



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-00216
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

08/21/2019

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On February 28, 2019, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. 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 April 1, 2019, Applicant answered the SOR and requested a hearing. The case was assigned to me on May 1, 2019. The Defense Office of Hearings and Appeals

(DOHA) issued a notice of hearing on May 28, 2019, and the hearing was held on July 24, 2019. The Government offered exhibits (GE) 1-3, which were admitted into evidence without objection. The Government's exhibit list was marked as hearing exhibit (HE) I. Applicant testified and offered exhibits (AE) A through D, which were admitted into evidence without objection. Applicant's non-evidentiary submissions were marked as HE II-IV. DOHA received the hearing transcript (Tr.) on August 5, 2019.

Findings of Fact

In Applicant's answer, he admitted all the Guideline H allegations, but denied the Guideline E allegations. I adopt his admissions as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 28 years old. He is engaged to be married and has no children. He has worked for his current employer, a major defense contractor, since July 2016. He holds bachelor degrees in computer science and mathematics. He has held a security clearance since September 2016. (Tr. at 5-6, 19; GE 1-3)

The SOR alleged Applicant used marijuana, with varying frequency, from January 2012 to at least January 2019; that he used marijuana while being granted access to classified information in September 2016; and he stated he intended to use marijuana in the future. The SOR also alleged that Applicant falsified his answers when completing his security clearance applications (SCA) in May and October 2016 when he failed to disclose his marijuana use within the last seven years on both SCAs, and when he failed to disclose his use of marijuana while having access to classified information on his October 2016 SCA.

Applicant described his marijuana use as beginning in approximately 2012 when a friend baked some marijuana-laced brownies that Applicant consumed. This use was in a state that prohibited marijuana use for any purposes. Applicant was diagnosed with throat cancer in 2011 and received radiation treatment for over six months. The treatment left Applicant with regular migraine headaches. Applicant claims his primary care doctor (unnamed) recommended that he use marijuana for the pain. The doctor did not provide a written recommendation or prescription for marijuana use. (Tr. at 20-22; Answer; AE A, D)

In 2016, after getting the job with his employer, Applicant moved to a state where marijuana has been legalized under state law. He then began using marijuana more frequently. His frequency of use after he began working for his employer and completing his first SCA was one to two times a month. He claimed he used marijuana only to deal with the migraine pain at night so he could sleep. He purchased marijuana from dispensaries. He used marijuana after completing his SCA in May 2016, after receiving a security clearance in September 2016, after completing his SCA in October 2016, after completing his background interview (BI) with a defense investigator in March 2018, and after answering interrogatories in February 2019. Applicant did not stop using

marijuana until after he received the SOR in March 2019. In both his BI in March 2018 and in his answers to interrogatories in February 2019, he stated that he intended to continue using marijuana in the future. (Tr. at 20-22, 24-27, 29; Answer; GE 1-3; AE A, D)

Applicant claims he was unaware that marijuana use was prohibited under federal law until he saw a “flyer” posted at work about the subject. He took a pre-employment drug test, but does not recall being informed about the company’s drug policies. (Note: the Drug-Free Workplace Act requires Federal contractors with a contract over \$100,000 to establish certain drug-free workplace policies. (See, 41 U.S. Code § 8101-8106. See also, the Federal Acquisition Regulation, 48 C.F.R § 52.223-6, Drug-Free Workplace)) He admitted that he failed to seek out more information after noticing the flyer and continued to use marijuana. Once he received the SOR, he realized that his marijuana use was a significant issue and in his SOR answer he claimed he would cease using marijuana immediately and try to find another type of pain relief for his migraines. He provided drug test results from June 2019 showing a negative presence for marijuana (THC) or any other illegal drugs. He also volunteered to take drug tests in the future to show his commitment to abstinence. (Tr. at 21, 24-25, 31-32; Answer; AE A)

Applicant explained the reason he failed to list his drug use on his May 2016 SCA was because he was out of the country at the time his employer notified him that he needed to complete the SCA immediately. He only had his cell phone and the SCA format was not displaying well on his phone. As a result, he incorrectly answered no to the question about past drug use within seven years. He claimed this was a mistake and not intentional. He received his secret clearance in September 2016 and in October 2016 was told to complete another SCA to request a top secret clearance. He again failed to list his marijuana use within the last seven years and he also failed to list his use while possessing a security clearance. Applicant explained his incorrect answers by stating that since this SCA was prepopulated with the information he provided on his May 2016 SCA, he did not scrutinize his answers as closely as he should have to make any changes. He did update one area of this October 2016 SCA to show that he now possessed a secret clearance. When Applicant was asked during his BI whether his answers to the drug questions were correct, he stated no and described his previous drug use. (Tr. at 22-23, 27, 31; Answer; GE 1-3)

Applicant presented an email from his employer indicating that he was selected as the employee of the month for April 2019. This award was given to him for demonstrating outstanding analytical and problem solving skills. (AE B)

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;
- (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 one occasion in 2012, then on a one to two times a month basis from May 2016 through March 2019. He used marijuana after being granted a secret clearance in September 2016. During his March 2018 BI and in his answers to interrogatories in February 2019, 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; 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 marijuana use was frequent and as recent as February 2019, while holding a security clearance and after he answered interrogatory questions about his drug use. Given his recent pattern of use, his claimed abstinence, beginning in March 2019, is not sufficient to overcome his recent drug use. He did not provide a signed statement of intent to abstain from all future illegal drug use. Additionally, as recently as February 2019, he indicated his intent was to continue his use of marijuana. Applicant's claimed abstention and one negative drug test are 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) and AG 26(b) do not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security concern:

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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying condition is potentially applicable:

- (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's explanation for failing to list his drug use on his May 2016 SCA is credible. His circumstances of being out of the country and trying to use his cell phone to complete the SCA led to a mistake and not an intentional withholding of material information about his past drug use. However, no credible explanation was presented regarding his failure to explain his past drug use and use while holding a security clearance on his October 2016 SCA. He had sufficient time to review his prepopulated answers from his earlier SCA and make any necessary changes, which he did to update the status of his security clearance. He failed to make any updates concerning his drug use. Additionally, given his employers obligation under the Drug-Free Workplace Act, I find Applicant's claim that he was unaware of the company's drug policy not credible. AG ¶ 16(a) applies to SOR ¶¶ 2(b) and 2(c).

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

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

Applicant disclosed his false statements when asked during his BI if his drug use information on his two SCAs was correct. However, a prompt good-faith effort to correct his false drug use information should have been made when he completed his October 2016 SCA, not a year and a half later when his BI was conducted. Providing false information on a SCA is not a minor offense because it is important to the overall security review process. Applicant's non-disclosure of his drug history on his October 2016 SCA casts doubt on his reliability, trustworthiness, and good judgment. Neither of the above mitigating conditions fully 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 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 Applicant's medical issues, his work performance award, his recent negative drug-test results, and his most recent statement of intention of no future marijuana use. However, I also considered that he used marijuana on numerous occasions while holding a security clearance and that as recently as February 2019, he expressed his intent to continue using marijuana. It was only after he received the SOR and realized that using marijuana jeopardized his security clearance that he had a change of heart concerning his future intentions. He intentionally failed to disclose his marijuana drug use on his October 2016 SCA.

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 and Guideline E, personal conduct.

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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraphs 2.b - 2.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