



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 23-02059

Appearances

For Government:
Jeff Nagel, Esquire, Department Counsel

For Applicant:
Lea Trojanowski, Esquire
Griffith, Young & Lass

05/16/2024

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted his initial Electronic Questionnaires for Investigations Processing (e-QIP) on March 28, 2023. (Government Exhibit 1.) On September 19, 2023, the Defense Counterintelligence and Security Agency Central Adjudication Services issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H (Drug Involvement and Substance Misuse). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended

(Directive); and the Adjudicative Guidelines effective within the Department of Defense after June 8, 2017.

Applicant answered the SOR in writing (Answer) with attachments on September 29, 2023, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on November 6, 2023. The case was assigned to me on November 9, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on November 14, 2023. I convened the hearing as scheduled on December 4, 2023. The Government offered Government Exhibits 1 and 2, which were admitted without objection. Applicant testified on his own behalf and submitted Applicant Exhibits A through K, which were also admitted without objection. DOHA received the transcript of the hearing (Tr.) on December 14, 2023.

Findings of Fact

Applicant is a 36-year-old microelectronics assembly technician II with a defense contractor. He has worked for them since January 2022. He is engaged. He has received several associate degrees. He is seeking to obtain a security clearance in connection with his work with the DoD. This is his first application for a security clearance. (Government Exhibit 1 at Sections 12, 13A, 17, and 18; Appellant Exhibit G.)

Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has used illegal drugs. Applicant admitted the single allegation under this paragraph with explanations.

1.a. Applicant started using marijuana in approximately June 2001. He testified that his use was sporadic until he stopped all use in February 2023. He would use marijuana for pleasure and for pain relief for sports injuries. He did not have a prescription or medical marijuana card. He legally purchased marijuana from dispensaries approximately 50 times. He estimated that he used marijuana approximately 100 times during this period. (Government Exhibits 1 and 2; Tr. 24-27, 36-41.)

Regarding his most recent use, Applicant stated that he used marijuana several times a month during 2021 when he worked for another company. After starting work for his current employer in January 2022 he used marijuana approximately monthly from August 2022 to February 2023. (Tr. 53-54.)

Applicant had a policy of stopping marijuana use two or three months before changing jobs. He did this because he knew most employers would have him take a drug test and he wanted to be clean. He did this before starting work for his current employer. (Government Exhibit 2; Tr. 45, 51-52.)

Applicant testified that his current supervisor does not know of his marijuana use. He stated that the reason is, "I would be embarrassed, to say the least. I really admire him. I look up to him. He's been a mentor to me since I've been there, and I think he'd be extremely disappointed if he had found out." (Tr. 55.)

Applicant submitted a written statement of intent not to use illegal drugs in the future with his Answer. He submitted a second written statement of intent at the hearing. He testified that he had no intention of using marijuana in the future because it would interfere with his career path. A recent negative drug test was admitted into the record. (Applicant Exhibits H and J; Tr. 28-29, 31-32.)

Applicant's basic explanation for continuing to use marijuana after being employed by a defense contractor was that he did not know that he could not use it. He admitted that it was a mistake to continue using it with his current employer. (Tr. 27-28, 42-43.)

Mitigation

Applicant has been working in the electronics field since 2010 while also going to school. His career has been progressing well and two of his former supervisors wrote letters of recommendation on his behalf. He testified that he told the people who wrote letters on his behalf about his past marijuana use, including one of his current coworkers. (Tr. 36; Applicants Exhibits A, B, and C.)

Applicant's evaluations from his current employer state that he successfully met expectations. He has also received "Spot" awards for his work. (Applicant Exhibits D and E.)

Policies

When evaluating an applicant's national security eligibility for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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 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 applicable guidelines in the context 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, “Any 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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, and has the ultimate burden of persuasion as to obtaining 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 national security eligibility. 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 or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)

The security concern relating to Drug Involvement and Substance Misuse is set forth 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.

I have examined the disqualifying conditions under AG ¶ 25 and especially considered the following:

(a) any substance misuse (see above definition.

Applicant used marijuana from 2001 through at least August 2023. Both of the stated disqualifying conditions apply.

The following mitigating conditions under AG ¶ 26 have also been considered:

(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;

(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 stated Mitigating Conditions fully apply to the facts of this case. Applicant has an extensive history of using illegal drugs, specifically marijuana. He only stopped using marijuana nine months before the record closed. I have considered his testimony about not using marijuana in the future, and his signed statements of intent. They are insufficient to support full mitigation given his long history of use, and the fact that he would stop use specifically to pass employment drug tests and conceal drug use from his employers. Paragraph 1 is found against Applicant.

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 national security 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 pertinent facts and circumstances surrounding this case. Applicant has not mitigated the security concerns raised by his long-term drug use, which continued after he gained employment in the defense industry. He is a mature person, who made a conscious decision to continue use after being employed by a defense contractor and applying for a security clearance. He purposely did not tell his current supervisor about his drug use because he was "embarrassed." The potential for pressure, coercion, exploitation, or duress continues to exist at unacceptable levels. Continuation or recurrence of similar conduct is likely. Overall, the record evidence does create substantial doubt as to Applicant's present suitability for national security eligibility and a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H: AGAINST APPLICANT

Subparagraph 2.a: 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 national security eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge