



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 24-00251 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

07/25/2024

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Guideline H, drug involvement and substance misuse security concern. Eligibility for access to classified information is denied.

Statement of the Case

On March 8, 2024, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse. 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 (AG) effective on June 8, 2017.

Applicant answered the SOR on March 19, 2024, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government’s file of relevant material (FORM), and Applicant received it on April 9, 2024. He was afforded an opportunity to file objections and submit material in refutation,

extenuation, or mitigation within 30 days of receipt of the FORM. The Government's evidence is identified as Items 4 through 7. (Item 1 is the SOR. Items 2-3 are administrative documents.) Applicant did not provide a response to the FORM. The case was assigned to me on July 11, 2024. There were no objections to any of the evidence and the Government's exhibits are admitted into evidence.

Findings of Fact

Applicant admitted the SOR allegation in ¶ 1.a and admitted ¶ 1.b with an explanation. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 38 years old. He earned a bachelor's degree in 2007. He married in 2016 and has two young children. He has worked for a federal contractor since 2016. (Item 5)

Applicant completed a security clearance application (SCA) in June 2023. In response to Section 23-Illegal Use of Drugs or Drug Activity, he disclosed that from August 2003 to April 2023, he used marijuana one to two times a month when he was relaxing at home. He indicated that he intended to continue to use marijuana in the future. His explanation was as follows: "I use it occasionally while sitting around the house to take my mind off things. Legal in [state]." (Item 5)

Applicant was interviewed by a government investigator in July 2023. He was asked about his past drug use and confirmed he used marijuana from August 2003 to April 2023 while at home to relax. He would obtain the marijuana from a friend he has known since high school. He and his wife socialize with this friend and his spouse multiple times a year at family functions in addition to playing golf together about five times a year. He also corresponds with him regularly through text messages. Applicant explained he had no idea how his friend obtained the marijuana. He further told the investigator that marijuana use is now legal in his state, so he no longer purchases it through his friend, but from a legal source. Recreational marijuana became legal in Applicant's home state in 2021. He stated he is not dependent on marijuana. Using it makes him calm and relaxed. He said his use has had no impact on his work, finances, school, home, family, or friends. He told the investigator that he is aware that it is illegal under federal law and confirmed he intended to continue to use marijuana in the future. He confirmed to the investigator that he has never held a security clearance. (Items 6, 7)

Applicant completed government interrogatories in March 2024. He disclosed that from 2003 to 2007 he used marijuana weekly and from 2008 to 2024 he used marijuana approximately monthly. He also disclosed that he purchased marijuana infrequently from August 2003 to September 2023. His last purchase was in September 2023 from a state dispensary where it is legal. He answered "yes" to the question in the interrogatories that asked if he understood that despite any state laws to the contrary, marijuana use remains illegal under federal law and any future use of marijuana may affect his eligibility to

maintain a security clearance or public trust position. He provided the following statement in his interrogatory response: "I answered yes during my interview based on the fact that marijuana is legal in [state]. I don't intend to use marijuana if it is illegal while having a security clearance." He disclosed that he had been drug tested by his employer in February 2016 and the results were negative. (Item 6)

The SOR alleged and Applicant admitted his use of marijuana from August 2003 to January 2024 (¶ 1.a). SOR ¶ 1.b alleged that he intended to continue to use marijuana in the future. Applicant stated in his SOR answer:

I admit to saying this. I said this under the assumption that since it was legal in my home state of [state] then it would be permissible. I now understand that is not the case, and do not intend to use marijuana in the future if granted a security clearance. Although the period of time stated above spans many years, the great majority of those days were marijuana free, and I would have no problem refraining from using it in the future. (Item 4)

Applicant did not respond to the FORM or provide any other mitigating evidence.

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the adjudicative guidelines 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 states 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 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.

AG ¶ 25 provides conditions that could raise security concerns. The following are potentially applicable:

- (a) any substance misuse;

- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia;

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

Applicant illegally used marijuana from 2003 to January 2024. He repeatedly

indicated his intent to continue using marijuana. It was not until he completed government interrogatories in March 2024 that he said he would discontinue future use. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from drug involvement and substance misuse. The following mitigating conditions under AG ¶ 26 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;

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions 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 being 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; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant began using marijuana in 2003 and used it while employed by a federal contractor 2016 to January 2024. He was put on notice when he was drug tested by his federal employer in 2016 that illegal drug use was not permitted. Recreational marijuana was legalized in the state where he lives in 2021. The majority of his use from 2003 to 2021 was illegal under both state and federal law. Applicant acknowledged to the government investigator during his July 2023 interview that he was aware marijuana use was illegal under federal law, yet he intended to continue using it. He then purchased marijuana in September 2023, fully aware that he was going through the security clearance eligibility process. Despite his acknowledgement, he continued to use marijuana until at least January 2024. It was not until he was confronted with answering government interrogatories in March 2024 that he indicated his intent to stop using marijuana. However, when he answered the SOR, he indicated his intent to discontinue use if granted a security clearance.

Applicant provided no explanation for why he was using marijuana for years before it was legalized in his state. Despite his recent statements that he no longer intends to use marijuana in the future, he repeatedly expressed his intent to continue using it and actually did until at least January 2024 and while going through the security clearance eligibility process.

Applicant's previous conduct must be weighed against his recent decision. Specifically, that he was using marijuana prior to it being legalized; he reported his marijuana use as illegal on his SCA; he continued to use it after acknowledging to the government investigator that he was aware it was illegal under federal law; he purchased it in September 2023 after his interview with the government investigator; and used it up to at least January 2024. In his answer to the SOR, Applicant stated he would abstain from marijuana use if granted a security clearance. He also said he was under the assumption that because it was legal in his state it would be permissible to use. I did not find this statement credible as he had already acknowledged during his background interview that he was aware it was illegal to use marijuana under federal law. He did not respond to the FORM. I do not have any recent update on whether he continued to abstain from marijuana use after he completed his government interrogatories.

I have considered Applicant's expressed intent to abstain from drug involvement. His drug use is recent and considering the frequency and lengthy period of marijuana use, I am unable to find a sufficient period of abstinence has expired and future use is unlikely to recur. AG ¶ 26(a) does not apply. Applicant did not provide evidence of an established pattern of abstinence, disassociation from drug-using associates and contacts, and changing or avoiding the environment where drugs are used. In addition, he indicated his intent to abstain from marijuana use was contingent upon receiving a security clearance. I find AG ¶ 26(b) does not apply.

Because Applicant requested a determination on the record without a hearing, I had no opportunity to question him about his illegal drug use or evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003).

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. I have incorporated my comments under Guideline H, in my whole-person analysis.

I have a duty to exercise prudence because 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.” I am obligated to follow that directive. Applicant failed to meet his burden of persuasion. After weighing the disqualifying and mitigating conditions under Guideline H and evaluating all the evidence in the context of the whole person, I conclude Applicant failed to mitigate the security concerns under the drug involvement and substance misuse guideline.

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:

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| Paragraph 1, Guideline H: | AGAINST APPLICANT |
| Subparagraphs 1.a-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 security to grant Applicant’s eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge