



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



In the matter of:)
)
) ISCR Case No. 19-00283
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

08/01/2019

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the 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 March 22, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a statement of reasons (SOR) detailing security concerns under Guidelines H and E. The DOD CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective June 8, 2017 (AG).

Applicant answered the SOR on April 13, 2019, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) on May 30, 2019. The evidence

included in the FORM is identified as Items 2-3 (Item 1 includes pleadings and transmittal information). The FORM was mailed to Applicant, who received it on June 3, 2019. Applicant was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He did not file any objections nor submit any additional evidence. Items 2-3 are admitted into evidence without objection. The case was assigned to me on July 18, 2019.

Findings of Fact

In Applicant's answer, he admitted all the allegations in the SOR, except SOR ¶ 1.d, which alleged that Applicant intended "to continue using marijuana in the future." 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 32 years old. He is single, never married, with no children. He has worked for his current employer, a federal contractor, since May 2008. He received his bachelor's degree in 2008. (Item 2)

The SOR alleged Applicant used marijuana, with varying frequency, from approximately June 2002 to July 2018; that he purchased marijuana during the same timeframe; that he used marijuana from July 2017 to July 2018, while granted access to classified information; and that he intended to continue using marijuana in the future. (SOR ¶¶ 1.a-1.d) The SOR also cross-alleged the same conduct under Guideline E, personal conduct. (SOR ¶ 2.a)

Applicant listed his marijuana use in his security clearance application (SCA) completed in March 2017. He described this use from June 2002 to February 2015. During college, he used approximately three to five times a week; from 2009 to 2013, he used three to five times a month; in 2014, he used four to six times; and he claimed he last used in February 2015. During his background investigation interview in August 2018, he described two uses in October 2017; two unspecified times of use; and he claimed last use in August 2018. He also admitted that he would continue using marijuana recreationally unless he is required to stop. He continues to associate with friends who use marijuana. He purchased marijuana from local dispensaries. He has not participated in drug treatment or counseling. (Items 2-3)

In Applicant's SOR answer, he admitted using marijuana while being granted access to classified information. He also modified his response regarding his future use of marijuana. He further stated he will only use marijuana in the future when it becomes legal under federal law and-or it becomes necessary and prescribed by a physician. He then further qualified this answer by saying that he would abstain from marijuana use as long as it was prohibited under the Guidelines. Responding to the Guideline E allegation, Applicant admitted his questionable judgment by using marijuana, but stated that he was ignorant about the difference between federal law and state law (where marijuana use is legal). He also pointed out that he was candid and honest about his marijuana use. (SOR answer)

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 ¶ 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 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 Misuse

AG ¶ 24 expresses the security concern for drug involvement and substance misuse:

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. Three conditions are potentially applicable in this case, to wit:

- (a) any substance misuse;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant used and purchased marijuana on multiple occasions between 2002 and 2018. He also used marijuana after being granted access to classified information. I find that 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 use of marijuana was frequent and, given his 16-year-pattern of use, his claimed abstinence beginning in February 2018 is not sufficiently attenuated to be considered remote. Even more troubling than his frequent use was his use after he was given access to classified information. He has vacillated about whether he intends to use marijuana in the future. Therefore, it is difficult to lend credence to his recently stated intention not to use in the future. He did not provide a signed statement of intent to abstain from all future illegal drug use, which acknowledged any future misuse would be grounds for revocation of his security clearance. Applicant's short abstention is insufficient to convince me that recurrence is unlikely. His history of marijuana use, and his use while holding a security clearance casts doubt upon his current reliability, trustworthiness, and good judgment. AG ¶¶ 26(a) and 26(b) do not fully 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.

No specific Guideline E disqualifying condition applies, however, Applicant's frequent use of marijuana from 2002 to 2018 while holding a security clearance

demonstrates questionable behavior and raises questions about his reliability, trustworthiness and ability to protect classified information.

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:

(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.

His frequent drug use was not minor. His actions create doubt about his overall trustworthiness, reliability, and good judgment, and ultimately on his worthiness to hold a security clearance. AG ¶ 17(c) does not 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 that he used marijuana regularly for approximately 16 years and as recently as July 2018. He also used marijuana while holding a security clearance.

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 and Guideline E.

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.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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