



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



In the matter of:)
)
) ISCR Case No. 19-02025
)
Applicant for Security Clearance)

Appearances

For Government: Patricia M. Lunch-Epps, Esq., Department Counsel
For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se* and Karen Nelson, Personal Representative

02/12/2020

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 July 17, 2019, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse. The DOD acted 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) implemented by the DOD on June 8, 2017.

On August 14, 2019, Applicant answered the SOR and requested a hearing. The case was assigned to me on November 26, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 9, 2019, and the hearing was held on January 9, 2020. The Government offered exhibits (GE) 1-2, which were admitted into evidence without objection. The Government's exhibit list was marked as hearing exhibit (HE) I and the Government's discovery letter was marked as HE II. Applicant testified and offered exhibits (AE) A-D, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on January 17, 2020.

Findings of Fact

In Applicant's answer, he admitted the Guideline H allegations, with some explanation. 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 35 years old. He is single and has no children. He has been in a relationship with his girlfriend for approximately five years. They bought a home and car together and reside together. He has worked for his current employer, a defense contractor, as a systems analyst since January 2011. He holds a bachelor's degree. He has held a security clearance since 2008, when he was affiliated with the U.S. Navy. (Tr. at 28-30, 34-36; GE 1)

The SOR alleged Applicant used marijuana, with varying frequency, from about 2012 to at least January 2019, while being granted access to classified information; and that he intended to use marijuana in the future.

Applicant described his marijuana use as beginning in approximately 2010 when he smoked it in a jurisdiction where it was illegal. He lives in a jurisdiction which has made marijuana use legal. He continued to use marijuana through approximately January 2019, after he completed his most recent security clearance application (SCA). Before 2012, he used marijuana more than twice a week. From 2012 until his claimed abstinence in January 2019, he used marijuana about two times a week. He generally acquired the marijuana through friends either by purchase or gift. He typically used marijuana in his home with his girlfriend, or with his friends, some of which are his neighbors, at their homes. (Tr. at 38-42, 45-47; AE A)

Applicant was aware that his company had a drug policy, but he did not know what the policy was. His supervisor testified that the company policy is that drug use is prohibited by all employees. She also stated that all employees are made aware of the drug policy. The company does not require drug-testing. Applicant stated in his SCA, his January 2019 background investigation interview, and his SOR answer that he intended to continue to use marijuana, unless it affected his security clearance. He is aware that marijuana use is incompatible with holding a security clearance. He testified that he now understands that drug use is a significant issue with the DOD and stated that he does not intend to use in the future. He did not provide a written statement confirming such

intent. He did not provide any documented drug counseling or treatment records. He provided a drug test result from December 31, 2019, which showed a negative result for the presence of marijuana. His girlfriend continues to use marijuana at least two times weekly. He claims she leaves the house to use marijuana so that he is not around when she uses marijuana. He still associates with friends, including neighbors, who continue to use marijuana. (Tr. at 42-43, 48-53, 57-58; AE D)

Applicant's direct supervisor testified and provided a written letter supporting him. Another coworker also provided a letter of support. Both opine that Applicant is trustworthy and reliable. Applicant also provided a letter from a community member who related Applicant's volunteer work for his community. The author described Applicant as "a kind, responsible person." (Tr. 56-58; AE A-C)

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 section E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive section 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 Abuse

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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. Those that are potentially applicable in this case include:

(a) any substance misuse;

(f) any illegal drug use while granted access to classified information or holding a sensitive position; and

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

Applicant used marijuana on a regular basis from 2010 through possibly January 2019. He used marijuana after being granted a secret clearance in 2008. In his answers to questions on his July 2018 SCA and in his answers to questions during his background investigation in January 2019, he stated his intent was to continue using marijuana. I find all 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 marijuana use was frequent and as recent as January 2019, while holding a security clearance and after he completed his latest SCA. Given his recent pattern of use, his claimed abstinence, beginning in early 2019, is not sufficient to overcome his recent drug use. He did not provide a signed statement of intent to abstain from all future illegal drug use. Additionally, as recently as January 2019, he indicated his intent was to continue his use of marijuana. Applicant's claimed recent abstention and one negative drug test are insufficient to convince me that recurrence is unlikely. The frequency and recency of his past use and his recent statement of intent to continue his use casts doubt upon his current reliability, trustworthiness, and good judgment. He still associates with his live-in girlfriend, his friends, and neighbors who continue to use marijuana on a regular basis. AG ¶¶ 26(a) and AG 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 Applicant's supervisor's testimony, his letters of support, his recent negative drug-test results, and his testimony declaring his intention of no future marijuana use. However, I also considered that he used marijuana on numerous occasions while holding a security clearance and that as recently as January 2019, he expressed his intent to continue using marijuana. It was only after he realized that using marijuana jeopardized his security clearance that he had a change of heart concerning his future intentions.

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.

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 |

Conclusion

In light of all of the circumstances, 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