



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



In the matter of:

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ISCR Case No. 18-00860

Applicant for Security Clearance

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

06/26/2019

Decision

HEINY, Claude, Administrative Judge:

Applicant used marijuana to alleviate severe back pain. He has stopped using marijuana and manages his pain with medication supplied by the U.S. Department of Veterans Affairs (VA). His financial delinquencies are being resolved and are under control. He has mitigated the security concerns under Guideline F, financial considerations, and Guideline H, drug involvement and substance misuse. Applicant's eligibility for access to classified information is granted.

Statement of the Case

Acting under the relevant Executive Order and Department of Defense (DoD) Directive, on April 23, 2018, the DoD issued a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse, and Guideline F, financial considerations.

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 18, 2018, Applicant answered the SOR and elected to have the matter decided without a hearing. On November 30, 2018, Defense Office of Hearings and

Appeals (DOHA) Department Counsel (DC) submitted the Government's case in a File of Relevant Material (FORM). The FORM contained five attachments (Items). Applicant's response to the FORM was due on January 7, 2019. No response to the FORM has been received by DOHA. On March 6, 2019, I was assigned the case.

Findings of Fact

In Applicant's answer to the SOR, he admitted, with explanation, that he used marijuana with varying frequency from about April 2012 to at least July 2017. He denied the three collection accounts: SOR 1.a (\$9,521), SOR 1.b (\$1,259), and SOR 1.c (\$1,016), which totaled approximately \$11,800. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact.

Applicant is a 39-year-old manager of concessions at a stadium, but has accepted a position as a technical office manager for a defense contractor if he obtains a security clearance. (Item 3) He is married and has a daughter age 3 and a son age 8. From April 1999 to August 2003 he honorably served in the U.S. Marine Corps. Applicant receives disability payments from the U.S. Department of Veteran's Affairs (VA). He is 100 percent disabled due to his service-connected disabilities. (Item 2, Tab F) He is considered totally and permanently disabled. The record is silent as to the amount of disability pay he receives.

In 2002, while in the Marine Corps, Applicant was a Marine military police officer and sustained a back injury while extracting an inmate from a cell. (Item 4) He had also sustained a knee injury while on active duty. He suffers from degenerative disk disease and has chronic back pain. (Item 2) In April 2012, the VA determined he is 100 percent disabled. (Item 2, Tab F) The VA had directed that Applicant obtain counseling for depression and anxiety associated with his back injury. (Item 4) The VA prescribed Vicodin to manage his pain, but the medication lessened his ability to focus on work and class assignments. In May 2017, he obtained his bachelor's degree in business administration. (Item 3, Item 2) The VA was unable to prescribe any alternate medication. In March 2012, Applicant stopped using Vicodin because he believed he was becoming addicted to Vicodin.

Applicant is now on a regimen of pain medication he receives through the VA. He was working with his doctor to control the pain. He had used marijuana when trying to find an alternative to the Vicodin and other pain medication prescribed by the VA.

On Applicant's November 2017 Electronic Questionnaires for Investigations Processing (e-QIP) he listed he had smoked marijuana from April 2012 through July 2017. He stated,

I would use it when pain was too severe to sleep or function throughout the day, and when my prescribed medication would not work. Never at work or outside of my residence. It was not often . . . I have been in chronic pain for the last 12 years and tried to manage the pain with marijuana, but

it did not help as I had hoped it would. So now I am on a regimen[] of pills issued by the Veterans Administration and am working with my Doctor to maintain manageable pain levels, physical therapy, diet and it is working . . . I have never had a problem with this drug and it is not addictive. I don't see why I would need it or want it in the future. (Item 3)

In 2012, Applicant started using marijuana at night to help him sleep and when the pain was severe. (Item 2, Item 4) He asserts when Applicant moved to his current state, which was August 2012, he stopped using marijuana and the VA prescribed him Gabapentin, Ibuprofen, and Acetaminophen to address his back pain. (Item 3 and 4) The drugs controlled the pain unless the pain became severe. He asserted that in the spring of 2017, he stopped using marijuana to manage his pain. (Item 2) In July 2017, he again stopped using marijuana. He asserts his use had no negative impacts on his life and it allowed him to sleep better and concentrate better on his work and school assignments. (Item 4) He said he was willing to sign a statement of intent to abstain from all illegal drug involvement and substance misuse. (Item 2)

Applicant did not list any financial problems or delinquencies on his e-QIP. (Item 3) In August 2017, he switched to part-time employment due to his back pain. (Item 4) In August 2017, he started working 10 to 15 hours per week. From March 2017 to May 2017, in addition to his full-time job and school attendance, he also worked a second job three or four days a week. He ended his second job because the commute from his home state to the job site in another state made his back pain more severe. (Item 4)

From October 2013 to February 2014, Applicant was a full-time student financially supported by his military disability pay and vocational rehabilitation payments. (Item 4) His GI Bill benefits and disability pay also financially supported him when he was a student at other colleges and universities. (Item 4) From January 2009 through July 2010, he was unemployed due to a lack of work at his company caused by the recession. He was also unemployed from March 2012 until February 2013. (Items 3 and 4) From February 2013 to September 2013, he was a stadium operations manager. (Item 2) From April 2015 through October 2017, he was a stadium operations center supervisor. (Item 2) Since March 2017, he has also worked as a baseball video scout.

The \$9,521 collection account (SOR 2.a) resulted from the purchase of a bed in August 2007. His December 2017 credit report, lists the account which required monthly payments of \$25 with a high credit of \$2,985. (Item 5) The credit report listed a balance on the account of \$9,521 with \$2,363 past due. (Item 5) He made timely payments on the account until 2009, when he was unemployed. He stopped payments when other bills such as food and basic necessities took precedence. (Item 4) He anticipated becoming current on this account once he became employed full time. However, he could not anticipate when the account would be satisfied. (Item 4)

Applicant has employed a company to assist in resolving his debts and to improve his overall financial health. (Item 2, Tab F) The company was attempting to negotiate settlement of the debt. The letter from the company states, "Resolution Dept: Erroneous:

Correction date: 'Resolution Expected no later than 5-1-2019.' (Item 2, Tab H) Applicant had been told by his financial assistance company that the debt was uncollectable. He provided no documentation supporting this assertion. (Item 2) The account remains delinquent as of the date of his SOR Response. In his SOR response he indicated the debt was being actively worked and he would make all payments as directed. (Item 2, Tab F)

Applicant had a \$1,259 collection account (SOR 2.b) related to a VISA account opened in 2015. The account has been paid. During his December 2017 interview, he acknowledged the debt and said it became delinquent when other bills such as food and basic necessities took precedence. (Item 4) A letter from the current creditor indicates the account has been settled in full and zero is owed on the account. (Item 2, Tab H)

In September 2016, Applicant had taken his daughter to the emergency room due to an allergic reaction to a flu shot. In his SOR Response, he asserted he was working hard to correct the misunderstanding concerning the \$1,016 medical collection account (SOR 2.c). (Item 2) When he learned of the delinquent obligation, he contacted the hospital and learned the claim for treatment had been sent to the VA for payment. When he contacted his insurance company, he was told no claim had been submitted. (Item 4) The claim was denied by his insurance company when the hospital used the wrong social security number. (Item 4) During his December 2017 interview, he acknowledged the debt, but could not say when it would be satisfied. The delinquent account is reflected in his December 2017 credit report. (Item 5) In his response to the SOR, Applicant claims the creditor told him the debt was erroneous, but the creditor would not provide him with documentation supporting this assertion. (Item 2)

Character reference

The owner of a national baseball team has known Applicant for four-and-a-half years stated Applicant is diligent, leads by example, has stellar character, and demonstrates an exemplary work ethic. (Item 2, Tab D) The vice president and assistant general manager of a national baseball team, who has known Applicant for four years, stated Applicant enjoys a reputation as a responsible, reliable, personable member of the staff and believes Applicant to be honest, respectful, and trustworthy. The team's general manager, who has known Applicant for two years, states Applicant is a great employee with a tremendous work ethic and ingenuity. (Item 2, Tab D)

A friend, who has known Applicant for eight years, states Applicant is dependable, reliable, and will do what needs to be done. A friend, roommate, and co-worker, who has known Applicant for 11 years, stated Applicant is generous, hospitable, with integrity and high standards. A friend, who has known Applicant for 20 years, indicated Applicant is dedicated to his friends and family and is diligent and honorable. (Item 2, Tab D) A coworker, who has known Applicant for more than three years, stated Applicant is a dedicated worker, who has the highest character, and is always willing to go the extra mile for someone in need. He stated Applicant is very organized, detail-oriented, prepared, who has a tremendous ability to connect with people and earn their respect

and trust. (Item 2, Tab D) A friend, who has known Applicant for 28 years, stated Applicant is honest, loyal, and a person who puts his whole heart and soul into the people and activities in his life.

In March 2002, Applicant received a letter of appreciation from the commanding officer of the naval consolidated brig commending Applicant for his superb dedication and outstanding devotion to duty. (Item 2, Tab D) A co-worker, who worked with Applicant at the correction facility brig, stated Applicant was a fair and impartial correctional officer who was assigned to the special quarters wing that housed the most violent and dangerous offenders due to Applicant's demeanor and confidence. (Item 2, Tab D) In February 2003, he received a certificate of completion in recognition of his continued professional development for completion of the 40 hour train the trainer course. (Item 2, Tab I)

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 weight 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 articulated 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.

Disqualifying condition AG ¶ 25(a), “any substance misuse,” is established because of Appellant’s marijuana use. From April 2012 to July 2017, he used marijuana, which he acknowledged on his November 2017 e-QIP. His last use of marijuana is almost two years ago. He used marijuana to assist in relieving his back pain.

In 2002, while in the Marine Corps, Applicant was a Marine military police officer and sustained a back injury while extracting an inmate from a cell. He also sustained a knee injury while on active duty and suffers from degenerative disk disease resulting in chronic back pain. The VA rated his disability at 100 percent. He has suffered from chronic back pain for more than 12 years. The VA prescribed Vicodin to manage his pain, but the medication lessened his ability to focus on work and class assignments. The VA was unable to prescribe any alternate medication. In March 2012, Applicant stopped using Vicodin because he believed he was becoming addicted to Vicodin.

When his pain was too severe to sleep or function throughout the day and his prescribed medication would not address the pain, he turned to smoking marijuana. The marijuana did not help as he had hoped it would. In July 2017, he stopped using marijuana

and went on a regimen of pills issued by the VA. He is working with his doctor to maintain manageable pain levels through physical therapy, diet, and medication.

In 2012, Applicant started using marijuana at night to help him sleep and when the pain was severe. He asserts when he moved to his current state, which was August 2012, he stopped using marijuana. At that time, the VA prescribed him Gabapentin, Ibuprofen, and Acetaminophen to address his back pain. (Item 3 and 4) The drugs controlled the pain unless the pain became severe. He asserted that in July 2017, he stopped using marijuana to manage his pain. He asserts he sees no reason to use it in the future. He is willing to sign a statement of intent to abstain from all illegal drug involvement and substance misuse.

His use of marijuana was Applicant's attempt to find an alternative to the Vicodin and other pain medication prescribed by the VA, which he believed were leading to addiction.

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." Although, his use was not infrequent, it ended almost two years ago. Additionally, he is unlikely to use marijuana in the future now that medication provided by the VA addresses his back pain.

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."

AG ¶ 26(b) is applicability because Applicant acknowledges 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's self-reporting of his marijuana involvement is evidence of good character. He stated he was willing to sign a statement of intent to abstain from marijuana use. He no longer uses marijuana and sees no reason to use it in the future. Applicant has established a sufficient pattern of abstinence to mitigate the drug involvement and substance misuse security concerns.

Guideline F, Financial Considerations

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed upon terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

Applicant had three accounts placed for collection totaling \$11,795. AG ¶ 19 includes three disqualifying conditions that could raise a security concern any may be disqualifying in this case: "(a) inability to satisfy debts;" "(b) unwillingness to satisfy debts regardless of the ability to do so;" and "(c) a history of not meeting financial obligations."

