



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



In the matter of:)
)
) ISCR Case No. 18-01815
)
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

03/26/2019

Decision

DAM, Shari, Administrative Judge:

Applicant failed to mitigate the drug involvement and substance misuse, and personal conduct security concerns, related to his use of marijuana while holding a security clearance, and his failure to disclose it on his security clearance application. Based on the pleadings and exhibits, national security eligibility for access to classified information is denied.

History of Case

On October 20, 2017, Applicant submitted a security clearance application (SCA). On August 31, 2018, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (Drug Involvement and Substance Abuse) and Guideline E (Personal Conduct). The action was taken under Executive Order 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 National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DoD after on June 8, 2017.

Applicant filed an Answer to the SOR in writing on September 19, 2018, and elected to have his case decided on the written record in lieu of a hearing. On November 19, 2018, Department Counsel submitted the Government's File of Relevant Material (FORM), containing five Items. Applicant received the FORM on November 26, 2018. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. Applicant did not provide a response to the FORM, object to the Government's evidence, or submit documents. Hence, all Items are admitted into evidence. The case was assigned to me on February 7, 2019.

Findings of Fact

Applicant is 29 years old and graduated from high school in May 2008. According to his SCA, he worked for Federal contractors from May 2008 to June 2017, and then started a position in private industry.¹ (Items 2, 3)

Applicant admitted that he used marijuana in late April 2017, and denied that he held a security clearance at the time, as alleged in SOR ¶ 1.a. According to his investigation and adjudication history, he was granted a security clearance in August 2008 and held it through at least January 2018. (Item 5) During an April 2018 interview with a government investigator, Applicant said that he tried marijuana, one time, while at a party. He said he had not smoked it since then and would not again. (Items 2, 4)

Applicant admitted that on May 23, 2017, he tested positive for marijuana while employed by a defense contractor (employer), as alleged in SOR ¶ 1.b. (Item 1)

Applicant admitted that he failed to disclose in his October 2017 SCA that he left his employer in May 2017, subsequent to testing positive for marijuana, and he denied that he left as the result of that incident, as alleged in SOR ¶ 2.a. In his Answer, he said that he left for a different reason, (seemingly to start another position with a private company.²) During an April 2018 interview with a government investigator, Applicant said he did not disclose information about his marijuana use because he forgot about it. He stated that after the May 23, 2017 test, his employer told him he would be suspended for a week or two, but Applicant left before that occurred, as he claimed he had previously intended to do. He did not disclose on his SCA that his employer told him he was to be suspended for one to two weeks for the incident. (Items 2, 4)

Applicant admitted that he failed to disclose in his October 2017 SCA that he used marijuana in April 2017, and tested positive in May 2017 while employed, as alleged in SOR ¶ 2.b. He denied that he held a security clearance at the time or was terminated as a result of using marijuana. He stated that he left, as previously planned, to assume another job. (Items 2, 4)

¹ Applicant has held a Secret or a Top Secret clearance with access to Sensitive Compartment Information (SCI) from August 2008 to at least January 2018. (Item 5)

² This is based on Applicant's work history recorded in his SCA. (Item 3)

Applicant admitted that, during the April 2018 interview, he told the investigator that he left his employment prior to being suspended for using marijuana, as alleged in SOR ¶ 2.c. However, he asserted that he did not leave because of his drug abuse or pending suspension. (Item 2) In Answer to SOR ¶ 2.d, which reiterated the allegations in SOR ¶¶ 1.a and 1.b, he again stated: “I admit, but did not leave for this reason,” meaning as a result of testing positive for marijuana. (Item 2.)

Policies

When evaluating an applicant’s suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant’s national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states that an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person applying for national security eligibility seeks to enter 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *a/so* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline H: Drug Involvement and Substance Misuse

AG ¶ 24 describes the concerns related to 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.

AG ¶ 25 sets out conditions that could raise a security concern and may be disqualifying:

(a) any substance misuse (see above definition);

(b) testing positive for an illegal drug; and

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

In April 2017, Applicant used marijuana, and in May 2017, he tested positive for marijuana. He was working for a Federal contractor at that time and held a security clearance. The evidence established the above disqualifying conditions.

AG ¶ 26 lists four conditions that could mitigate security concerns raised under this guideline. Three may potentially apply:

(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 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; 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 did not present evidence to establish mitigation under any of the above three conditions. The behavior happened about two years ago, and there is insufficient evidence to conclude it happened under unusual circumstances, such that it does not cast doubt on his current trustworthiness. He provided no evidence corroborating his assertion that he used marijuana only once, before testing positive on a urinalysis conducted after he later claimed his single use occurred. He made no mention of receiving treatment for substance abuse.

Guideline E: Personal Conduct

AG ¶ 15 explains the security concerns relating to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. One may be disqualifying in this case:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant did not disclose to the Government his marijuana use or that his previous employer intended to suspend him after he tested positive for marijuana in May 2017. Applicant asserted that he left that employer before he served a two-week suspension because he had found another position that he had intended to start before the suspension was imposed. He held a security clearance at the time of the incident. His

statement that he did not disclose his marijuana use because he had forgotten about the May 2017 marijuana incident when he completed his October 2017 SCA is not credible, especially in light of his contemporaneous employment disruption. The evidence establishes the above disqualifying condition, and indicates that he intentionally concealed requested relevant information concerning his recent drug abuse.

AG ¶ 17 provides conditions that could mitigate security concerns and include:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant presented insufficient evidence to establish mitigation under any of the above conditions. He failed to be candid and forthright when he completed his October 2017 SCA. He did not disclose his marijuana use until confronted by the investigator a year later. He knew his employer intended to suspend him as a result of the positive test in May 2017, regardless of the fact he chose to take another position instead of accepting this punishment. It is not reasonable to believe that four months later he could not recall this information that was required to be disclosed on his October 2017 SCA.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility by considering the totality of the applicant's conduct and all relevant 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in this whole-person analysis.

Applicant is a young man who has held a security clearance for about ten years, during which time he worked for Federal contractors. His use of marijuana and attempt to conceal it on his SCA support independent but equally serious security concerns. He failed to demonstrate rehabilitation or significant behavioral changes. Overall, the evidence raises doubt as to Applicant's present eligibility and suitability for a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a through 2.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 interests of national security to grant Applicant access to classified information. National security eligibility is denied.

SHARI DAM
Administrative Judge

