



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ADP Case No. 18-02951
)
)
Applicant for National Security Eligibility)

Appearances

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

04/29/2020

Decision

WHITE, David M., Administrative Judge:

Applicant disclosed his recreational marijuana use, with varying frequency, between 1998 and July 2018. Resulting trustworthiness concerns were mitigated after he voluntarily stopped using marijuana and credibly evinced his intent to abstain from substance misuse in the future. Based upon evaluation of the testimony, pleadings, and exhibits, national security eligibility to occupy a designated sensitive position is granted.

History of Case

On September 9, 2016, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On March 7, 2019, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) alleging trustworthiness concerns under Guideline H (Drug Involvement and Substance Misuse). The action was taken under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017, as promulgated in Appendix A of SEAD 4.

Applicant answered the SOR in writing on April 10, 2019 (Answer), and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on August 7, 2019. DOHA issued a Notice of Hearing on August 7, 2019, setting the hearing for September 10, 2019. On that date, Department Counsel offered Government Exhibits (GE) 1 and 2 into evidence. Applicant testified, and offered Exhibits (AE) A through C into evidence. All exhibits were admitted without objection. I granted Applicant's request to leave the record open until October 10, 2019, to permit submission of additional evidence. DOHA received the hearing transcript (Tr.) on September 18, 2019. Applicant timely submitted additional evidence, which was marked and admitted into evidence as AE D, without objection.

Findings of Fact

Applicant is 41 years old, has never married, and has no children. He earned a bachelor's degree in 2000, and held a Top Secret clearance during 2001 and 2002 while working for a defense contractor. He applied for a trustworthiness determination after starting his current position with a major technology company in March 2015. He has never served in the military or worked in the Federal civil service. (GE 1; Tr. 6, 8, 29.)

Applicant first used marijuana while attending college. In October 1998, he was arrested by a local police department there for possession of marijuana. He successfully completed a yearlong period of probation and community service, after which the charge was dismissed. (GE 2; Tr. 29-30.)

Applicant did not use marijuana between 1998 and 2009. From June 2009 to April 2016, as it became decriminalized and ultimately legalized under the laws of his current state of residence, he recreationally smoked marijuana with a frequency that varied from monthly to daily, but also included many months with no use. Before sales in state-licensed stores began, he purchased small amounts for personal use from various friends. He ceased use in April 2016 when informed that he would need to submit an e-QIP for national security eligibility, but he resumed smoking marijuana once or twice a month after hearing nothing from the Office of Personnel Management (OPM) or DoD CAF for over two years. He acknowledged that this was a bad choice on his part, and he voluntarily stopped all marijuana use after having smoked it twice during July 2018. (GE 1; GE 2; Tr. 30-40.)

When finally interviewed by an OPM investigator on September 14, 2018, Applicant said that he continued to associate with people who legally, under state law, use marijuana on occasion. He said that his infrequent use in 2018 had taken place because he did not consider its possible adverse impact on his employment eligibility, and involved using small amounts at home for relaxation and enjoyment. Contrary to the implication of the sentence from the OPM investigator's summary that was paraphrased in the SOR, a comprehensive reading of the report confirms Applicant's hearing testimony that he stopped marijuana use after July 2018 with the still-continuing intent to remain abstinent. He did not say that he intended to continue marijuana use. He frankly acknowledged that numerous friends and family members continue to recreationally

smoke marijuana on occasion, but they no longer do so in his presence because they respect his choice to avoid further involvement with the drug. (GE 2; Tr. 17-18, 27-28, 30-39.)

Appellant submitted five-panel drug screen test results for hair samples he submitted to cover the period from May to September 2019, all of which were negative. He also submitted 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. He underwent a complete alcohol and drug evaluation at an established state-licensed treatment and recovery center on September 4, 2019. The facility's administrator submitted a letter on September 17, 2019, documenting that the evidence from that evaluation did not support a diagnosis of any substance abuse disorder. (AE A; AE B; AE D.)

A coworker and friend of Applicant's who has known him for eight years, wrote a letter describing his excellent professional performance and personal character. The writer never observed any indication of drug abuse or addiction, and described Applicant as a reliable, consistent, trusted advisor who performs well in high-pressure situations. (AE C.) Applicant's hearing testimony was honest and straightforward. (Tr. 27-42.)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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. The entire process is a conscientious scrutiny of applicable guidelines in the context 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. I have not drawn inferences based on mere speculation or conjecture. Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Pursuant to Directive ¶ E3.1.15, 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 applying for national security eligibility seeks to enter 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive or classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of information compromise.

Analysis

Guideline H: Drug Involvement and Substance Misuse

The trustworthiness concerns under the guideline for drug involvement and substance misuse are set out in 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.

AG ¶ 25 describes three conditions that could raise trustworthiness concerns and may be disqualifying based on the SOR allegations in this case:

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

Applicant was charged with marijuana possession in October 1998, after he had started using it while in college. He stopped using it in compliance with his resulting probation, but later resumed occasional recreational use of marijuana in 2009. He stopped using again in 2016, but smoked some a few times during early 2018. The OPM

investigator's summary of their September 2018 interview was ambiguous, but was interpreted by the drafter of the SOR to convey that Applicant continued to use marijuana and, by implication, did not intend to stop. This was a miscommunication or misunderstanding of Applicant's statement and actual intention at the time. He had voluntarily stopped using marijuana after July 2018, with the ongoing intention to remain abstinent. The evidence supports security concerns under AG ¶¶ 25(a) and (c), but not under AG ¶ 25(g).

AG ¶ 26 provides two conditions that could mitigate the drug-related trustworthiness concerns raised 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.

Applicant abused marijuana, with varying frequency, during 1998, and from 2009 to 2018. This drug abuse was infrequent, stopped almost two years ago, is unlikely to recur, and does not cast doubt on his current reliability, trustworthiness, and good judgment. Substantial mitigation under AG ¶ 26(a) was established.

Applicant readily acknowledges his illegal use and possession of marijuana in the past, and demonstrated his effective actions to overcome these problems and establish a pattern of abstinence. He cannot fully disassociate from friends and family members who occasionally use marijuana, but has clearly delineated that such activity cannot take place in his presence. He provided 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. He accordingly established additional mitigation under AG ¶ 20(b). Other potential mitigating conditions are inapplicable in the absence of prescription drug abuse or any form of drug treatment.

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 relevant 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.

According to 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 applicable 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 a mature adult, who recreationally used minor amounts of marijuana, with varying frequency. He chose to stop doing so in July 2018, and fully demonstrated both the ability and the intent to remain abstinent. No significant potential for pressure, exploitation, or duress exists. Overall, the evidence alleviates the previous doubt as to Applicant's national security eligibility. He met his burden to mitigate the trustworthiness concerns arising under the Drug Involvement and Substance Misuse guideline.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraphs 1.a through 1.e:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility to occupy a designated sensitive position. National security eligibility is granted.

DAVID M. WHITE
Administrative Judge