



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



In the matter of:)
)
) ISCR Case No. 18-00630
)
Applicant for Security Clearance)

Appearances

For Government: Mary M. Foreman, Esq., Department Counsel
For Applicant: Frederic Nicola, Esq.

05/28/2019

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H, drug involvement and substance misuse. Eligibility for access to classified information is denied.

Statement of the Case

On March 30, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse. The action was taken 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 (AG) effective on June 8, 2017.

Applicant answered the SOR on May 24, 2018, and requested a hearing before an administrative judge. The case was assigned to me on February 25, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 12, 2019. I

convened the hearing as scheduled on April 17, 2019. The Government offered exhibits (GE) 1 through 3.¹ Applicant testified and offered Applicant Exhibits (AE) A and O. There were no objections to any exhibits offered, and all were admitted into evidence. DOHA received the hearing transcript on April 30, 2019.

Findings of Fact

Applicant admitted all of the allegations in SOR. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 35 years old. He earned a bachelor's degree in 2015. He married in 2011, and has a seven-year-old daughter. He has worked for his current employer since April 2016. Before then he worked in the restaurant business for 15 years.²

Applicant completed a security clearance application (SCA) in June 2016. He disclosed the following information. In 2002, he was charged with possession of marijuana during a traffic stop. He pleaded not guilty, and was found guilty and convicted of the charge in 2003. He was sentenced to a year of probation, fines, drug classes, and community service. He completed the probation attendance requirements, passed all of the drug tests, attended the drug awareness classes, but failed to complete the community service and pay the fines. His probation was revoked. He completed the community service, paid the fines, and was ordered to serve 12 days in the county jail for the probation violation. He served six days and the remainder was commuted for good behavior.³

In 2011, Applicant failed a drug test at work while employed at a hotel resort. He had been injured on the job and sought medical treatment where they administered a urinalysis. He tested positive for marijuana.⁴

In October 2015, Applicant began working as an undergraduate research assistant for a research laboratory. In April 2016, he was offered a full-time job with the company and has been employed there since. Two months later in June 2016, he completed his security clearance application (SCA).⁵

¹ Hearing Exhibit (HE) I is Applicant's request for a continuance and associated documents and email correspondence. HE II is an excerpt from the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-V). Department Counsel requested I take administrative notice of the sections provided. The request was granted.

² Tr. 24; AE C, D, E.

³ Tr. 38-42, 69-70, 72; GE 1, 2, 3.

⁴ Tr. 43-44; GE 1, 2.

⁵ Tr. 45-47.

In Applicant's SCA, he disclosed that he was a regular user of marijuana while in high school and during his restaurant career from June 1999 to January 2016. He also purchased marijuana during this time. He disclosed the following:

The frequency varied between 1-7 times per week until 2015 when I was finishing college. At this time, I reduced my use to 1-2 times per month, knowing that drug use would bar me from employment in my field of study. In 2016, I used once in January in celebration of my graduation and another use during my employment at the University Coop Bookstore working as an attendant.⁶

Section 23 of the SCA asked if he intended to use this drug or controlled substance in the future and he replied "no." He provided the following explanation:

I am concerned that further use will directly conflict with my employment with a federal contractor. For this, I will avoid further use. Also, I now wish to be a better role model for my daughter who is coming to an age where she is very aware and deserves to see that her parents are willing to live well in the face of temptation.⁷

Applicant testified that at the time he made the statement on his SCA, his intention was not to use marijuana, and he made the statement in good-faith.⁸

Applicant was interviewed by a government investigator in June 2017. He disclosed that since he completed his SCA in June 2016, he had used marijuana approximately 20 times. He used it with family and friends. In 2016, he used it on July 4th, Halloween, Christmas, New Year's Eve, and at a friend's party. He said the reason for his use was because he enjoys it recreationally and as an alternative to alcohol, which upsets his stomach. It relaxes and makes him comfortable. He told the investigator that he would prefer to continue using marijuana because he enjoys it and many of his family and friends use it. He continues to associate with them and uses it at their homes. He had not purchased marijuana after January 2016, but uses it when provided by his family and friends. He did not intend to purchase it in the future. He did not feel dependent on marijuana. He stated that his marijuana uses has not had any impact on his work, finances, school, home, family or friends, all of whom are aware of his use. He said marijuana use has had no impact on his personality, judgment, reliability, or ability to maintain a confidence.⁹

⁶ GE 1.

⁷ GE 1.

⁸ Tr. 28-29.

⁹ Tr. 47-49; GE 2.

Applicant testified that when he was interviewed by the investigator he said he had used marijuana 20 times since completing his SCA. He stated that his use was between 10 and 20 times. He confirmed he told the investigator that he preferred to continue using marijuana because he enjoyed using it recreationally, but this was a preference and not an intention. He confirmed that at the time he completed his SCA, he told the investigator that he did not intend to use marijuana in the future because he was concerned it would impact federal employment. He testified that he had a few “slips” since completing the SCA, and he will avoid future use.¹⁰

Applicant testified that after he was interviewed in June 2017, he received government interrogatories and was asked to review the statement he made to the investigator. He confirmed the accuracy of his statement and signed the interrogatories in March 2018. Applicant did not disclose in the interrogatory that he continued to use marijuana after his June 2017 interview until November 2017. He explained his use in November 2017 was in a social setting with old friends. He said it seemed harmless at the time. He said he has disassociated himself from these friends and others friends who use marijuana. The family members with whom Applicant has used marijuana in the past were his mother and sister. He still associates with them. His wife does not use marijuana. He stated he has not used marijuana since November 2017 because he realized how serious his conduct was.¹¹

In May 2018, Applicant signed a statement of intent to never use illegal drugs again and to refrain from associating with drug using individuals and to avoid environments where drug use is prevalent. He provided negative drug test results from May, August, October, November 2018, and January and March 2019. Applicant paid for these and decided when to take the tests. The tests were not random and Applicant decided when he would take them. In April 2018, at his request, Applicant was evaluated by a licensed professional counselor for his marijuana use. She diagnosed him under DSM-V with cannabis abuse, in remission. He explained that he requested the psychological evaluation because he thought it would be valuable to show he was of sound mind and capable of making well thought out decisions. In May 2018, he completed an eight hour online marijuana education program that provided techniques on how to refrain from marijuana use.¹²

In Applicant’s May 2018 answer to the SOR, he admitted he used and purchased marijuana from June 1999 to June 2017. He explained that when he began using marijuana he did not know that he would be seeking a security clearance later in his life. He stated that he made the poor decision that the consequences of marijuana use were worth the risk. He has now educated himself about marijuana use. He explained that his marijuana use after completing his SCA was a severe lapse in judgment. He believed he

¹⁰ Tr. 47-49.

¹¹ Tr. 30-31, 37-38, 47-58; GE 2.

¹² Tr. 30-33, 52-55; AE I, J, L, K.

was strong enough at the time to abstain but did not make the necessary life changes to remain drug free. In times of weakness, he believed that not purchasing marijuana was sufficient but then found he used it when it was provided to him by others. He said he did not realize the severe effect his use could have, but he has since realized what is at stake, and he will no longer use it. He said that previously he had not taken the necessary steps, but now he has, and there is no likelihood of future drug use. His perception has changed, as he has become aware of the costs associated with his drug use and the impact it could have on his family's finances, especially if he went to jail.¹³

Applicant was asked if he had attempted to stop using marijuana in the past. He stated that he took breaks in his use when he had upcoming job interviews and after his daughter was born. He admitted that the reason he stopped using marijuana before a job interview was because he might have to take a drug test. He said in the past, he had to take pre-employment drug tests and wanted to be clean. He then went back to using marijuana after the test. He also tried to stop after he completed his SCA, but admitted he failed. When asked what has changed, he said the consequence for using it are so great as well as the loss of his integrity at work. He is aware that possession and use of marijuana is illegal in his state. He used marijuana while working for a defense contractor. He did not know if his supervisor at the time was aware of his drug use. He said that his perception of illegal drug use has changed now that he has abstained for a period.¹⁴

A coworker who has worked with Applicant for two years testified on his behalf. He considered Applicant a reliable coworker who has a good reputation and is an important member of their team. Applicant follows all of the required security protocols. They have participated in activities outside of work that were family oriented. He considers Applicant honest. He believed Applicant was involved in an isolated incident of marijuana use. They have never discussed Applicant's prior drug use.¹⁵

A senior-level employee testified on Applicant's behalf. He has worked for their employer for 15 years, and he is a project manager. He has worked with Applicant for the past three years. They worked on the same project for a year and half and had daily contact. They work on different projects now and see each other about three times a week. He considers Applicant extremely reliable and motivated. He noted that Applicant played an important role on a project. He said that the team was involved in all types of security and protocols, and Applicant was serious about security. The witness testified that he was aware Applicant had some involvement with illegal drugs when he was in high school in that he was caught with marijuana. The witness was unaware of Applicant's other drug use or while serving on the team. He confirmed that their employer has a drug policy and all employees are made aware of it when they are processed for employment.¹⁶

¹³ Tr. 56-57, 70-72; Answer to SOR.

