



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



In the matter of:)
)
) ISCR Case No. 19-00316
)
)
Applicant for Security Clearance)

Appearances

For Government: Tara Karoian, Esquire, Department Counsel
For Applicant: Leon J. Schachter, Esquire, Applicant's Counsel

January 14, 2020

Decision

CEFOLA, Richard A., Administrative Judge:

On November 14, 2016, Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP). On May 9, 2019, the Department of Defense Consolidated Adjudications Facility (DODCAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines effective June 8, 2017.

Applicant acknowledged receipt of the SOR on May 20, 2019. He answered the SOR (Answer) in writing on June 6, 2019, and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) received the request on July 22, 2019. I received the case assignment on July 22, 2019. DOHA issued a Notice of Hearing on August 2, 2019, and I convened the hearing as rescheduled on September 17, 2019. The Government offered Exhibits (GXs) 1 through 3, which were received into evidence over objection. (Transcript (TR) at page 14 line 4

to page 16 line 15.) Applicant testified and resubmitted Exhibits (AppXs) A through D, which were already appended to Applicant's Answer, and admitted into evidence without objection. DOHA received the transcript of the hearing (TR) on September 26, 2019. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR Applicant admitted the factual allegation in Subparagraph 1.a., but denied Subparagraph 1.b. of the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 33 years old, is "single," works for a defense contractor, and has held a security clearance "since 2009." (TR at page 18 line 17 to page 20 line 17.)

Guideline H – Drug Involvement

1.a. Applicant admits he used marijuana in about July of 2017, after having been granted a security clearance. (TR at page 33 line 16 to page 34 line 1, and GX 2 at page 6.) This usage was not intentional. (TR at page 22 line 22 to page 32 line 17.) At the time of the incident, Applicant was a heavy cigarette smoker. He had run out of cigarettes, and took one puff from a co-workers "vape pen," not knowing it contained marijuana. Applicant only discovered that the vape pen contained marijuana when "a few minutes" later he "felt light-headed." Only then did the owner of the pen disclose its contents. (*Id.*) Applicant self-reported this unintentional usage. (TR at page 39 lines 20-23, and at page 40 line 21 to page 41 line 18.) Applicant's credibility in this regard is attested to by former and present colleagues at work. (AppX D.) Furthermore, he has provided a signed statement of intent to abstain from all drug involvement and substance misuse in the future. (TR at page 20 line 18 to page 21 line 4, and AppX D.) This allegation is found for Applicant.

1.b. Although Applicant does not remember the alleged usage more than 18 years ago, I find that he used marijuana twice in August of 2001, as disclosed in his February 2007 e-QIP. (TR at page 21 line 5 to page 22 line 21, at page 36 line 20, and GX 3 at page 23.) This allegation is also found for Applicant.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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. Under Directive ¶ E3.1.15, an "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 protect or 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 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

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, 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.

The guideline at AG ¶ 25 contains seven conditions that could raise a security concern and may be disqualifying. Three conditions are established:

- (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
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Appellant smoked marijuana on three occasions. On the most recent occasion, Appellant had a security clearance for his job at that time. Therefore, AG ¶ 25 (a), (c), and (f) are established.

The guideline at AG ¶ 26 contains four conditions that could mitigate security concerns. Two conditions may be 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.

The Applicant used marijuana twice over 18 years ago, and once over two years ago under such unusual circumstances that it is unlikely to recur. He has also provided a signed statement of intent eschewing future involvement or misuse. The Drug Involvement and Substance Misuse guideline is found for Applicant.

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 an 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.

AG ¶ 2(b) requires each case must be judged on its own merits. 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 very well respected in the workplace. (AppXs C and D.)

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his drug involvement and substance abuse.

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: FOR APPLICANT

Subparagraphs 1.a. and 1.b.: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant national security eligibility for a security clearance. Eligibility for access to classified information is granted.

Richard A. Cefola
Administrative Judge