



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



In the matter of:)	
)	
)	ISCR Case No. 23-02521
)	
Applicant for Security Clearance)	

Appearances

For Government: Troy Nussbaum, Esq., Department Counsel
For Applicant: *Pro se*

12/10/2024

Decision

BENSON, Pamela C., Administrative Judge:

Applicant mitigated the Guideline H security concerns arising from his past use of marijuana. National security eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and signed his security clearance applications (SCA) on June 9, 2016, and on December 2, 2022. On December 11, 2023, the Department of Defense (DOD) 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 (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 *National Security Adjudicative Guidelines* (AG) effective within the DOD on June 8, 2017.

On January 3, 2024, Applicant provided a response to the SOR. (Answer) He admitted the single SOR allegation (¶ 1.a) and requested a hearing before an administrative judge. The case was assigned to me and on August 6, 2024, and the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for September 11, 2024.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through 3, and Applicant offered Applicant Exhibits (AE) A through C. I admitted all proffered exhibits into evidence without objection. I marked the Government's disclosure letter dated February 7, 2024 as Hearing Exhibit (HE) I, and appended it to the record. DOHA received the hearing transcript (Tr.) on September 19, 2024.

Findings of Fact

Applicant is 33 years old and unmarried. He has resided with his girlfriend for about nine years, and they have three minor children. He attended some college courses, but he did not earn enough credits for a degree. He started employment with a defense contractor in February 2023. He had been previously offered employment by this defense contractor in 2016, but he was not hired after he failed a hair follicle drug test. His job duties include working with cranes as a rigger. He does not currently possess a DOD security clearance. (Tr. 15-18, 22; GE 1, GE 2)

Drug Involvement and Substance Misuse

The SOR alleges Applicant used marijuana with varying frequency, from approximately October 2007 to about July 2022. (¶ 1.a) Based on his June 2016 SCA, he disclosed he had used marijuana three to four times a week from October 2007 to November 2015. He also disclosed this information on the SCA he completed in December 2022, and he added that he had smoked marijuana "occasionally," (one to two times a month), from August 2012 to May 2022, which he corrected to July 2022 during the hearing. (Answer; GE 1, 2; Tr. 18-20, 31)

Applicant admitted that he used marijuana socially, but once he became a father, he dramatically reduced his use of marijuana. He has purchased marijuana infrequently. He resides in a state that has decriminalized the use and purchase of marijuana. Applicant testified that his friends, who used to smoke marijuana with him in the past, have also matured, and now they too have children of their own. He currently does not socialize much with his old friends, but if they do, no one smokes marijuana in his presence since he has made them aware that he has stopped using marijuana. He last used marijuana in July 2022. (Tr. 19-23, 31)

Applicant has coached high school football for the past three years, and he is currently coaching youth basketball and youth softball as a volunteer. Community service is important to him, and it is his goal to start an AAU program in their small city for travel basketball and travel softball teams. His kids are a priority in his life. They are of an age now that they notice everything and could be influenced by his decisions. It is his intention to never use illegal drugs in the future. He fully understands that federal law supersedes state law, even if his state of residence has decriminalized the use of marijuana. When he was offered employment by his employer the second time in late 2022, he passed both a urine drug test and a hair follicle drug test. He is focused on moving forward with his life and career. (Tr. 23-25, 28-32)

Applicant provided three character reference letters. A state representative from his state of residence has known Applicant for over 25 years. He has personally witnessed Applicant's volunteer efforts in the community. He stated, "I find [Applicant] as an outstanding person for our community. I vouch for his character, commitment, compassion, and love for the next generation of youth." The chief of police also attested to Applicant's outstanding volunteer efforts in the community. The final letter, from Applicant's supervisor at his place of employment, stated, "[Applicant] continues to prove he is a productive employee at [defense contractor] and [pillar] in his community." He recommended Applicant's eligibility for access to classified information be granted. (AE A, B, C)

Policies

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 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 access to classified information will be resolved in favor of 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 not drawn inferences grounded 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, 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 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 Executive Order 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

AG ¶ 24 expresses the security concern for drug involvement:

The illegal use of controlled substances . . . 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

AG ¶ 25(a) any substance misuse;

(b) testing positive for an illegal drug; and

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

Applicant used and purchased marijuana, with varying frequency, from about October 2007 to July 2022. He was not hired by his current employer in 2016 because he tested positive for an illegal drug. The above disqualifying conditions apply.

I have considered the mitigating conditions under AG ¶ 26. The following are potentially applicable:

AG ¶ 26(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

AG ¶ 26(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 or substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant used marijuana over a long period of time, for social and recreational purposes. He disclosed his marijuana usage on both of the SCAs. He last used marijuana in July 2022, before he completed his second SCA in December 2022. He has matured since becoming a father, and he has made his family, career, and community a priority in his life. He did not use marijuana on a frequent basis, and upon further reflection, he realized that marijuana added no value to his life. He also notified his friends, when he sees them on an infrequent basis, that he no longer uses marijuana. Over two years have passed since he last used marijuana, and Applicant credibly stated that he had no intent to use any illegal drugs in the future. Mitigating conditions AG ¶¶ 26(a) and 26(b)(1), and 26(b)(2) apply.

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 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 and the AG ¶ 2(d) factors in this whole-person analysis.

The Federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. In deciding whether to grant or continue access to classified information, the Federal government can take into

account facts and circumstances of an applicant's personal life that shed light on the person's judgment, reliability, and trustworthiness. Furthermore, security clearance decisions are not limited to consideration of an applicant's conduct during work or duty hours. Even if an applicant has a good work record, his off-duty conduct or circumstances can have security significance and may be considered in evaluating the applicant's national security eligibility.

Applicant made positive changes in his life, which are fully supported by his three character references. He is committed to remaining drug-free, and I find his future use of marijuana is unlikely to recur. After evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the drug involvement and substance misuse 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: FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, I conclude that it is clearly consistent with national security to grant Applicant's national security eligibility. Eligibility for access to classified information is granted.

Pamela C. Benson
Administrative Judge