The Government's evidence and Applicant's own admissions raise security concerns under AG ¶¶ 19(a), 19(b), and 19(c). The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App.

Bd. Sept. 22, 2005)). Applicant has the burden of presenting evidence of explanation, extenuation, or mitigation to overcome the financial considerations security concerns.

The following mitigating conditions under AG ¶ 20 are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices or identity theft), and the individual acted responsibly under the circumstances; and

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant made timely payments on his debt until he became unemployed in 2009. His December 2017 credit report listed 11 accounts as being paid as agreed. In 2009, he stopped making payment on some of his debts when other bills such as food and basic necessities took precedence. He has paid one debt (SOR 2.b, \$1,259) and a second debt (SOR 2.c, \$1,016), a medical debt, resulted when the bill was not submitted correctly by the health provider. He has health insurance coverage. The medical provider used an incorrect social security number resulting in a bill not being paid. The medical provider acknowledged the error and stated the debt is no longer owed. He is working with a financial correction company to address the last debt (SOR 2.a, \$9,521). He is willing to make all payments on the debt as directed. He has worked both full-time and part-time jobs at the same time to address his finances.

Applicant had three delinquent debts which indicates the conduct was infrequent. AG ¶ 20(a) has some applicability. AG ¶ 20(b) also applies. Being unemployed is a condition beyond his control as was his daughter's allergic reaction to a flu shot. He had medical insurance and the debt resulted from the medical provider using incorrect information in their attempt to receive payment. AG ¶ 20(d) applies to the debt in SOR 2.b, which has been paid. He has one delinquent obligation yet to be addressed, which he intends to pay. Based on him having addressed the other two debts, but more importantly this believe is based on his character as described in the reference letters, I believe this debt will be paid.

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

I have considered Applicant's honorable active duty service in the U.S. Marine Corps that resulting in him being rated as 100 percent disabled by the VA. His military service merits considerable respect. He received a letter of appreciation from the commanding officer of the naval consolidated brig commending him for his superb dedication and outstanding devotion to duty. A co-worker, who worked with him at the correction facility brig, stated Applicant was a fair and impartial correctional officer who was assigned to the special quarters wing that housed the most violent and dangerous offenders due to Applicant's demeanor and confidence.

The character evaluations of supervisors and coworkers are important and often more accurate because they have observed Applicant over longer periods of time and under a variety of events and stresses. The owner of a national baseball team, who has known Applicant for four-and-a-half years stated Applicant is diligent, led by example, has stellar character, and demonstrated an exemplary work ethic. The vice president and assistant general manager of the nation baseball teams, who has known Applicant for four years, stated Applicant enjoys a reputation as a responsible, reliable, personable member of the staff and believes Applicant to be honest, respectful, and trustworthy. The team's general manager, who has known Applicant for two years, states Applicant is a great employee with a tremendous work ethic and ingenuity.

Applicant's friends and coworker indicated Applicant is a dedicated worker, dependable, reliable, generous, hospitable, is willing to do what needs to be done, with integrity and high standards. They state he is very organized, detail-oriented, thorough, prepared, who has a tremendous ability to connect with people and earn their respect and trust and always willing to go the extra mile for someone in need. They stated he is a person who puts his whole heart and soul into the people and activities in his life.

Applicant has stated he stopped using marijuana in 2017 and will not use it in the future. His use of marijuana did not work as well as he had hoped and he now has a medical regimen through the VA to address his chronic back pain. I find for him as to drug

involvement and substance misuse. As to financial considerations, the issue is not simply whether all the delinquent obligations have been paid — it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. (See AG ¶ 2(c)). Two of the three delinquent obligations have been addressed and Applicant indicated he intends to pay the last debt. Overall, the record evidence leaves me without questions and doubts about Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigate the drug involvement and substance misuse and financial considerations concerns.

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, drug involvement and substance misuse: FOR APPLICANT
- Subparagraph 1.a: For Applicant.
- Paragraph 2, Financial Considerations: FOR APPLICANT
- Subparagraphs 2.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 national interest to grant Applicant a security clearance. Applicant’s eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge