



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



In the matter of:)	
)	
)	ISCR Case No. 23-02864
)	
)	
Applicant for Security Clearance)	

Appearances

For Government:
Jeff Nagel, Esquire, Department Counsel

For Applicant:
Pro se

05/21/2024

Decision

GLENDON, John Bayard, Administrative Judge:

Applicant has not mitigated security concerns raised by his drug involvement and expressed intent to continue his substance misuse.. National security eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) on December 13, 2022 (e-QIP). On January 26, 2024, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) 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 (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as

amended (Directive); and the adjudicative guidelines (AG) effective within DoD after June 8, 2017.

In an undated document, Applicant responded to the SOR (Answer) and requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on February 23, 2024. The case was assigned to me on April 1, 2024. DOHA issued a Notice of Hearing on April 17, 2024, scheduling the case to be heard via Microsoft Teams video teleconference on May 3, 2024.

I convened the hearing as scheduled. Department Counsel offered two documents marked as Government Exhibits (GE) 1 and 2, which I admitted without objection. Applicant testified on his own behalf. He did not offer any documentary evidence. At the conclusion of the testimony, Department Counsel moved to amend SOR ¶ 1.a to conform with the evidence regarding Applicant's last use of an illegal drug to be April 2024. Applicant did not object, and I granted the Government's motion. DOHA received the transcript of the hearing (Tr.) on May 10, 2024. (Tr. at 11-14, 24-25.)

Findings of Fact

Applicant is 22 years old. He has never married and has no children. He earned a high school diploma in May 2020 and has taken some college courses. He has worked for a U.S. Government contractor since June 2023 as an electrician. He is seeking to be granted national security eligibility in connection with his employment. (Tr. at 15-17; GE 1 at 5, 8-9, 13-14.)

The Government alleged in the SOR, as amended, that Applicant is ineligible for a security clearance because he has illegally used tetrahydrocannabinol (THC) from about January 2018 to at least April 2024, and that he intends to continue using THC in the future. (SOR ¶¶ 1.a, 1.b). In his Answer, Applicant admitted both allegations. At the hearing, Applicant testified candidly that he uses THC to treat pain from sore muscles and stress, to increase his appetite so that he gains weight, and to help him cope with a traumatic incident in 2019 when he witnessed a mass shooting. He also admitted that he started using THC during his sophomore year in high school, years before he reached the legal age of 21 for purchasing THC products in his state. Applicant's last use of THC was April 2024, about a week before the hearing, after he broke his nose in a martial arts class. On that occasion, he used THC to ease the pain from his injury. (Tr. at 17-24.)

Applicant testified that he intends to use THC in the future. He discussed the possibility that his employer may require all employees to have security clearances in the future. If that change occurs, Applicant said that he might consider ceasing all use of THC in the hope that he could satisfy the requirements for a clearance. He also appreciates that he would need to change his statement regarding his future use of THC. He commented further that many of his co-workers are not honest about their use of THC

and have clearances, and he may be deemed ineligible because he is totally honest about his drug use. (Tr. at 17-27, 29-30.)

Policies

When evaluating an applicant's suitability for national security eligibility, 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

Guideline H, Drug Involvement and Substance Misuse

The security concerns relating to the guideline for drug involvement and substance misuse are set out in AG ¶ 24, which reads as follows:

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.

AG ¶ 25 sets forth the following condition that could raise security concerns and may be disqualifying in this case:

- (a) any substance misuse (see above definition); and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant's admissions to the SOR allegations and his testimony at the hearing established the above potentially disqualifying conditions. Accordingly, the burden shifts to Applicant to mitigate the security concerns raised by his conduct and stated intentions.

AG ¶ 26 contains the following two conditions that could mitigate the security concerns raised by Applicant drug use:

- (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 the 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.

In my analysis, I have taken administrative notice of the Security Executive Agent (SecEA) “Clarifying Guidance Concerning Marijuana for Individuals Eligible to Access Classified Information or Eligible to Hold a Sensitive Position,” dated December 21, 2021. (Guidance.) In her Guidance, the SecEA noted the increased number of states that have legalized or decriminalized the use of marijuana and issued the Guidance to “provide clarifying guidance.” She reaffirmed the previous SecEA’s 2014 memorandum regarding the importance of compliance with Federal law on the illegality of the use of marijuana by holders of security clearances. She provided further clarification of Federal marijuana policy writing that this policy remains relevant to security clearance adjudications “but [is] not determinative.” She noted that the adjudicative guidelines provided various opportunities for a clearance applicant to mitigate security concerns raised by his or her past use of marijuana.

The evidence, however, does not establish either of the above mitigating conditions. Applicant’s use of the illegal drug THC is likely to recur and casts doubt on his current reliability, trustworthiness, and good judgment. Also, he has not engaged in a period of abstinence or provided any statement, written or oral, that he intends to abstain from all involvement with illegal drugs, including THC, in the future.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant’s eligibility for national security eligibility 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 above whole-person factors and the potentially disqualifying and mitigating conditions, as well as the SecEA's Guidance, in light of all pertinent facts and circumstances surrounding this case. I credit Applicant's honesty and understand his concern that his colleagues may not be honest about their illegal drug use during the processing of their national security eligibility. However, that possibility does not permit a conclusion that Applicant's illegal drug use and future intentions with respect to drug use can be ignored or mitigated. Overall, the record evidence raises questions and doubts as to Applicant's present suitability for national security eligibility and a security clearance, as well as a statutory prohibition to granting that eligibility.

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

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 or continue Applicant's national security eligibility. Eligibility for access to classified information is denied.

JOHN BAYARD GLENDON
Administrative Judge