¹⁴ Tr. 27-28, 36, 62-68.

¹⁵ Tr. 74-83.

¹⁶ Tr. 83-94.

Applicant provided a character letter from his supervisor. Applicant had worked for him when he was part of a research project during his senior year of college. His supervisor noted that Applicant's skillset, trustworthiness and outstanding character spurred him to hire him full time after graduation. He was deemed a hard worker, completing tasks outside of work hours to meet deadlines. Applicant was self-motivated and focused, which lead to the success of the project. He was professional, attentive, punctual, knowledgeable, honest, and reliable. The supervisor was aware of Applicant's "past marijuana use." He noted it did not have an effect on Applicant's ability to think clearly, make professional decisions, and there were no deficiencies in Applicant's character and honesty.¹⁷

Applicant provided other character letters that state he is reliable, honest, trustworthy, thoughtful and caring. He provided performance evaluations that reflect his performance typically exceeded expectations. He earned his Eagle Scout award in 2001¹⁸

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, 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(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 states an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or

¹⁷ AE A.

¹⁸ Tr. 33; AE A, G, H, O.

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 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.

AG ¶ 25 provides conditions that could raise security concerns. The following are potentially applicable:

- (a) any substance misuse;
- (b) testing positive for an illegal drug;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

From approximately June 1999 to June 2017, with varying frequency, Applicant used and purchased marijuana. He completed his SCA in June 2016 and stated that he did not intend to use illegal drugs in the future. He continued to use marijuana after the date he signed his SCA and after the date he was interviewed by a government investigator in June 2017. He said his last use of marijuana was in November 2017. In 2011, he tested positive for marijuana after he sought medical assistance from an injury. In 2002, he was charged with possession of marijuana and was convicted in 2003. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 26 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;

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions to overcome the 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 being 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; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant has a history of abusing marijuana since 1999. He stopped using marijuana for short periods of time so he could pass employment drug tests and then resumed. He used marijuana with friends and also family members, including his mother and sister. He honestly disclosed his marijuana use on his June 2016 SCA and said he would not use illegal drugs in the future because of the impact it would have on him obtaining a job, and his young daughter. Despite this promise, he continued to use marijuana. He was interviewed by a government investigator in June 2017, and disclosed that he continued recreational use because he enjoyed it. He again promised to refrain from using marijuana. He broke this promise again and used it after his interview. He said his last marijuana use was November 2017. He was 33 years old at the time.

Based on Applicant's past history of marijuana use and his repeated failure to abstain, even after completing his SCA and background investigation, I cannot find that future use is unlikely to recur. Applicant admitted he would abstain from using marijuana when there was a possibility of drug testing. Although he says he is now committed to

abstaining because of the potential effect it could have on his job and daughter, those same factors existed after he completed his SCA and background interview. His illegal drug use spans over 18 years and occurred after he was aware that it was a security concern and applied for a security clearance. His conduct casts doubt on Applicant's current reliability, trustworthiness, and good judgment. AG ¶ 26(a) does not apply.

Applicant acknowledged his drug involvement. He provided negative drug test results, albeit not random. He has completed an eight-hour online drug program. He says he no longer associates with those who use drugs and has changed his environment, and has provided a statement that he does not intend to use illegal drugs in the future. However, that statement is not sufficiently persuasive, given his history of failing to adhere to his commitments not to use marijuana. AG ¶ 26(b) applies minimally. I have considered that he had a psychological evaluation that indicated his cannabis abuse is in remission, but he did not complete a prescribed drug treatment program or aftercare program. AG ¶ 26(d) does not apply.

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, but some warrant additional comment.

Applicant is an intelligent 35 year old husband, father, and exceptional employee. He is also a long term user of marijuana. Despite being charged and convicted of marijuana possession in 2003 and going to jail for six days when he failed to complete the terms of his sentence, it did not serve as a deterrent. The evidence shows that his marijuana use was with family and friends, and he preferred it for recreational use over

other legal substances. He was aware that those with whom he worked valued his knowledge and commitment to their work, and he had an opportunity to further his career with new opportunities. Hence he was sponsored for a security clearance. He made promises to abstain from using marijuana after he completed his SCA and after his background interview. He failed to abstain as promised, despite acknowledging the potential work and personal costs that further marijuana abuse could have on his life. Although Applicant provided some mitigation stating he is now abstaining from marijuana use, has changed his environment, and has disassociated from those who use marijuana, those actions are insufficient to overcome his past conduct and repeated failure to abstain from marijuana use. The record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, 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, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against 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 Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge