



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



In the matter of:)
)
) ISCR Case No. 18-00453
)
Applicant for Security Clearance)

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

08/28/2019

Decision

HEINY, Claude, Administrative Judge:

Applicant used marijuana, with varying frequency, from 1990 to 2016. He also used various other illegal drugs. In 1999, while serving in the U.S. military, he tested positive for marijuana and cocaine. He received non-judicial punishment and an other than honorable conditions (OTH) discharge from the service. In March 2005, he was charged with conspiracy and homicide. He mitigated the Guideline J, criminal conduct security concerns. However, he failed to mitigate the Guideline H, drug involvement and substance misuse, security concerns, due to the recency of his marijuana use and his failure to clearly and convincingly commit to discontinue such misuse. Applicant's eligibility for access to classified information is denied.

Statement of the Case

Acting under the relevant Executive Order and Department of Defense (DoD) Directive, on May 21, 2018, the DoD issued a Statement of Reasons (SOR) detailing security concerns under Guideline H and Guideline J.

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 effective within the DoD on June 8, 2017 pertain to this decision.

On June 5, 2018, Applicant answered the SOR and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On November 26, 2018, DOHA issued a Notice of Hearing that was amended on December 6, 2018, scheduling a hearing that was conducted on December 12, 2018.

At the hearing, five Government exhibits (Ex. 1 – 5) were admitted into evidence without objection. Applicant submitted no exhibits. Documents submitted by Applicant as attachments to his SOR response were considered. Applicant testified, as reflected in a transcript (Tr.) received on January 2, 2019.

Findings of Fact

In Applicant's response to the SOR, he admitted, with explanation, that he used marijuana with varying frequency from about April 2012 to at least June 2016. He admitted the other illegal drug use alleged in the SOR. He admitted being discharged from the U.S. military for drug use and being charged with criminal conspiracy and homicide. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact.

Applicant is 41 years old and works with technical orders and laptops for a defense contractor. (Tr. 21) He is not married and has no children. (Ex. 1, Tr. 22) From July 1996 through February 1999, Applicant served in the U.S. military. (Ex. 1) In 1999, he tested positive for marijuana and cocaine. He received non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ). (Ex. 2) He was separated with an OTHC, which is the most severe form of administrative discharge. (Tr. 62) He listed his discharge in his August 2016 Electronic Questionnaires for Investigations Processing (e-QIP). (Ex. 1)

In 1990, at age 12, Applicant's parents sent him to a two-week drug rehabilitation program after they discovered him with a bottle of chopped-up ibuprofen. They believed the bottle contained a different drug. (Ex. 2) He asserts he was discharged from the clinic because he did not have a drug problem and his parents had sent him to the clinic as a form of punishment.

Also in 1990, Applicant started smoking marijuana. (Tr. 22) From 1990 through June 2016, he used marijuana. (Ex. 2, Tr. 6) At times not identified in the record, he sold marijuana to his friends weekly or every couple of weeks. (Tr. 60) In 2009 or 2010, he stopped selling marijuana. (Tr. 44, 61) Between January 1999 and October 2008, he used cocaine seven times. From September 2011 until August 2013, he used methamphetamine, and from November 2013 through February 2014, he used diazepam three or four times a week. (Ex. 2, Tr. 53, 59) He used the diazepam to help him sleep because he had bad tooth pain. (Ex. 2) He obtained the drug from a friend who had a prescription for the drug. (Ex. 2) In October 2002, he used illegal mushrooms once a week for three weeks. He used LSD four times in November and December 1998. (Ex. 2, Tr. 6) He did not list any of his drug use on his August 2016 e-QIP. (Ex. 1)

In Applicant's April 2018 response to written interrogatories, he provided the following information concerning his future intentions of drug use:

As of June of 2016, the use of drugs has not been an issue for me, I have been doing [a] study on drugs and the implications and effect that it can have on a person's life. And the physical harm that drugs can do to an individual's health. I believe in this time in my life, I can say the abuse of drugs is no longer a choice of entertainment. And I have focused my energy on more important things in my life . . . I have a whole new perspective on life, and plan on using it to obtain a sound mind and body." (Ex. 2)

At the hearing, when Applicant was asked why he stopped using marijuana he stated, "I just stopped randomly . . . I don't know [why I stopped] I just – no reason." (Tr. 46) He has not undergone any drug treatment, rehabilitation, or assistance program. (Tr. 46) None of his friends or family abuse drugs. (Tr. 55) He testified, "so getting involved in drugs would not be a very wise decision on my part." (Tr. 56) He hopes to further his education by attending college. (Tr. 55)

At the hearing, when Applicant was asked to provide a reason why he would not start using in the future he stated:

Well, I couldn't tell you that I wouldn't use in the future. I don't know. I don't know anything about the future. I know right now I'm not using. To me marijuana is not a big deal, but like you said earlier, the federal Government looks at it as it's bad . . . I can't promise you that I wouldn't do it again, if that is what you're saying. I don't know if I would or not. (Tr. 47)

In June 2005, at age 26, Applicant was involved in a murder. The victim and all others involved lived within a few blocks of each other. Court documents indicate the victim had been good friends with two of the individuals involved in the killing until June 2004. (Ex. 4) The victim had previously dated the sister of one of the individuals convicted of killing him. The breakup caused "bad blood" between the victim and his prior friends related to the sister. (Tr. 28-29) Acrimony between the individuals and the victim increased in the month prior the murder. (Tr. 29) The victim and one of the two individuals convicted of killing him had previously been in a fistfight. (49)

Applicant was sitting around drinking and using illegal drugs with four friends. As a group they agreed to go to the victim's house, without firearms, and beat up the victim. (Tr. 30, 31) Applicant accompanied his friends to what he was believed would be a fistfight. An altercation occurred, and Applicant was returning to the car when a friend in the group pulled a shotgun from his pants and killed the victim. (Tr. 61)

Applicant and the others were arrested. From March 2005 through March 2006, Applicant remained in jail awaiting trial. (Ex. 2, Tr. 38) He was charged with first degree murder, conspiracy, and the lesser charges of second degree murder and involuntary

manslaughter. (Ex. 2, Ex. 3) Two individuals in the group were convicted of murder, one was convicted of voluntary manslaughter, and Applicant and another were found not guilty. (Tr. 62) Being acquitted, he was never placed on probation or parole. (Tr. 62) Applicant has not seen or had any communication with any of the other individuals involved in the murder since seeing them in court in 2006. (Tr. 40, 57) He did not list his arrest or charges on his August 2016 e-QIP. (Ex. 1)

In December 2011, Applicant was charged with being under the influence of a controlled substance. He did not list the charges on his e-QIP. (Ex. 1, Ex. 3) The evening had started with him and friends drinking and smoking methamphetamine. (Ex. 2, Tr. 41) Applicant explained things began to “get weird.” When Applicant saw one of his friends with a baseball bat, he quickly left the residence and ran to a fast-food restaurant. (Tr. 41) The police arrived at the fast-food restaurant and took him to the police station where a drug urinalysis was conducted. (Ex. 2) He was placed in a holding cell for six to eight hours and released in the following morning. (Tr. 41) When he went to court, the charge of being under the influence of a controlled substance was dropped. (Tr. 42)

Applicant denies any intention to use illegal drugs in the future, stating he had “a whole new perspective on life and plan on using it to maintain a sound mind and body.” (Tr. 56) However, he would not make an unequivocal statement that such use would never occur in the future. (Tr. 56)

Character reference

Applicant’s cousin states that since Applicant moved to his current state, he is a quiet, intelligent, capable, honest and trustworthy individual. He is dedicated to his job and leads a responsible lifestyle. (SOR Response) A retired Air Force chief master sergeant states Applicant takes pride in job accomplishment and understands the need to protect information with which he is entrusted. (SOR Response) Applicant’s immediate supervisor states Applicant is eager to learn new jobs, quick to volunteer, performs all tasks in a timely manner, is very knowledgeable of his responsibilities, and is someone who strives to and desires to live a wholesome life. (SOR Response)

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 must be considered 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 adjudication process is an examination of a sufficient period and a careful weighting 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 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant 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 EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination of 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 concerns about drug involvement and substance misuse are set forth 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.

Applicant first used marijuana at age 12 and last used it in June 2016, which was over a span of 28 years. On occasion until 2009 or 2010, he sold marijuana. He used a variety of other illegal drugs including: cocaine, methamphetamine, mushrooms, LSD, and diazepam. His 1999 positive urinalysis resulted in non-judicial punishment and separation from the military with an OTHC discharge. Disqualifying conditions AG ¶ 25(a), “any substance misuse,” AG ¶ 25(b), “testing positive for an illegal drug,” AG ¶ 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” and AG ¶ 25(g), “expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse,” apply.

