



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



In the matter of:)
)
) ISCR Case No. 19-00903
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Kent, Esquire
For Applicant: *Pro se*

12/12/2019

Decision

LYNCH, Noreen A., Administrative Judge:

Statement of the Case

This case alleges security concerns raised under Guidelines H (Drug Involvement and Substance Abuse) and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

On June 10, 2019, in accordance with DOD Directive 5220.6, as amended (Directive), the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct).¹

Applicant timely answered the SOR and requested a hearing before an administrative judge. (Answer) The case was assigned to me on September 26, 2019.

¹ The action was taken under Executive Order 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 or after September 1, 2006. Since that time, the AG were amended as *Guideline H: Drug Involvement and Substance Abuse*, and it is now in effect for any adjudications on or after June 8, 2017.

The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 11, 2019, scheduling the hearing for November 21, 2019. I convened the hearings as scheduled.

The Government (GX) submitted four documents marked GE 1-4 and a discovery letter, which was marked as Hearing Exhibit I. There was no objection to the documents and they were entered into the record. Applicant did not submit any documents and testified on his behalf.

Findings of Fact

Applicant is 38 years old. He graduated from high school, has various certifications, and works as an asbestos worker. He is twice divorced, remarried, and has two children. He has been employed with various companies since approximately 2016. Applicant completed his latest security clearance application (SCA) on September 20, 2018. (GX 1)

The SOR alleges under Guideline H that Applicant used marijuana, with varying frequency, from about May 2001 to at least August 2018 (1.a); and that he tested positive for marijuana on an employer's urinalysis test in June 2017 and August 2018 (1.b). The SOR further cross alleges under Guideline E the drug use (2.a) and also that Applicant falsified his February 26, 2018 SCA when he answered "No" to Section 14: Illegal Drugs in the last year (2.b). Applicant admitted the allegations under 1.a and 1.b, denied 2.a and admitted 2.b.

Applicant testified that to be social he smoked marijuana with his friends. He had no idea about its correlation with a security clearance. (Tr. 16) He usually would drink and smoke at the same time. He admits smoking at rugby tournaments with his friends and at social banquets. (Tr. 18) He stated that if someone offered him a joint he was not going to say no. However, Applicant stated that it is not a habit. His employer wants to send him abroad to clean asbestos in American embassies and he needs a security clearance. His employer advised him to not smoke marijuana.

Applicant began smoking marijuana in 2001, when he came to the United States at the age of 21. (Tr. 21) He also noted that he smoked in his home country in 1997. He noted that it made him high and that he partakes of a joint when it is offered to him. He has not purchased marijuana or sold it. Applicant acknowledged that his employer has a drug policy. He knows it is illegal to smoke marijuana. Although, he referred to its legality in some states, as an excuse for thinking it would be okay to smoke. The company tested Applicant in June 2017 and he failed the drug test. (Tr. 29) Applicant's employer warned him that he would not get a clearance if he continued to smoke marijuana. (Tr. 32)

Applicant failed a second drug test in August 2018. (GX 4) He stated that he probably had smoked about a month before at a rugby tournament. He was told to take a drug test because he had hit a car with his large company van in a parking lot and did

not leave a note. (GX 3) He was given a warning from his employer. Applicant explained that after the second test, he tried to modify his behavior by not going to the rugby games or the dinners with his friends. (Tr. 35) He believes that he had smoked about five times from June 17, 2019 until 2018. (Tr.36) Applicant resigned from that job in September 2018. (GX 4) He had been given various warnings for security violations.

