (Tr. p. 31.)

In March 2022, Applicant began working for his current employer, Company C. He believes that at the time he was hired, the company did not have a drug policy, but they later established one. They have been obtaining Government contracts and Applicant was required to apply for a security clearance. He completed the security

clearance application on January 6, 2023. He underwent a voluntary drug test on December 5, 2023, and on January 22, 2024, and the results were negative. (Applicant's Exhibit A, and Applicant's Post-Hearing Exhibit A.) Despite the policy at Company C that prohibits all illegal drug use, Applicant continued to use marijuana and last used it on July 15, 2023. (Tr. p. 33, and Applicant's Post-Hearing Exhibit A.)

Applicant stated that he is now trying to be open and transparent about his past use of marijuana. In September 2023, he discussed the situation with his supervisor and since then, he has taken the matter seriously. He stated that despite his marijuana use, he is trustworthy. He realizes that he must not use marijuana in the future, and he is ready to let it go forever. (Tr. p. 41.)

Applicant submitted a Personal Summary, wherein he indicates that he will never use or possess any type of illegal drug in the workplace or on any federal land or property and will refrain from using any type of these illegal drugs or substances indefinitely, however, he does not acknowledge that any future involvement or misuse is grounds for revocation of national security eligibility. (Applicant's Post-Hearing Exhibit A.) He also seems to qualify his non-use of illegal drugs to the workplace, or on federal land or property, when Federal law prohibits the use of marijuana anywhere at any time.

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.

Applicant has a long history of drug use involving marijuana. He recently used it in July 2023, just six months ago, after being hired by a defense contractor, after applying for a security clearance, and while holding a sensitive position. The above disqualifying conditions apply.

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.

Applicant has used marijuana and/or other THC products with varying frequency from at least 2006 through July 2023. The use of marijuana is against Federal law. During his past and present employment, he has used marijuana in total disregard of the law, DoD policy, and company rules and regulations that prohibit illegal drug use. Even after applying for a security clearance in January 2023, he continued to use marijuana, knowing it was against Federal law. His last use of marijuana occurred as recently as July 2023, about six months ago. As Applicant stated, he only recently started taking this matter seriously. His conduct does not demonstrate a high level of maturity, trustworthiness, or good judgment. Given his recent history of illegal drug use, he does not meet the requirements for eligibility to access classified information. None of the mitigating conditions are applicable.

Considered in totality, Applicant's conduct precludes a finding of good judgment, reliability, and/or the ability to abide by rules and regulations. To be entrusted with the privilege of holding a security clearance, applicants are expected to abide by all laws, regulations and policies that apply to them. Applicant has disregarded the Federal law.

Under the particular facts of this case, at this time, he does not show the requisite character or judgment of someone who has the maturity, integrity, good judgment, and reliability necessary to access classified information. Applicant does not meet the qualifications 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. An individual who holds a security clearance is expected to comply with the law at all times. Applicant has not demonstrated the level of maturity needed for access to classified information. This 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. Applicant is not qualified for access to classified information and does not meet the qualifications for a security clearance.

Overall, the record evidence leaves me with many questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has failed to mitigate the Drug Involvement and Substance Misuse security concerns.

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

Darlene Lokey Anderson
Administrative Judge