AG ¶ 26(a) provides for mitigation when the drug involvement and substance misuse “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.” Given he used marijuana over some 28 years to as recently as June 2016, it cannot reasonably be said that his marijuana use happened so long ago or was “so infrequent” to trigger AG ¶ 26(a) in mitigation. His use of other illegal drugs was infrequent and the most recent use of the other illegal drugs was February 2014, almost five years before the hearing. He has established a pattern of abstinence related to his use of the other illegal drugs sufficient to mitigate the drug involvement and substance misuse security concerns related to those other drugs.

AG ¶ 26(b) has some applicability because Applicant has acknowledged his drug involvement and there is no evidence that he currently associates with drug-using associates and contacts. AG ¶ 26(b) provides:

(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 failed to list his illegal drug involvement on his August 2016 e-QIP. He had last used marijuana two months prior to completing the e-QIP. At his hearing, Applicant when asked about future use of illegal drugs, he stated he would not say he

would not use marijuana in the future. He was not currently using marijuana, but would not promise he would not use it again. His statement raises doubt about his commitment and ability to abstain from future usage.

There are no “bright line” rules for determining when conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.”

Applicant's present abstinence of two and a half years, as of the close of the evidentiary record, is very short in comparison to the 28 years over which he used marijuana. He provided no corroborating evidence from others attesting to his change to a drug-free lifestyle. Applicant has yet to establish a sufficient pattern of abstinence to mitigate the drug involvement and substance misuse security concerns caused by his marijuana usage in disregard of Federal law.

Guideline J: Criminal Conduct

The concern under this guideline is set out in AG ¶ 30: Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

In 1999, while serving in the U.S. military, Applicant received non-judicial punishment after testing positive for marijuana and cocaine in a urinalysis. As a result, he was separated from the military with an OTHC discharge. In March 2005, he was charged with criminal conspiracy and homicide. In December 2011, he was charged with being under the influence of a controlled substance. He sold marijuana until 2009 or 2010. The aforesaid conduct and charges establish the following disqualifying conditions under this guideline:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;

AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and

AG ¶ 31(e): discharge or dismissal from the Armed Forces for reasons less than “Honorable.”

The criminal conduct security concerns have been mitigated by the following applicable factor:

AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

In June 2005, 13 years ago when Applicant was 26 years old, he accompanied a group of friends to what he thought would be a fist fight. The altercation resulted in the death of an individual. Applicant was in jail from March 2005 through March 2006, awaiting trial. At trial, he was acquitted of all charged against him. He has not seen or had any communication with any of the other individuals involved in the murder since seeing them in court in 2006. He has not sold marijuana in nine or ten years. His 2011 arrest for being under the influence of a controlled substance occurred seven years ago, and the charges were dismissed. His discharge from the military occurred almost 20 years ago. None of these events are recent. There was no showing of recent criminal misconduct.

There has been a passage of time sufficient to conclude that his questionable judgment and criminal misconduct will not recur. Although charged with criminal conduct, Applicant was never convicted of a crime. Non-judicial punishment is not equivalent to a conviction.

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 have incorporated my comments under

Guidelines H and J in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

Applicant was charged but never convicted of a crime. The underlying conduct leading to criminal charges being filed, his non-judicial punishment, his OTHC discharge, and 2005 homicide charge were carefully reviewed. His acquittal of the homicide and the passage of time mitigate the criminal conduct security concerns. However, the drug involvement was not mitigated.

The Government must be able to rely on those persons seeking security clearance eligibility to comply with the Federal drug laws without regard to their personal interests. For the reasons discussed, Applicant has raised enough doubt in that regard to where I am unable to conclude that it is clearly consistent with the national interest to grant him eligibility for a security clearance.

The decision to deny a clearance at this time should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a security clearance in the future. The awarding of a security clearance is not a once in a life time occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under Applicant's current circumstances a clearance is not recommended, but should Applicant be afforded an opportunity to reapply for a security clearance in the future, he may well demonstrate persuasive evidence of his security worthiness. Favorable consideration would be given to additional months without any evidence of misconduct or illegal drug usage. However, a clearance at this time is not warranted.

For all these reasons, I conclude Applicant has mitigated the criminal conduct. However, insufficient time has passed since his last marijuana use to mitigate the drug involvement and substance misuse.

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, Drug Involvement And Substance Misuse:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant.
Subparagraphs 1.b –1.g:	For Applicant.
Paragraph 2, Criminal Conduct:	FOR APPLICANT
Subparagraphs 2.a – 2.d:	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 interest to grant Applicant a security clearance. Applicant's eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge