



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



In the matter of:)	
)	
)	ISCR Case No. 23-02185
)	
Applicant for Security Clearance)	

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: *Pro se*

04/25/2024

Decision

BENSON, Pamela C., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline H (Drug Involvement and Substance Misuse). National security eligibility for access to classified information is not granted.

Statement of the Case

On March 8, 2022, and again on August 1, 2022, Applicant submitted security clearance applications (SCA), also known as the Electronic Questionnaires for Investigation Processing. On October 4, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline H. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (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 on June 8, 2017.

Applicant provided an undated response to the SOR (Answer), where he admitted SOR ¶¶ 1.a, 1.b, and denied SOR ¶ 1.c. He requested a hearing before an administrative judge, and the case was assigned to me on December 13, 2023. On February 7, 2024, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing for a video teleconference scheduled for March 6, 2024. The hearing was convened as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through 3, and a November 2023 disclosure letter, which I marked as Hearing Exhibit (HE) 1. There were no objections, and GE 1 through 3 were admitted into evidence, and HE 1 was appended to the record. Applicant testified but he did not offer any documents. I held the record open for two weeks in the event either party wanted to supplement the record. DOHA received the transcript (Tr.) on March 13, 2024. No post-hearing documents were submitted, and the record closed on March 20, 2024.

Findings of Fact

Having thoroughly considered the evidence in the record, I make the following findings of fact:

Applicant is 47 years old. He is single and does not have any children. In May 2001, he earned a Bachelor of Science degree in computer information systems. Since November 2021, he has worked for a defense contractor. His job title is solutions specialist, which is a data administrator position. He enlisted in the U.S. Army in October 2002. He received a general discharge in March 2003, an entry-level separation, after he returned from Christmas break and tested positive for Delta-9-tetrahydrocannabinol (THC). (Tr. 16-19; GE 1, 2 and 3)

(SOR ¶ 1.a) Applicant used and purchased THC, with varying frequency, from about January 2003 to at least April 2022. He admitted this information in his Answer, and during the hearing he stated that he had used THC before 2003 while he was enrolled in college. During Christmas break (December 2002 - January 2003), while an enlisted member of the Army, he deliberately used THC because he wanted to get out of the military. From 2003 to 2019, he may have used THC infrequently on a recreational basis, but his first “regular” use of THC started in 2019 when he used it to treat his symptoms of back pain. (Tr. 20-22; GE 1 and 3)

In 2018, Applicant’s state of residence legalized the use of THC for medicinal purposes. He was experiencing severe back pain at the time, and in 2019, he visited a doctor at a cannabis clinic. The doctor prescribed him THC drops to treat his symptoms. He sought treatment at the cannabis clinic after undergoing treatments with his primary care doctor, which did not alleviate his back pain. Applicant was aware that, despite his medical use of THC being legal in his state, it was still considered illegal under federal law. (Tr. 22-24)

(SOR ¶ 1.b) Applicant continued to use THC after he completed his SCA in March 2022 to obtain a DOD security clearance. He admitted this information in his Answer. When Applicant completed his SCA in March 2022, he listed that he had used an illegal substance within the last seven years; specifically, THC, three times daily from December 2000 to February 2022 to help with “chronic sciatica pain.” When he filled out another SCA five months later in August 2022, he denied that he had used an illegal drug within the last seven years. Applicant could not give an explanation why he listed his THC use on one SCA only, as he knew it was illegal under federal law and he was being candid about his use of THC. (GE 1 and 2; Tr. 24-27)

(SOR ¶ 1.c) Applicant intends to use THC in the future. He denied this SOR allegation. In his Answer he stated, “I deny any and all intentions to continue using THC in the future.” At the hearing he testified he meant to state in his Answer that he would not use THC *after* he was granted a DOD security clearance. (Answer; Tr. 27)

Applicant had stopped using THC in about June 2023, because he had been prescribed muscle relaxers from his general practitioner to treat his back pain. He was able to maintain abstinence from THC until December 2023. It was during this time that he communicated with Department Counsel about his security clearance hearing, which caused him to feel anxiety and stress. He resumed using THC in December 2023, due to these symptoms. His last use of THC occurred during the Super Bowl game on February 11, 2024, to celebrate his aunt’s life and to overcome his social anxiety. At the hearing, he stated that he does not intend to use THC in the future. He also admitted he has made that promise before and ended up using THC while he was stressed, depressed, or anxious. (Tr. 27-32)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied 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.” 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. Directive ¶ E3.1.15 an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining 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 that an 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 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 . . . 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.

The guideline at AG ¶ 25 contains the following conditions that could raise a security concern and may be disqualifying:

- (a) any substance misuse; and

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

The record evidence and Applicant's admissions support the disqualifying conditions listed in AG ¶¶ 25(a) and (g), above.

The burden shifted to Applicant to rebut or prove mitigation of the resulting security concerns. AG ¶ 26 provides conditions that could mitigate security concerns in this case:

(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;

(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; and

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended.

None of the above mitigating conditions apply to the facts of this case. Applicant admitted that he used THC over the years, and that his THC use became regular in 2019, when a doctor prescribed it to treat his chronic back pain. He knew that, although medicinal use of THC was legal in his state, it was still considered a controlled substance and prohibited under federal law. To his credit, he stopped using THC in June 2023. In his undated Answer, most likely provided in late October 2023, he stated unequivocally that he had no intention of using THC in the future. It is clear that his statement was not conditional upon a grant of a DOD security clearance, as he claimed during the hearing.

After declaring in his Answer that he intended to abstain from using THC in the future, Applicant resumed his use of THC in December 2023, after communicating with Department Counsel about his upcoming security clearance hearing. It is important to note that he used THC not to treat his back pain, but to ease his anxiety and stress. Applicant again used THC less than a month before his March 6, 2024 hearing. On this occasion he was depressed about his aunt's death, and/or he used THC to celebrate

her life and to treat his social anxiety. Again, his use of THC was not to treat his chronic back pain. His post-SCA and post-Answer use of THC is security significant -- regardless of what he may have intended in his Answer about future intent -- because he used THC after being placed on notice that THC was incompatible with a security clearance. Applicant's conduct falls short of a clear and convincing commitment to discontinue his use of THC. Drug Involvement and Substance Misuse security concerns are not mitigated for SOR ¶¶ 1.a and 1.c. I find SOR ¶ 1.b in favor for Applicant since it is duplicative of the facts alleged in SOR ¶ 1.a. Illegal drug use after submitting an SCA is an aggravating factor, but this allegation does not allege any additional disqualifying conditions.

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 the 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 the facts and circumstances surrounding this case.

Applicant applied for a DOD security clearance when he completed his SCAs in 2022. He was aware at that time that using THC is illegal under Federal law, and the continued use of THC is clearly prohibited by the DOD as well. He eventually stopped using THC in June 2023, but he resumed using it shortly thereafter when he was troubled with anxiety, depression, and/or stress. I am not convinced that future symptoms are unlikely to recur, or whether he will turn to THC when faced with future challenges. As such, the record evidence leaves me with questions and doubts about his eligibility and suitability for a security clearance.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more time without any security concern, and a track record of treatment or other constructive actions he has taken to overcome this continuing problem, he may be

able to demonstrate persuasive evidence of his security clearance worthiness. I have carefully applied the law, as set forth in Department of the Navy v. Egan, 484 U.S. 518, 528 (1988) and EO 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate the drug involvement and substance misuse consumption 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:	AGAINST APPLICANT
Subparagraphs 1.a and 1.c:	Against Applicant
Subparagraph 1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge