



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



In the matter of:)
)
) ISCR Case No. 19-02104
)
Applicant for Security Clearance)

Appearances

For Government: Dan O’Reilly, Esq., Department Counsel, &
Jeff Kent, Esq. Department Counsel
For Applicant: Leon J. Schachter, Esq.

03/10/2020

Decision

GARCIA, Candace Le’i, Administrative Judge:

Applicant mitigated the security concerns involving drug involvement and substance misuse. Eligibility for access to classified information is granted.

Statement of the Case

On July 26, 2019, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse). The action was taken under Executive Order (Exec. Or.) 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 DOD on June 8, 2017.

Applicant responded to the SOR (Answer) on August 14, 2019, and requested a hearing before an administrative judge. Appended to his Answer is documentation marked as Applicant’s Exhibits (AE) A through H, which I consider to be a part of his

Answer. The case was assigned to me on September 26, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing (NOH) on September 30, 2019, scheduling the hearing for October 29, 2019. I convened the hearing as scheduled. (Tr. at 13-17)

Applicant objected to Government Exhibit (GE) 1, consisting of his November 2018 security clearance application (SCA), on the basis that it is irrelevant and immaterial. I overruled Applicant's objection and admitted GE 1 in evidence. Applicant testified, called three witnesses, and submitted AE I through L, which I admitted in evidence without objection. The record closed at the conclusion of the hearing. DOHA received the hearing transcript (Tr.) on November 12, 2019. (Tr. at 10-17, 129)

Findings of Fact

Applicant admitted the sole allegation in his Answer. He is 46 years old, married, and does not have any children. (Answer; Tr. at 18, 84-94; GE 1)

Applicant earned a bachelor's degree in 1996 and a doctorate degree in 2010. As of the date of the hearing, he worked as a lead scientist for his employer, a DOD contractor, since September 2018. He has never held a security clearance. (Answer; Tr. at 18-26, 60, 105, 108-109; GE 1)

Applicant used marijuana from approximately 1991 to March 2018 (SOR ¶ 1.a). He purchased marijuana for personal use from friends and his brother between 1991 and 2012. After marijuana was legalized in his home state in 2012, he purchased ingestible marijuana from state dispensaries between 2014 and 2018. He disclosed his use and purchase of marijuana on his 2018 SCA. He has always known that marijuana use is illegal. He first used marijuana during his first year of college in 1991. He used it recreationally and approximately once a week throughout college. His marijuana use was primarily with college friends, but he acknowledged that he used it alone on occasion. (Answer; Tr. at 26-84; GE 1)

Applicant continued to use marijuana after graduating from college while working in the private sector. He underwent and passed pre-employment drug testing with various employers, but he was not subsequently subject to drug testing. He was unaware that any of his employers prohibited illegal drug use. He did not use marijuana at work or report to work under the influence of marijuana. He used it recreationally and approximately twice monthly from around 1996 to 2000. He then used it approximately once every three weeks from around 2000 to 2003, and then once monthly from around 2003 to February 2018. He used marijuana to relax, primarily when he was alone at home and during the weekends. He stated that it was "my equivalent of having a glass of wine after a long day or a long couple of weeks." He used marijuana with his brother, his wife's cousin, and friends; and he used marijuana with his spouse once, in around 2002. His marijuana use did not adversely affect his job performance and he was favorable rated by his employers during this period. (Answer; Tr. at 26-94; GE 1)

Applicant abstained from marijuana use four times: (1) in 2006 for three months; (2) from 2008 to 2009; (3) from 2010 to early 2012; and (4) from 2014 to 2015. The first two periods of abstention occurred during two major examinations for his doctoral program; the third occurred during the year that he worked overseas, where the consequences of illegal drug use were severe, and for five months after his return to the United States; and the fourth occurred because he had no need to use it. (Answer; Tr. at 26-94; GE 1)

Applicant decided to permanently stop using marijuana in March 2018. The impetus for his decision was his recruitment by his current employer. He testified:

[My employer] described the position to me and we had a very frank and open discussion about my marijuana use and my history. The exact conversation we've had here, I had with [my employer]. And [my employer] made it very clear to me that marijuana use was strictly prohibited and was not conducive with the position that I was looking at taking. And I immediately stopped. I realized that this position was the -- so at first, I hadn't really looked very closely at positions in government, advising the government on tactical matters. That was not a job that I had really looked at closely. I was approached by [my employer]. We had this frank discussion. I went out through my network and spoke with other people that had similar positions, and I became very attracted to the idea of coming out here. So I immediately stopped my marijuana use and signed an agreement with [my employer]

(Answer; Tr. at 48-50, 71-72, 108-122; AE I, J, K, L)

Applicant testified that it was not difficult for him to decide to never again use marijuana, and he would leave if he were to find himself in a situation where illegal drugs were being used. He adopted a new and active lifestyle in 2018. An August 2019 evaluation by a licensed clinical social worker determined that Applicant did not have a substance use disorder. He also signed a letter of intent to not use illegal drugs or misuse legal drugs in the future in August 2019. He declared such an intention despite his employer's lack of a drug testing program. His spouse was aware of and supported his commitment to abstain from marijuana use. He disassociated from most of the individuals with whom he previously used marijuana, except for his brother, his wife's cousin, and his two friends. He notified these four individuals in March 2018 about his decision to abstain from marijuana and his intent to disassociate from anyone who used it in his presence, and they were supportive of his decision. (Answer; Tr. at 18-94; AE I, J, K, L)

The two founding partners of the company for whom Applicant worked testified. Both were aware of Applicant's illegal drug use and were confident in his decision to abstain from such use. They described Applicant as an outstanding employee and a trustworthy, honest, and reliable individual. Several former co-workers who were aware of Applicant's marijuana use also attested to Applicant's reliability, honesty, and trustworthiness. His performance for the period of September to December 2018 was

rated favorably by his employer. His previous employer also rated him favorably for the years in which he worked there, from 2011 to 2018. (Answer; Tr. at 94-122; AE I, J, K, L)

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 to be 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, administrative judges apply the guidelines 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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the 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." The applicant 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Section 7 of Exec. Or. 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* Exec. Or. 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 for drug involvement and substance misuse is 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.

The guideline notes the following applicable conditions that could raise security concerns under AG ¶ 25:

- (a) any substance misuse . . . ; and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant used marijuana from 1991 to 2018. AG ¶¶ 25(a) and 25(c) are established.

Conditions that could mitigate the drug involvement and substance misuse security concerns are provided under AG ¶ 26. The following are potentially 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 has taken responsibility for his lengthy past drug use. He was forthcoming in his SCA and at the hearing. He credibly stated that he has no intention to use illegal drugs in the future. He disassociated himself from most of the individuals with whom he previously used illegal drugs, and he notified the four individuals with whom he continued to socialize of his intent to abstain from illegal drug use. He provided a signed statement of intent in 2019. I find that AG ¶¶ 26(a), 26(b)(1), 26(b)(2), and 26(b)(3) are established.

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 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.

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 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. I have incorporated my comments under Guideline H in my whole-person analysis. Applicant was credible and candid at his hearing. Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the security concerns involving 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:
Subparagraph 1.a:

FOR APPLICANT
For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Candace Le'i Garcia
Administrative Judge