



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



In the matter of:)
)
) ISCR Case No. 19-00821
)
Applicant for Security Clearance)

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: Charles Walton, Esq.

11/15/2019

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guideline H, Drug Involvement and Substance Misuse. National security eligibility for access to classified information is denied.

Statement of the Case

On April 10, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement and Substance Abuse. The action was taken 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) effective within the DOD on June 8, 2017.

Applicant answered the SOR in writing (Answer) on May 7, 2019. He requested a hearing before an administrative judge. The case was assigned to me on July 12, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on July

23, 2019, for a hearing on October 3, 2019, and I convened the hearing as scheduled. The Government offered Government Exhibits 1 through 4, which were admitted without objection. Applicant testified on his own behalf, and submitted Applicant Exhibits (AE) A through I, which were admitted. I kept the record open until October 24, 2019, and Applicant timely submitted a packet, which was marked as AE J, and admitted into the record without objection. DOHA received the transcript of the hearing (Tr.) on October 11, 2019.

Findings of Fact

Applicant is 39 years old. He is an employee of a defense contractor. He is single and has no children. He attended college for approximately three years but he has not obtained an undergraduate degree. He has obtained many certifications during his 17 year career. (AE B, C) He has not served in the military. He has held a security clearance since September 2016. (Tr. 26) He has been employed with his current employer for about three years. (Tr. 26) Applicant acknowledged that he was briefed regarding the use of illegal drugs at his various employments. (Tr. 81)

Drug Involvement

Applicant admitted that he used marijuana infrequently over the course of August 2000 through July 2018 in his 2018 SCA (SOR 1.a) He obtained a public trust clearance sometime in 2016. (GE 1) He was aware of the policy of zero tolerance for drug use. He testified that he used marijuana in college but he noted that it was infrequently. (Tr. 37) He reports his last use was in July 2018 which was on his birthday. (GE 4) He described the circumstances involving the use of marijuana. He was at a party and a joint was passed around and he took a "puff." (Tr. 39) He has never tested positive for a drug test. He signed a letter of intent not to use any illegal drug in the future on October 2, 2019. (AE F) He states that he does not associate with the people with whom he previously smoked marijuana.

However, in his answer to the SOR, he denied the use of marijuana in SOR 1.a and 1.b. He stated that the date should have been July 2016 not July 2018, in contradiction to his disclosure in 2018 SCA. At the hearing, he states that it was 2018 for his last use of marijuana. (Tr. 84) He admitted that his denial in his answer was incorrect. (Tr. 86) He stated that he was just nervous. In his investigative interview he stated that he could not remember the exact number of times he partook of marijuana while holding a security clearance. (GE 4)

Applicant admits that he was arrested in October 2012 for possession of marijuana-misdemeanor (less than an ounce at a concert). (GE 1, 2) He reports that a joint was passed to him and he took a puff. (Tr. 73) He did not purchase the marijuana. This case was dismissed after completion of 40 hours of community service and is now expunged. (SOR 1.c) Applicant testified at the hearing that his next use was in 2015, not 2016. (Tr. 83) He stated that he was in a music studio and an associate passed a joint to

him. (Tr.83) At that time, he was working for a contractor, he knew the use of marijuana was against federal law. (Tr. 84, 92) He disclosed the October 2012 arrest in his July 2018 SCA. (SOR 1.c) He admits that this was after his eligibility for a public trust position.

In June 2019, Applicant sought the guidance of a psychologist after receiving the SOR. A report reflects that Applicant attends bi-weekly sessions. The report does not note any assessments that were given other than stating that he is amicable and his character is nothing short of a psychological profile that any institution would foster the opportunity to hire. (AE D) The psychologist directed Applicant to take four drug tests, which were negative. (AE E) Applicant stated that the doctor did not provide a diagnosis or provide any treatment recommendations. The psychologist did not give any assessments according to Applicant and did not review the SOR. (Tr.110)

Applicant reports that he is a mature man and accepts the responsibility for his conduct, and is remorseful. He explained that he would never jeopardize the United States regarding classified information. He just made a mistake. He also explained that since the drug was being decriminalized in D.C, this may have influenced his last use.

Applicant submitted five letters of recommendation. Each letter attests to his honesty and trustworthiness. His college friend, a colleague and a minister praise Applicant for his professionalism, work ethic and good judgment. The letters describe Applicant as a good worker and a good man. (AE J) He also submitted his performance evaluations which laud his performance. None of the persons who wrote the character letters appear to know about the marijuana use.

Policies

When evaluating an applicant's 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 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states 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 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 as to potential, rather than actual, risk of compromise of classified information.

Finally, Section 7 of EO 10865 provides that adverse 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

The security concern relating to the guideline for Drug Involvement and Substance Misuse is set forth at 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.

The guideline at AG ¶ 25 contains seven conditions that could raise a security concern and may be disqualifying. Three conditions are established:

- (a) any substance misuse (see above definition);
- (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 marijuana with varying frequency from 2007 through 2018. When he held a security clearance or a public trust position, he used marijuana. He changed his dates several times during the hearing. He continued his use of marijuana to include taking a puff at a birthday or special occasion. Therefore, AG ¶ 25 (a), (c), and (f) are established.

The guideline at AG ¶ 26 contains four conditions that could mitigate security concerns. Two conditions may be applicable:

- (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 last use of marijuana was in July 2018. I find that insufficient time has transpired for mitigation in this case given the period of time in his life that he illegally used drugs. He did seek help from a counselor and no longer associates with the persons with whom he smoked. He signed a Letter of Intent in 2019. However, his ever-changing dates of use listed in his SCA and his answer provide me with great doubts about his veracity. I find no mitigation under Guideline H.

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 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 national security eligibility must be an overall commonsense judgment based upon careful consideration of the 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. Applicant is respected by those that know him. He performs well at work. He has worked at his current employment for three years. He has held a security clearance or public trust position since 2016. He has excellent letters of recommendation. He stated that his last use was in July 2018. He sought out a psychologist in June 2019. He has had no positive drug tests.

Applicant admitted his 2012 marijuana arrest and admitted on his SCA use of marijuana from 2000 through 2018. However he kept changing the dates of his use in 2015 or 2016 with regard to holding a clearance. This is troubling. In his interview in 2018, he stated that he could not provide the number of times that he used marijuana while holding a security clearance. (GE 4) He admits that he was anxious and did not want any negative effects on his job or security clearance. Applicant knew it was illegal to use marijuana. He changed the dates of his use at the hearing several times. He tried to explain that he was confused because it was becoming decriminalized in D.C. I did not find his testimony credible, but rather self-serving. This engenders serious questions regarding his suitability for a security clearance. I have doubts and questions as to 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.

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-c:	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 access to classified information. National security eligibility is denied.

Noreen A. Lynch
Administrative Judge