



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



In the matter of:)
)
) ISCR Case No. 23-01681
)
Applicant for Security Clearance)

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: *Pro Se*

03/06/2024

Decision

BENSON, Pamela C., Administrative Judge

Although Guideline E (Personal Conduct) is found in favor of Applicant, he failed to mitigate security concerns under Guideline H (Drug Involvement and Substance Misuse). National security eligibility for access to classified information is not granted.

Statement of the Case

On January 31, 2023, Applicant submitted a security clearance application (SCA). On September 12, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guidelines H and E. The action was taken under Executive Order (EO) 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 the DOD on June 8, 2017.

Applicant provided an undated response to the SOR, and he admitted SOR ¶¶ 1.a and 1.b. He did not specifically admit or deny SOR ¶ 2.a, which cross-alleged SOR ¶¶ 1.a and 1.b under Guideline E. During the hearing he admitted this SOR allegation. (Hearing Transcript (Tr.) pages 9-10, 12, 24) He requested a hearing before an administrative judge, and the case was assigned to me on November 28, 2023. On December 18, 2023,

the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing for a video teleconference scheduled for January 24, 2024. The hearing was convened as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1-3, and an October 2023 disclosure letter, which I marked as Hearing Exhibit (HE) 1. Applicant testified and offered two documents marked as Applicant Exhibits (AE) A and B; there were no objections, and all proffered documents were admitted into evidence. DOHA received the Tr. on January 31, 2024.

Findings of Fact

Having thoroughly considered the evidence in the record, I make the following findings of fact:

Applicant is 26 years old. He is single and does not have any children. He earned a cyber and network security certificate in November 2021. Since August 2022, he has worked for a federal contractor. His job title is cyber security analyst. He enlisted in the Army National Guard Active Reserve (AGR) on a part-time basis in February 2016. His military occupational specialty (MOS) is battle-system manage operator. He was employed full time by the AGR from November 2021 to April 2022. From May of 2022 to August 2022, he worked for a company as a front-end developer. He stated during the hearing that he is inactive in the AGR since February of 2023. He was issued a security clearance in April 2016, and his employer is sponsoring him to continue his DOD security clearance eligibility. (Tr. 18-23, 40; GE 1 and 3)

(SOR ¶ 1.a) Applicant used marijuana while granted access to classified information. (SOR ¶ 1.b) He tested positive for marijuana in May 2022 after submitting to a urinalysis test administered by his AGR unit. He admitted both allegations, and stated in his SOR response that he was at a low point during that time due to COVID-19, losing his full-time job, and having no purpose in life. This was the first and only time he ever used this substance. On May 31, 2022, his test results showed a positive for tetrahydrocannabinol (THC) metabolite. Applicant was reduced in rank from specialist (E-4) to private first class (E-3), and he was referred to a substance abuse education course. He successfully completed three hours of substance abuse education. (SOR response; GE 1, 2 and 3; Tr. 23-25; AE A)

Applicant had attended a friend's party, and he was invited to smoke marijuana through the use of a "bong." He was at a low point in his life, and even though he knew it was illegal and against DOD policy, he decided to try it. He denied ever being in the presence of marijuana before that gathering. He admitted too his awareness of the government's zero tolerance drug policy since he had been drug tested on numerous occasions while serving in the AGR. About a week or two after he used marijuana, he was randomly drug tested by his unit on May 15, 2022. He did not disclose his use of marijuana to his commander because he had hoped his drug test would show a negative result for the presence of THC. (Tr. 23-30, 32-35, 45-46; GE 2; AE A)

Department Counsel asked Applicant when he used the bong for the first time to smoke marijuana, was he ever concerned about the effect it would have on him, and Applicant stated,

To be honest, I kind of didn't really care. I was in my -- I mean -- you know, when you're like -- when you're -- when you're low, you're like, you know, no reason to do anything. You're like what's the point kind of, what's the point in all this. (Tr. 27)

Applicant admitted that since the end of 2021 he continues to suffer through periods of depression. He has not yet obtained treatment for his recurring problem, to include thoughts of suicide on two separate occasions, but he plans to do so in the near future. When he found out the results of his positive drug test, he told members in his military unit about his depressive symptoms and he was offered a referral for counseling, but he did not go due to lack of money. He said that at the time he used marijuana he was depressed because it was the height of the pandemic, and he was unemployed. Further questioning however showed that the height of COVID-19 occurred during 2020 to 2021, and in May 2022 he was employed. (Tr. 27, 30-32, 38-39, 46-48, 57, 59-60; GE 1)

Applicant was asked whether he used marijuana again in a depressive state since May of 2022. He said that he used marijuana once and does not intend to use it in the future. He acknowledged that he does have access to classified information during specific training sessions with the AGR, and he admitted he holds a sensitive position in the military. He recently turned to drinking alcohol when he is feeling low and experiencing depressive symptoms. (Tr. 39, 42-45)

When explaining Applicant's recurring depressive symptoms, he stated,

I mean, I'm just trying to be honest. This is -- I mean this is just me just being honest. It was a low point in my life. I feel like I've gotten better at it. I do get these changes, you know, once in a while, you know, these remote depressive, but I've kind of come out of it. It's kind of like a cycle. Now that I've kind of stabilized, I've kind of gotten more into getting some treatment or help, like I've finally gotten a doctor, finally gotten like some help, I guess once I make some more money, I can probably go afford a therapist or something. (Tr. 50)

Applicant submitted a character reference letter from a colleague who has known Applicant for two years. He stated that Applicant demonstrated characteristics such as integrity, responsibility, and he has proven himself to be an invaluable cyber security analyst. (AE B)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG 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 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 forth at AG ¶ 24:

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.

The guideline at AG ¶ 25 contains three conditions that could raise a security concern and may be disqualifying:

- (a) any substance misuse;
- (b) testing positive for an illegal drug; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The record evidence and Applicant's admissions support the disqualifying conditions listed in AG ¶¶ 25(a) and (b), above. There is insufficient evidence to support AG ¶ 25(f). There are no listed dates as to when he had access to classified information during training.

The burden shifted to Applicant to rebut or prove mitigation of the resulting security concerns. AG ¶ 26 provides 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.

Applicant admitted that he used marijuana despite knowing it was illegal in May 2022 during a recurrent depressive state he suffers to the present time. He deliberately used marijuana while serving in the military and holding a sensitive position with a DOD security clearance. He smoked marijuana because he just did not care. He now sometimes uses alcohol to deal with his depressive bouts, but he does not intend to use marijuana in the future. He plans to obtain treatment for his depressive symptoms in the near future.

Applicant completed three hours of substance abuse education. The concerns noted above are not mitigated by his satisfactorily completion of this program. As such, I am unable to find that Applicant's one-time use of marijuana 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. Until he receives treatment for his recurrent depressive symptoms, he is unable to show rehabilitation or that he is unlikely to resort to substance misuse to treat his symptoms or when he is in a state of indifference. He has failed to provide evidence of constructive actions he has taken to overcome this continuing problem. Drug Involvement and Substance Misuse security concerns are not mitigated.

Guideline E: Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

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. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

Applicant's drug involvement and substance misuse issues were addressed under Guideline H. The same issues were cross-alleged under the personal conduct guideline. No specific personal conduct allegations were raised beyond what was raised under the appropriate guideline. I have previously addressed the drug involvement and substance misuse security concerns and to do so under personal conduct is redundant and unnecessary. I find for Applicant regarding personal conduct security concerns.

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.

Applicant is currently not receiving treatment for his recurrent bouts of depression. When he is in this state, he does not care whether he follows laws, rules, or regulations. I am not convinced that his future depressive symptoms are unlikely to recur, or whether he will turn to substance abuse when depressed. As such, the record evidence leaves me with questions and doubts about his eligibility and suitability for a security clearance.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more time without any security concern, and a track record of treatment or other constructive actions he has taken to overcome this continuing problem, he may be able to demonstrate persuasive evidence of his security clearance worthiness. I have carefully applied the law, as set forth in Egan, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate the drug involvement and substance misuse consumption 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 and 1.b:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For 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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge