



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-01749
)
Applicant for Security Clearance)

Appearances

For Government: Mary Margaret Foreman, Esq., Department Counsel
For Applicant: *Pro se*

02/26/2020

Decision

COACHER, Robert E., Administrative Judge:

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

Statement of the Case

On September 20, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse. 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 October 6, 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 November 1, 2019. The evidence included in the FORM is identified as Items 3-4 (Items 1-2 include pleadings and transmittal information). The FORM was mailed to Applicant, who received it on November 12, 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 3-4 are admitted into evidence without objection. The case was assigned to me on February 6, 2020.

Findings of Fact

In Applicant's answer, he admitted the allegations in the SOR. He also provided some explanation for his conduct, as well as a statement of intent not to use illegal drugs 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. (Item 2)

Applicant is 32 years old. He is single with no children. He has worked as an engineer for his current employer, a federal contractor, since October 2014. He holds a bachelor's degree. He has never held a security clearance. (Item 3)

The SOR alleges Applicant used marijuana, with varying frequency from approximately January 2006 to December 2018 (I find that the underlying facts alleged in SOR ¶ 1.b are consumed within the allegation in SOR ¶ 1.a without adding any additional disqualifying conduct. I therefore find in favor of Applicant regarding SOR ¶ 1.b). Applicant listed his use of marijuana from January 2006 to September 2017, in his security clearance application (SCA) completed in March 2018. He described the frequency of this use as: from 2006-2009, approximately three times a week; from 2009-2014, approximately less than one time a week; from 2014-2017, approximately 5-10 times a year. He stated in his SCA, in response to a question about his future intent to use controlled substances, that he "do[es] not intend to use due to health purposes (asthma and respiratory issues) and per requirements of maintaining a security clearance." (Items 1, 3)

In March 2019, Applicant admitted to a defense investigator that he used marijuana one additional time in December 2018, which post-dated the completion of his SCA. He explained that he used marijuana in December 2018 with a friend who supplied it. At the time, he had not heard the results of his security clearance investigation and because several colleagues who applied at the time he did had been granted their clearances, he assumed his clearance was denied and he was not jeopardizing anything by using marijuana. He used while on vacation and when he had no professional responsibilities. (Items 2, 4)

Applicant is aware that his company has a drug-free policy, which is outlined in its employee handbook. His company is unaware of his past marijuana use. He has never received drug counseling or treatment. He continues to associate with friends who use marijuana. As noted above, he provided a written statement expressing his

future intent not to use illegal controlled substances, noncompliance of which would be grounds for revoking his security clearance. Since Applicant submitted this case for an administrative determination, I was unable to judge his credibility based on demeanor. (Items 2-4)

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 pertaining to 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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. One condition is potentially applicable in this case, to wit:

(a) any substance misuse.

Applicant used marijuana on multiple occasions between 2006 and 2018, to include one use after completing his SCA in March 2018. I find that the above disqualifying condition applies.

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 from 2006 through 2017, when he claims to have ceased use while he applied for a security clearance. He used one more time in December 2018, when he assumed his clearance had been denied. Given his 11-year pattern of frequent use and his resumption in late 2018, after he applied for a security clearance, his claimed abstinence after December 2018 is not sufficiently attenuated to be considered remote. Even more troubling than his frequent use was his use after he completed his SCA. He provided a written statement invoking his intent not to use marijuana in the future, but based on his past actions (he also made the same statement when completing his SCA, which he failed to honor), it is difficult to lend credence to such stated intention. Applicant's short abstinence is insufficient to convince me that recurrence is unlikely. Additionally, he continues to associate with friends who use marijuana. His frequency of past use and his use of marijuana after stating his intent not to use cast doubt upon his current reliability, trustworthiness, and good judgment. AG ¶¶ 26(a) and 26(b) do 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 11 years and he used marijuana after completing his SCA in December 2018.

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 substance misuse.

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 |
| Subparagraph 1.a: | Against Applicant |
| Subparagraph 1.b: | For 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