



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



In the matter of:)
)
) ISCR Case No. 23-02821
)
Applicant for Security Clearance)

Appearances

For Government: Brian L. Farrell, Esq., Department Counsel
For Applicant: *Pro se*

09/26/2024

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines H (drug involvement and substance misuse) and J (criminal conduct). Eligibility for access to classified information is denied.

Statement of the Case

On June 6, 2023, Applicant submitted a Questionnaire for National Security Positions (SF-86). On January 12, 2024, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H and J. The SOR detailed reasons why the CAS was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On January 24, 2024, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated February 15, 2024, was provided to him by letter on that same

day. Applicant received the FORM on March 8, 2024. Department Counsel attached as evidence to the FORM Items 1 through 4. Applicant was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. He did not submit any information within the 30 days after receipt of copy of the FORM. On June 24, 2024, the case was assigned to me.

Findings of Fact

Background Information

Applicant is a 23-year-old electrical engineer employed by a defense contractor since May 2023. He is a first-time applicant for a security clearance. It is unclear from the record what level of access Applicant is currently seeking.

Applicant graduated from high school in June 2019. He was awarded a bachelor's degree in May 2023. He has never married and has no dependents. Applicant has not served in the Armed Forces.

Drug Involvement and Substance Misuse

SOR ¶ 1.a alleges that Applicant used marijuana with varying frequency from about July 2020 until at least April 2023; SOR ¶ 1.b alleges that he purchased marijuana on various occasions from about July 2020 until about April 2023; SOR ¶ 1.c alleges that on at least three occasions, he purchased marijuana in State A and transported it to State B, where he sold a portion of the marijuana to a friend; and SOR ¶ 1.d alleges that he intends to use marijuana in the future. He admitted SOR ¶¶ 1.a through 1.c, without explanations, and denied SOR ¶ 1.d, with an explanation. (Items 1, 2)

These allegations came to light when Applicant self-admitted his past drug use on his June 6, 2023 SF-86 (Item 3). On August 7, 2023, he was subsequently interviewed by an Office of Personnel Management (OPM) investigator. During that interview, Applicant provided further details regarding his past drug use. (Item 4)

In his adopted subject interview, Applicant disclosed his drug use began in May 2021 and it continued through March 2023. (Item 4) He was using marijuana via edibles or smoking about one-to-two times a week with no breaks. (Item 4) Applicant would buy his marijuana either from a friend or from a dispensary in State A. On three occasions, he purchased marijuana in State A and brought it to State B "as a favor" for a friend. (Item 4) Although Applicant legally purchased marijuana in State A, his transporting it across state lines and selling to his friend in State B is problematic. Possession and distribution of marijuana in State B is illegal. (See federal drug trafficking statutory cites and State B drug possession and distribution statutory cites in FORM, p. 5)

Applicant was aware that marijuana was federally illegal. (Item 4) He also stated, in his adopted interview, that he "does intend to consume marijuana if not prohibited by

employment and/or while he is not maintaining a security clearance eligibility/access.” (Item 4) However, in his SOR Answer, he stated:

. . . in previous interviews, I was asked questions about what my behavior surrounding (future) marijuana usage would’ve been if I wasn’t in a position at [defense contractor], and to the best of my knowledge I answered along the lines that I may have continued using the substance. As I am now employed at [defense contractor], as well as for other personal reasons I mentioned in those previous interviews, I have no intention to use marijuana at any point in the future, especially considering the nature of my position and the sensitivity that comes with it. Regardless of the outcome of my security decision, I have no desire or intention to consume marijuana in the future, which is why I answered “I deny” to this concern. (Item 2)

Lastly, Applicant stated that he “does not have any current socialization/association with individuals who use drugs illegally.” (Item 4)

Criminal Conduct

SOR ¶ 2.a cross-alleged information as set forth in SOR ¶¶ 1.b and 1.c., above. Applicant admitted this allegation without comment.

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 clearance favorable 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

Drug Involvement and Substance Misuse

AG ¶ 24 describes the security concern about drug involvement and substance misuse:

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 provides three conditions that could raise a security concern and may be disqualifying in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant denied SOR ¶ 1.d and the explanation he provided in his SOR Answer that he does not intend to use marijuana in the future, quoted verbatim in part above, is accepted. Accordingly, the allegation in SOR ¶ 1.d is not established and AG ¶ 25(g) is not applicable. However, with regard to the remaining allegations, Applicant's admissions and the record establish SOR ¶¶ 1.a, 1.b, and 1.c. Disqualifying conditions AG ¶¶ 25(a) and 25(c) are applicable to these three allegations. Further review is required.

AG ¶ 26 lists 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; 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.

I have considered all of the mitigating conditions under drug involvement and substance misuse and especially considered AG ¶¶ 26(a) and 26(b).

Concerning AG ¶ 26(a), there are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the Directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence

shows, “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge’s decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis, the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) *with* ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant’s efforts at alcohol rehabilitation.”) (citation format corrections added).

Applicant’s most recent marijuana use occurred in April 2023, approximately three months before he submitted his SF-86 in June 2023, and approximately ten months before DOHA issued his SOR in January 2024. Applicant asserts that he has turned his life around, that he no longer wants to use drugs, and will not use drugs in the future. Applicant receives credit for no longer associating with anyone who uses illegal drugs and avoiding the environment where drugs are used. Accordingly, mitigation credit under AG ¶ 26(a) is not applicable. Applicant is, however, able to receive partial credit under AG ¶¶ 26(b), 26(b)(1), and 26(b)(2) for acknowledging his drug involvement, disassociating from drug-using associates, and avoiding the environment where drugs were used. He did not submit a signed statement of intent to abstain from all drug involvement and substance misuse as discussed in AG ¶ 26(b)(3), *supra*.

The fact that Applicant recognizes that drug use is incompatible with holding a security clearance and his decision to refrain from further drug use is commendable. With that said, additional and full credit under this mitigating condition is not warranted without corroborating evidence demonstrating a sustained period of sobriety. Hence, the limited information available in this FORM is insufficient to apply full mitigation under Guideline H given Applicant’s recent two-year history of self-admitted intermittent use of marijuana.

Criminal Conduct

AG ¶ 30 describes the security concern about criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 31 lists conditions that could raise a security concern and may be disqualifying in this case:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Security concerns under AG ¶¶ 31(a) and 31(b) are established. Discussion is in the mitigation section, *infra*.

AG ¶ 32 lists conditions that could mitigate security concerns:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur ¶and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

No mitigating conditions under AG ¶ 32 are fully applicable for the reasons discussed under Drug Involvement and Substance Misuse, *supra*. Criminal conduct concerns are not mitigated.

In summary, apart from partial application of AG ¶ 26(b), no other mitigating conditions fully apply. In addition to evaluating the facts and applying the appropriate adjudicative factors under Guidelines H and J, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Applicant is gainfully employed and is presumed to be a mature, responsible citizen. Nonetheless, without

other information suggesting his recent drug involvement and substance misuse problems are being or have been addressed, doubts remain about his suitability for access to classified information. Protection of the national interest is the principal focus of these adjudications. Accordingly, those doubts must be resolved against Applicant.

Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the drug involvement and substance misuse and criminal conduct security concerns. By failing to provide such information, and in relying on an explanation lacking sufficient detail to fully establish mitigation, drug involvement and substance misuse considerations and criminal conduct security concerns remain.

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 – 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. National security eligibility is denied.

ROBERT TUIDER
Administrative Judge