



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



In the matter of:)
)
) ISCR Case No. 18-00393
)
Applicant for Security Clearance)

Appearances

For Government: Kelly M. Folks, Esq., Department Counsel
For Applicant: *Pro Se*
03/18/2019

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

On February 15, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H. Applicant timely answered the SOR and elected to have his case decided on the written record in lieu of a hearing.

Department Counsel submitted the Government’s file of relevant material (FORM) on November 30, 2018. Applicant received the FORM on December 4, 2018, and had 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the Government’s evidence, and he provided a two-page response (Response) to the FORM that incorporated by reference his previous Answers to the SOR dated April 30, 2018, and May 4, 2018 (and attachments). Applicant included a statement of intent to abstain from all drug involvement and substance misuse subject to revocation of his national security eligibility. The Government’s evidence, identified as Items 1 through 4, is admitted without objection. Department Counsel requested that I

take administrative notice of the following: D.C. Code § 48-904.01 (amended in 2015); The Facts on Marijuana Laws, from the Metropolitan Police Department website; and a Memorandum dated October 25, 2014, entitled Adherence to Federal Laws Prohibiting Marijuana Use, from the Director of National Intelligence. I have taken administrative notice of these documents collectively marked as Hearing Exhibit (HE) 1. The case was assigned to me on March 1, 2019.

Findings of Fact¹

Applicant is 38 years old. He graduated from high school in 1999 and obtained his bachelor's degree in 2003. He obtained a master's degree in 2008. He has been employed as an architect for a federal contractor since 2004. He was promoted to principal and partner in an architectural firm engaged as a federal contractor in 2018. Applicant reports no military service, and he has never married. Applicant previously held a security clearance since 2007, without incident.

On May 12, 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 first use of marijuana was in January 2002, and he used marijuana (MJ) "once or twice a year, for fun, with friends."² He also stated that he used MJ while he possessed a security clearance and he did not intend to use any controlled substances in the future. In an earlier SCA signed by Applicant on December 21, 2006, he responded "yes" to similar questions about any illegal use of drugs or controlled substance in section 24 (Use of Illegal Drugs and Drug Activity).³ He indicated that he used MJ about 10-15 times between September 1999 and February 2002. He was granted a security clearance in 2007.

In his Answer to the SOR in April 2018, Applicant stated that his most recent use of MJ in 2017, was due to a misinterpretation of the change in the law effectively legalizing MJ in Washington, D.C. He used the drug only recreationally at social settings where it was provided by friends and he never cultivated, sold, or purchased MJ. Since the District is a federalized city, he wrongly assumed that the legalization of MJ applied across the federal government. Although, he self-reported his use of MJ occurring between September 1999 and May 2017, Applicant stated that there was a long lapse of several years before he re-offended in 2017. He does not know which years he used MJ, or the exact number of usages. He provided a statement of intent to abstain from all drug involvement or substance misuse subject to revocation of his national security eligibility.

¹ Unless stated otherwise, the source of the information in this section is Applicant's May 12, 2017 Security Clearance Application (SCA) (Item 3) and his SCA dated December 21, 2006 (item 4).

² Item 3, p. 35.

³ Item 4, p. 29.

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. Applicant also attached his resume, detailing his significant experience and accomplishments in his profession, several letters of appreciation, and two performance appraisals showing that he was rated excellent or outstanding in all categories. He has experience working on high visibility, secure, projects. He received year-end bonuses each year from 2014 – 2017. He also provided four positive character reference letters at Tab E attached to his Answer to the SOR, including one from his facility security officer (FSO). All attest to Applicant's integrity, trustworthiness, and reliability.

Policies

DOD took action in this case 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.

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

¶ 24: The security concern for drug involvement and substance misuse is set out in AG

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.

¶ 25. The guideline notes several conditions that could raise security concerns under AG

- (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.

Applicant used MJ on sporadic social occasions between 1999 and May 2017, including after he submitted an SCA in December 2006 and received a clearance. 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 continued his sporadic use of MJ until his last use in May 2017, almost two years ago. He did not use continuously during the period from 1999-2017. He self-reported and he provided evidence that he has disassociated from friends who use illegal drugs, and a letter of intent to abstain in the future. He misinterpreted the byzantine change in the law in Washington, D.C., with respect to legalizing the use of MJ. He is not an attorney and there is considerable confusion surrounding the patchwork of state laws around the nation, legalizing MJ. Applicant's use of MJ has been mitigated by the passage of time. He self-disclosed his MJ use in his 2006 SCA, and was granted a clearance nonetheless. It is unclear whether this was perceived as acquiescence to his recreational drug use, or whether Applicant understood that his MJ use conflicted with federal law, after completing that SCA. I perceive his voluntary disclosure as candor and cooperation. The government would never know about his MJ use but for his own disclosures. In any event, he now knows, and he has taken appropriate actions to overcome this disqualification. 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.

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. 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 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 interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is granted.

Robert J. Kilmartin
Administrative Judge