



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



In the matter of:)
)
) ISCR Case No. 23-02824
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: *Pro se*

08/28/2024

Decision

Dorsey, Benjamin R., Administrative Judge:

Applicant did not mitigate the drug involvement and substance misuse or the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On March 19, 2024, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. On April 9, 2024, Applicant responded to the SOR and requested a decision based on the written record in lieu of a hearing.

The Government’s written case was submitted on May 2, 2024. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was given 30 days to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on May 10, 2024, but he did not respond to it. The case was assigned to me on August 15, 2024. The Government exhibits included in the FORM (Items 1-3) are admitted in evidence without objection.

Findings of Fact

Applicant is a 30-year-old employee of a defense contractor for whom he has worked since March 2022. He earned a bachelor's degree in December 2022. He has been married since November 2013 and has a five-year-old child. He served on active duty with the U.S. Army from February 2013 until he was involuntarily separated and discharged under other than honorable conditions in April 2017. (Items 2, 3)

From March 2017 to January 2024, Applicant used marijuana with varying frequency. His March 2017 marijuana use occurred while he had been granted security clearance eligibility. There is insufficient evidence to determine that he had access to classified materials (no evidence of a non-disclosure agreement or a need to know). His other than honorable conditions discharge from the Army resulted from an April 2017 failed urinalysis test where he tested positive for marijuana. Shortly thereafter, because of his positive urinalysis test, his command took action against him in the form of administering nonjudicial punishment (NJP) under the Uniform Code of Military Justice (UCMJ), Article 15. In addition to Applicant's involuntary administrative separation, his punishment consisted of 45 days of extra duty, forfeiture of pay, and a reduction in rank. There is no evidence in the record that he enrolled in or completed the Army Substance Abuse Program (ASAP) or any other substance abuse counseling. (Items 1-3)

After he was discharged from the Army, Applicant used marijuana that he purchased about every other weekend. In February 2022, he tested positive for marijuana after taking an employer-issued urinalysis test. His employer, another government contractor, terminated him as a result. In May 2023, he completed and certified an Electronic Questionnaires for Investigations Processing (SF 86). As required, he disclosed his March 2017 to February 2022 marijuana use on the SF 86 and claimed that he did not intend to use marijuana in the foreseeable future. However, during a July 2023 security interview (PSI), which he authenticated, he told a DOD investigator that his marijuana use decreased to every two or three weeks, but that he still used it. He claimed that his marijuana use did not have a negative impact on his life, he never used it while working, and that he intended to continue to use it. (Items 2, 3)

In February 2024, Applicant completed his responses to interrogatories and disclosed his marijuana use until January 2024. He claimed that he stopped using marijuana then to assist with applying for a security clearance, and that he stopped using it to show that he is not reliant on it. He again claimed that he only used marijuana outside of work and claimed that he used it the way others use alcohol. He stated he does not intend to continue to use marijuana but admitted that he might use it again if it was legalized. (Item 3)

In his response to the SOR, Applicant admitted his marijuana use from March 2017 until January 2024. He also admitted his 2017 marijuana use, while he was granted security clearance eligibility. He admitted that he had been discharged from the Army under other than honorable conditions because of a failed drug test and that he had been terminated from employment because of another failed drug test. He denied that he intended to use marijuana in the future. He claimed that he has learned his

lesson and understands that he was irresponsible for using marijuana. He also claimed that he foolishly and immaturely stated that he might use marijuana in the future if it was legalized. He vowed to regain his integrity and do what is best for his wife and child. He claimed that he does not associate with anyone who is involved with illegal drugs. (Items 1-3)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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 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."

Under Directive ¶ E3.1.14, the Government must 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." The applicant has the ultimate burden of persuasion to obtain 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible

extrapolation of 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 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. 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.

On October 25, 2014, the Director of National Intelligence (the Security Executive Agent (SecEA)) issued DNI Memorandum ES 2014-00674, “*Adherence to Federal Laws Prohibiting Marijuana Use*,” which states:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines An individual’s disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual’s judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

On December 21, 2021, the SecEA promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications (*Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of*

Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position). It states in pertinent part:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a “whole-person concept.” This requires adjudicators to carefully weigh a number of variables in an individual’s life to determine whether that individual’s behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used marijuana with varying frequency from March 2017 until January 2024. He used marijuana in March 2017 while he was granted eligibility for a security clearance. He tested positive for marijuana on two separate urinalysis tests, in 2017 and 2022, respectively. By using marijuana, he would have had to possess it. During the PSI, he stated his intent to continue to use marijuana. AG ¶¶ 25(a), 25(b), 25(c), and 25(g) are established. AG ¶ 25(f) is not established because there is insufficient evidence that Applicant had access to classified information or held a sensitive position.

AG ¶ 26 provides conditions that could mitigate security concerns. The following 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; 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.

It has only been about nine months since Applicant last used marijuana. His prior marijuana use was frequent and lasted over a significant period. He committed to discontinue his marijuana use in the past only to resume using it again. He continued to use marijuana after he completed the SF 86 and after the PSI. He also continued to use marijuana despite being separated from the military and losing a job because of his use. For these reasons, I do not find that his marijuana use is unlikely to recur or that he has established a sufficient pattern of abstinence. None of the Guideline H mitigating factors are applicable.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security concern:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. Potentially applicable conditions include:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

In April 2017, Applicant was administratively separated from the Army under other than honorable conditions because he consumed marijuana and tested positive for it after a urinalysis test. In February 2022, his employer fired him because he consumed marijuana and tested positive for it after a urinalysis test. These actions showed questionable judgment and an unwillingness to comply with rules and regulations. AG ¶ 16(c) is not perfectly applicable because the alleged conduct is sufficient for disqualification under Guideline H. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. The following mitigating conditions potentially apply in Applicant's case:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

For the reasons provided in my analysis under Guideline H, I do not find that Applicant's marijuana use is unlikely to recur. I also find that his willingness to continue to use marijuana until January 2024, despite it causing him serious issues with his military and civilian career, casts doubt on his reliability, trustworthiness, and good judgment. None of the Guideline E mitigating factors are applicable.

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 the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude he did not mitigate the drug involvement and substance misuse security concerns or the personal conduct 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-1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Benjamin R. Dorsey
Administrative Judge