



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



In the matter of:)
)
) ISCR Case No. 18-00120
)
Applicant for Security Clearance)

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: Mary K. Deon, Esq.

04/25/2019

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant mitigated the security concerns under Guideline H (drug involvement and substance misuse). Applicant’s eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 5, 2017. On February 16, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H. The DOD CAF acted 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 (AGs) implemented by DOD on June 8, 2017.

Applicant timely answered the SOR, admitting all of the SOR allegations. He admitted to using marijuana (MJ) with varying frequency since 2001; using LSD once; and hallucinogenic mushrooms twice, as alleged in SOR ¶¶ 1.a, 1.b, and 1.c. Applicant also requested a hearing before an administrative judge. The case was assigned to me on January 3, 2019. On February 21, 2019, the Defense Office of Hearings and Appeals

(DOHA) notified Applicant that the video teleconference (VTC) hearing was scheduled for March 28, 2019. I convened the VTC hearing as scheduled.

Government Exhibits (GE) 1 and 2 were admitted into evidence without objection. At the hearing, Applicant testified and submitted a packet of documents, which was marked as Applicant's Exhibit A (AE A) and admitted without objection. (Tr. 20) It included five attachments to Applicant's previous response to a file of relevant material (FORM) submitted by the Government. These will be referred to as attachments 1-5. DOHA received the transcript (Tr.) on April 11, 2019.

Findings of Fact¹

Applicant is 31 years old. He graduated from high school in 2005 and obtained his bachelor's degree in 2012. He has been employed as a software engineer for a federal contractor since March 2017. He previously left graduate school to work for a major automobile manufacturer in Detroit from 2014 to 2017. He was married in 2013 and reports no children and no military service. Applicant has not previously held a security clearance. (Tr. 43)

On May 5, 2017, Applicant completed a Security Clearance Application (SCA), and in section 23 (illegal use of drugs or drug activity) he responded "yes" to questions about illegal drug use and/or misuse of prescription drugs within the last seven years. He estimated his use of marijuana MJ was from 2001 with varying frequency and his last use was in 2017.² He also disclosed that he used LSD once in 2016, and hallucinogenic mushrooms twice, in 2010 and 2015.³ He indicated that his spiritual and soul-searching experiences are over and he does not intend to use any controlled substances in the future. He also signed a statement promising to abstain from future use of illegal drugs and medicinal MJ and acknowledging any future use would be grounds for revocation of his national security eligibility. (AE A, attachment 1; Tr. 15)

Applicant was forced to take medical leave from college in 2010 due to a devastating disease diagnosis. (Tr. 22) He required extensive surgery, removal of a large part of his intestine, and multiple transfusions. (Tr. 23) He provided a detailed summary of his medical conditions and treatments. (AE A, Attachment 4) He is coping with multiple life-threatening illnesses. He also required an ostomy bag (Tr. 26) Consequently, he suffered from anxiety and depression and complex post-traumatic stress disorder (PTSD) due to what he describes as a lack of adequate coping skills. (Tr. 28)

Applicant described himself as a socially awkward youth. He smoked marijuana socially every couple of weeks during high school (HS) due to peer pressure. However,

¹ Unless stated otherwise, the source of the information in this section is Applicant's May 5, 2017 SCA (GE 1).

² At the hearing, he testified that his last use of medical marijuana was in December 2018.

³ GE 1, pp. 32-33.

he stopped using it early in HS when his mother caught him in 2003. He resumed using MJ in college, but never purchased MJ or sold it. (Tr. 31-32) He used MJ once every two or three months in college. (Tr. 57) He stopped using MJ socially once he started working full time after college as it no longer fit his lifestyle and he no longer associated with the same friends. (Tr. 31)

The first time Applicant took hallucinogenic mushrooms was in 2010 after his initial diagnosis. (Tr. 32) They were a gift. (Tr. 52) A friend suspected Applicant was depressed and offered the mushroom suggesting it would help. The second time was when Applicant and his wife took mushrooms that were given to them as a proposed bonding experience. (Tr. 33) Neither one liked the effects nor will they ever use mushrooms again. (Tr. 33) Applicant also admitted to experimenting with LSD one time in 2016. (Answer, Tr. 33) It was offered to him in a social setting at a Spring festival. (Tr. 34) He did not enjoy it and will never try it, or any other illegal drug, again. He no longer associates with the festival attendees. (Tr. 34)

Most of the pain management surrounding Applicant's multiple surgeries was opiate based. (Tr. 35) He was prescribed medicinal MJ by a physician in April 2017 to help with stress and aid recovery. MJ was legalized in his state in 2008. (Tr. 60) He received a medical marijuana card. (AE A, attachment 5, Tr. 35) Applicant testified credibly that the medical MJ helped with his unique medical conditions. (Tr. 36) He last used MJ recreationally before he left college in 2014. He believed that his medical MJ use starting in 2017 was legal in his state, and he never shared it with anybody. Now, since receiving the SOR, he understands that the Federal Government considers all MJ use to be illegal. (Tr. 37) Applicant attributes his past drug use to untreated or poorly managed medical conditions. (Tr. 40) He is taking different medications now.

Applicant testified credibly that he informed his current employer about his medical MJ use. (Tr. 39) He was hired by a college friend who responded that it was fine so long as Applicant had the medical MJ certification. (Tr. 39) He concedes that his MJ use before 2014 was illegal. (Tr. 52) Applicant stopped using medical MJ in December 2018 after enduring two more surgeries in 2017. (Tr. 66) That was about nine months after the SOR issued. (Tr. 65) He did not stop using sooner due to confusion about the interplay of options and laws surrounding MJ use. (Tr. 66)

Applicant has never been diagnosed as having a substance-abuse disorder and he did not seek treatment. He has now disassociated from friends who use MJ recreationally. He last used MJ recreationally in 2014, and subsequent use was under physician's care and for medicinal purposes only.

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, 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(a), the adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is 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 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.

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.

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

Applicant used MJ on sporadic social occasions while he was in high school and college. He experimented with mushrooms twice, and LSD once, when these drugs were given to him over three years ago. He resumed use of MJ, on a medicinal basis, in April 2017, and ceased medical MJ use in December 2018 once he understood the impact on the security clearance process. The government provided sufficient evidence to establish that the disqualifying conditions above are applicable, and the burden shifts to Applicant to show mitigation.

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.

Applicant's last recreational use of MJ was over five years ago. He did not use MJ continuously during the period from 2014-2017. He self-reported and he has

disassociated from friends who use illegal drugs, and provided a letter of intent to abstain in the future acknowledging that any future use will be grounds for revocation of his national security eligibility. He was confused about the laws in his state with respect to legalizing the use of MJ and medicinal use of MJ. There is considerable confusion surrounding the patchwork of state laws around the nation, legalizing MJ.⁴

Applicant's recreational use of MJ and experimentation with mushrooms and LSD has been mitigated by the passage of time. He self-disclosed his illegal drug use in his May 2017 SCA. While, it is disturbing that Applicant continued to use medical MJ after he received the SOR, I am not convinced that he understood that his MJ use conflicted with federal law, until he consulted with counsel. Moreover, Applicant presented a compelling case that his medical conditions affected his physical and mental state, and probably compromised his judgment temporarily. I perceive his voluntary disclosure as candor and cooperation. The government would never know about his earlier illegal drug use but for his own disclosures. In any event, he now knows, and he has taken appropriate actions to overcome this disqualification including signing a statement of intent to abstain and disassociating from former friends. His conduct does not cast doubt on his reliability, trustworthiness, or good judgment. AG ¶¶ 26(a) and 26(b) apply and his self-reported drug use is mitigated.

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.

⁴ The Director of National Intelligence (DNI) Memorandum ES 2014-00674, "Adherence to Federal Laws Prohibiting Marijuana Use," October 25, 2014, states: Changes to state laws . . . 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.

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 in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline. Most importantly, Applicant was candid and cooperative throughout the security clearance process. He has overcome significant adversity. He resolved the specific violations alleged in the SOR, and he has unequivocally declared his intention to refrain from further use of illegal drugs.

Applicant's drug involvement no longer remains a security concern. These self-reported offenses were committed under such unusual circumstances that they are unlikely to recur. There is sufficient evidence to conclude that Applicant has acknowledged the egregiousness of his drug involvement and taken steps to insure that such behavior does not recur. He has met his burden of persuasion. The record evidence leaves me with no questions or doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising under Guideline H.

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
Subparagraphs 1.a - 1.c:	For Applicant

Conclusion

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

Robert J. Kilmartin
Administrative Judge