



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



In the matter of:)
)
) ISCR Case No. 18-02407
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: Dan Meyer, Esq.

06/19/2019

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, drug involvement. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On October 22, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse. The DOD acted 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) implemented by the DOD on June 8, 2017.

On November 16, 2018, Applicant answered the SOR and originally requested an administrative determination. Applicant hired counsel and requested a hearing. The case was assigned to me on April 4, 2019. The Defense Office of Hearings and Appeals

(DOHA) issued a notice of hearing on April 25, 2019, and the hearing was held on May 22, 2019. The Government offered exhibits (GE) 1-4, which were admitted into evidence without objection. The Government's exhibit list was marked as hearing exhibit (HE) I. Applicant testified and offered exhibits (Tab) A through E, which were admitted into evidence without objection. Applicant's counsel submitted a hearing brief, which was marked as HE II and an exhibit list, which was marked as HE III. The record remained open and Applicant timely submitted Applicant exhibit (AE) F, which was admitted without objection. DOHA received the hearing transcript (Tr.) on June 5, 2019.

Findings of Fact

In Applicant's answer, he admitted all the SOR allegations. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 34 years old. He is married and has no children. He has worked for his current employer, a defense contractor, since May 2010. He first worked for a federal contractor in 2008, which is when he obtained a security clearance. He has a master's degree. (Tr. at 18, 20, 26-27; GE 1)

The SOR alleged Applicant used marijuana, with varying frequency, from March 2005 to July 2017; that he used marijuana while holding a security clearance; and that in April 2018, when he completed his security clearance application (SCA), he stated he intended to use marijuana in the future.

Applicant admitted using marijuana a few times in 2005. He discontinued using marijuana because he did not find it interesting and he was concerned such use would hamper his ability to obtain a job. He was granted a security clearance in 2008 after filling out an security clearance application (SCA), which asked him about recent drug use. He resumed using marijuana in approximately December 2017, in an attempt to relieve his headaches and as a way to relax. He held a security clearance at the time and knew use of marijuana was against federal law and the law of his state of residence. He continued to use marijuana approximately 20 times through June 2018. He filled out another SCA in April 2018, admitting his use of marijuana and stating that he intended to continue to use marijuana in the future. He continued to use marijuana until June 2018. He was interviewed by a defense investigator in July 2018. He told the investigator that he did not intend to continue using marijuana because he no longer found it interesting and it was "hit or miss" with providing headache relief. Upon cross examination at hearing, he admitted that one reason he changed his view of future marijuana use was because he discovered the impact such use had on his security clearance and possibly his job. (Tr. at 29-30, 32, 34-36; GE 1-4)

When Applicant was using marijuana he used it with his wife, his sister, and some friends. He used by smoking the marijuana. He claims that both his sister and his wife have stopped using marijuana (wife provided a negative drug test from March 2019), and that his friends either no longer use marijuana or they do not use in his

presence. He sought treatment for substance-induced anxiety disorder in July 2018 and successfully completed counseling later that month. Other than a letter describing his successful completion of counseling, no specific treatment plan, or prognosis, was set out. In May 2019, he signed a written statement of intent not to use illegal drugs in the future. He also provided two drugs tests from March 2019 and May 2019 showing that he tested negative for marijuana on both occasions. Applicant indicated that he now uses meditation as a substitute for marijuana to deal with his anxiety. (Tr. at 38, 41-43; Tab C, E; AE F)

Applicant presented seven declarations from friends and a former coworker. They described Applicant as truthful, trustworthy, responsible, and possessing good judgment. They all believe he will not use illegal drugs in the future. His 2018 job performance appraisal gave him an overall evaluation of “substantial impact,” which was the highest rating for his employee category. (Tabs C-D)

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 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(a), 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.

Under Directive section E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive section E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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 Abuse

AG 24 expresses the security concern pertaining to drug involvement:

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.

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

AG 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

(a) any substance misuse;

(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

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

(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used marijuana on a few occasions in 2005, stopped using for about 12 years, then resumed his use between December 2017 and June 2018 on approximately 20 occasions. He has held a security clearance since 2008. In his 2018 SCA, he stated his intent was to continue using marijuana. I find all the above disqualifying conditions apply.

AG 26 provides conditions that could mitigate security concerns. Two potentially apply 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; and

(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.

Applicant's use and of marijuana was frequent and as recent as June 2018, while holding a security clearance and after he recently completed an updated SCA. Given his recent pattern of use, his claimed abstinence beginning in June 2018 is not

sufficiently attenuated to be considered remote. Although he provided a signed statement of intent to abstain from all future illegal drug use, as recently as April 2018 he indicated his intent was to continue his use of marijuana despite knowing it was unlawful to do so. He claims his wife, sister and friends that he associates with no longer use marijuana. Applicant's claimed abstention is insufficient to convince me that recurrence is unlikely. The frequency and recency of his past use and his recent statement of intent to continue his use casts doubt upon his current reliability, trustworthiness, and good judgment. AG 26(a) does not apply and AG 26(b) has some application.

Although he received counseling for substance-induced anxiety disorder in July 2018, that evidence does not contain a prognosis by a qualified medical professional. AG 26(d) has some application.

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 guideline 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 considered that Applicant voluntarily disclosed his marijuana history, his character references, his work performance, his drug counseling, his recent negative drug-test results, and his stated intention of no future use. However, I also considered that he used marijuana on numerous occasions while holding a security clearance and that as recently as April 2018, he expressed his intent to continue using marijuana. It was only after he realized that using marijuana jeopardized his security clearance that he had a change of heart concerning his future intentions.

Overall, the record evidence leaves me with questions and doubts about 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.

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.c:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge