



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



In the matter of:)
)
) ISCR Case No. 18-02057
)
Applicant for Security Clearance)

Appearances

For Government: Nicholas Temple, Esq.
For Applicant: Paul M. Smith, Esq.

04/04/2019

Decision

DAM, Shari, Administrative Judge:

Applicant has illegally used marijuana with varying frequency since 2010. He intends to continue using it. He did not mitigate the resulting security concerns. Based upon a review of the record as a whole, national security eligibility for access to classified information is denied.

History of Case

On May 31, 2017, Applicant submitted his first application for a security clearance (SCA). On August 31, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement and Substance Misuse). Applicant answered the SOR in writing on October 6, 2018 (Answer), and requested a hearing before an administrative judge.

The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on February 7, 2019. DOHA issued a Notice of Hearing on February 12, 2019, setting the hearing for February 27, 2019. Department Counsel offered Government Exhibits (GE) 1 through 3 into evidence. Applicant testified and offered Applicant Exhibits (AE) A through D into evidence. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on March 11, 2019.

Findings of Fact

Applicant is 27 years old and unmarried. He earned a bachelor's degree in 2014. (GE 1) In April 2017, he began a position with a Federal contractor. Prior to this job, he worked for a private company. (GE 1)

Applicant disclosed a history of illegal drug abuse in his May 2017 SCA. He was arrested for possessing marijuana in July 2010 and July 2016. (GE 1) The 2010 charge was expunged. Applicant was fined \$300 for the 2016 charge. (Tr. 21; GE 1, GE 2, GE 3) Applicant disclosed that he first used marijuana in April 2010, and claimed that his last use was in July 2014. He noted that he used it five to ten times, purchased marijuana five times while in college and high school, and used LSD twice while in college. (GE 1)

On April 20, 2018, Applicant was interviewed by an investigator from the Office of Personnel Management (OPM). He told the investigator that he used marijuana beyond the July 2014 date he disclosed in his May 2017 SCA. He stated he continued to use marijuana infrequently after July 2014. He stated he did not feel dependent on the drug. (GE 2)

Applicant intends to continue possessing and using marijuana because he believes that it does not affect his ability to perform his job. He used it twice in the week before his hearing, including the day before. He uses it socially, generally about twice a week. He does not have a recognized medical reason for using it.¹ He is aware that his recreational use is illegal under both his state's and Federal law. He used it after he completed his May 2017 SCA. (Tr. 18-19, 28) He has never been given a drug screening by his current employer. He does not know if his current employer has a zero-tolerance policy related to using illegal drugs. (Tr. 28-29)

Applicant submitted four letters of recommendation from members of his employer's supervisory staff. All of them compliment Applicant for his high level of performance and reliability. (AE A, AE B, AE C, AE D) Applicant said these people are aware of his marijuana use, although they did not comment on it. (Tr. 25)

Policies

This case is adjudicated 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 *National Security Adjudicative Guidelines for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective within the DOD on June 8, 2017.

¹ Medical marijuana is legal in the state in which Applicant lives. Possession of it, up to 10 grams, has been decriminalized since 2016.

When evaluating an applicant's national security eligibility, 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 are useful in evaluating an applicant's national security 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(b) and 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.

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

A person who applies 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 eligibility for access to classified information or assignment in sensitive duties. 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 information.

Section 7 of Executive Order 10865 provides, "Any 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 *also* 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

The security concerns under the guideline for drug involvement and substance misuse are 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. *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 describes two conditions that could raise security concerns and may be disqualifying in this case:

- (a) any substance misuse (see above definition); and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant admitted that he has illegally used marijuana since 2010, with varying frequency, and subsequent to completing his 2017 SCA. He intends to continue using it in the future. The evidence establishes security concerns under the above disqualifying conditions.

AG ¶ 26 provides conditions that could possibly mitigate the drug-related security concerns raised in this case:

- (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;

(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.

There is no evidence to establish any of the above mitigating conditions. Applicant has a long history of abusing illegal drugs that began in 2010, while in high school. His regular marijuana use continues to date, and casts doubt on his judgment. He acknowledges that possessing and using marijuana, especially while working for a Federal contractor, is illegal and may jeopardize his employment, but expresses his intention to continue doing so. He has a long history of frequent marijuana use, but has not been evaluated for substance abuse or addiction, or participated in a treatment program.

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 pertinent facts and circumstances surrounding this case. I incorporated my comments under Guideline H in this whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

After listening to his testimony and observing his demeanor, I found Applicant to be candid about his history of marijuana use and staunchly determined to continue using

it, despite the fact that it violates state and Federal criminal laws and may jeopardize his request for a security clearance. Overall, the evidence creates significant doubt as to Applicant's judgment, reliability, and suitability for a security clearance. It raises serious concerns about his ability or willingness to follow rules and regulations. He failed to meet his burden to mitigate the security concerns arising under the guideline for drug involvement and substance misuse.

Statutory Prohibition²

Independent of analysis under the AG, the Bond Amendment, 50 U.S.C. § 3343, prohibits Federal agencies from granting or renewing national security eligibility to any unlawful user of a controlled substance. The term, "unlawful user," is not further defined in terms of frequency or recency. However, this statutory prohibition clearly applies to Applicant at present, given his ongoing and regular marijuana use, and his expressed intent to continue using it.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:

AGAINST APPLICANT

Subparagraphs 1.a and 1.b:

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 a security clearance. National security eligibility is denied.

SHARI DAM
Administrative Judge

² See Directive Enclosure 2: Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines*, dated December 10, 2016, at ¶ E.2 and Appendix B.