Applicant completed a SCA in February 2018. He stated that he has a problem with writing and spelling and reading. (Tr. 40) He admitted that he answered “No” to Section 14: Use of Illegal Drugs. In his answer, he stated that was a mistake and that it should have been a “Yes.” At the hearing, he elaborated that he probably read the question wrong. He noticed all the other drugs listed, such as codeine, hashish, narcotics and the marijuana was not in his head. (Tr. 42) Applicant also stated that he told the investigator during his 2018 interview about the failed drug tests. (Tr. 43) In his September 20, 2018 SCA, he indicated that he had used marijuana. (GX 1)

Applicant was adamant that he no longer smokes marijuana, but he goes out with his friends and does not stay away from marijuana but does not smoke it. (Tr. 47) He then stated that he has not gone to a rugby game or a banquet in a year. He stated that he does not miss smoking marijuana. He has never obtained any drug counseling. (Tr. 51)

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. 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(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 access to classified information will be resolved in favor of 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. The Government reposes a high degree of trust and confidence in those granted access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard such information. Decisions shall be in terms of the national interest and do not question the loyalty of an applicant.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern for this guideline is set forth in AG ¶ 24, where it is noted that the illegal use of a controlled substance, and the use of other substances that can 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. This is 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. Such use also raised questions about a person’s ability or willingness to comply with laws, rules, and regulations.

Here, Applicant admitted he used marijuana with varying frequency from 2001 to 2018. He failed two drug tests in 2017 and 2018. This is sufficient to raise AG ¶ 25(a): any substance misuse, and ¶ 25(b): testing positive for an illegal drug. The Government’s substantial evidence, as provided by Applicant’s admissions, thus raises security concerns under Guideline H. Therefore, the burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate related security concerns.

Under Guideline H, conditions that could mitigate security concerns arising from drug involvement and substance misuse are enumerated. The following mitigating conditions under AG ¶ 26 potentially apply to Applicant’s 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 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, an illegal substance, took place in 2018. He acknowledged using marijuana with varying frequency during the period from 2001 through 2018. In the life of this Applicant, in terms of age, maturation, and work history, sufficient time has not passed to deem his marijuana usage as remote. I find AG ¶ 26(a) and 26(b) (1)-(3) do not apply.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are 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, and

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard classified or sensitive information.

Here, Applicant intentionally answered "No" on his February 2019 (SCA) in response to a question inquiring whether he had illegally used any controlled substance, for example marijuana, in the last year. (Section 14) He responded "Yes" on his September 2019 SCA. His reasoning was not credible in that he changed his answer. In truth, Applicant had used marijuana on several occasions as early as 1997, and between 2001 and 2018. Consequently, these two disqualifying conditions apply.

AG ¶ 17 describes conditions that could mitigate security concerns. Potentially applicable in this matter is AG ¶ 17(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, untrustworthiness, or good judgment.

Here, Applicant exhibited two instances of unreliable conduct reflecting questionable judgment. These include the few instances he used marijuana between 2001 and 2018. His failure to disclose on his one SCA that he had used marijuana was intentional. The responses that he provided were not reasonable and varied each time he responded. He gave various reasons why he answered "No" to Section 14. He stated that he later informed the investigator, but I do not find that plausible, given the plain language of the question on the SCAs. I find none of the mitigating conditions apply in this case.

Whole-Person Concept

Under the whole-person concept, one must evaluate security clearance eligibility by considering the totality of the applicant's conduct and all relevant circumstances. Consideration shall be given to the nine adjudicative process factors listed at AG ¶ 2(d). The final determination must be an overall commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and conducted a whole-person analysis based on the record. In addition to Applicant's past drug involvement and personal conduct. He did not follow his employer's advice to not smoke marijuana so that he could obtain a security clearance. Thus, I have no other evidence to consider.

Applicant is a 38-year-old asbestos worker. He is married and has two children. He loves his job and wants to work abroad. However, he still associates with the friends who smoke marijuana. He seemed very casual about the use and the reason for the security clearance. His use was from 2001 to 2018 with varying frequency. He stated that he does not smoke anymore.

However, he intentionally falsified an SCA regarding his use of marijuana. The reasons he gave are not plausible. I have doubts as to Applicant's trustworthiness, judgment, and reliability. Any doubts must be resolved in favor of the Government. Under these circumstances, I find Applicant has not mitigated drug involvement and substance misuse, and has not mitigated the personal conduct security concerns due to intentional falsification of his 2018 SCA. Clearance is denied.

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.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST applicant
Subparagraphs 2.a-2.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 national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Noreen A. Lynch
Administrative Judge