



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-02494
)
Applicant for Security Clearance)

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: *Pro se*

05/19/2020

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On November 25, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. The action was taken 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) effective within the DOD on June 8, 2017.

Applicant answered the SOR on December 30, 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), and Applicant received it on February 6, 2020. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. The Government's evidence is identified as Items 1 through 6. Applicant did not respond to the FORM, provide documentary evidence, or object to the Government's evidence, and it is admitted. The case was assigned to me on May 12, 2020.

Findings of Fact

Applicant admitted all of the SOR allegations. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 28 years old. He is not married and has no children. He attended college, but did not earn a degree. He later earned a technical certificate. Applicant has worked with his current employer, a federal contractor, since August 2017. (Item 3)

In November 2011, Applicant was arrested and charged with possession of marijuana, first offense in State A. This charge was dismissed following completion of a drug education class, mandatory drug testing, and a probationary period. (Items 2, 3, 4, 5, 6)

Applicant was arrested in September 2018 and charged with possession of marijuana, a first offense misdemeanor in State B. Applicant disputed the September 2018 date and said it occurred in October 2018. Court documents confirm the September 2018 date. His charge was deferred, pending the completion of a drug-screen assessment to determine if he needed drug counseling and the completion of three drug tests a month apart. He was also required to complete 100 hours of community service. He began drug testing in January 2019, completed the terms of the deferment in June 2019, and the charge was dismissed. (Items 2, 3, 4, 5, 6)

Applicant completed a security clearance application (SCA) on December 20, 2018. In it, he disclosed that he used marijuana once every few days from August 2010 until October 2018, the month he said he was arrested for marijuana possession. He also disclosed that he intended to continue using marijuana as a sleep aid and because it was legal in the jurisdiction where he lived. (Item 3)

In March 2019, Applicant was interviewed by a government investigator. During his interview, he told the investigator that he intends to continue to use marijuana when he goes out, but had not used it since January 2019, because, at that time, he had to pass the three drug tests that were part of the diversion program for his 2018 marijuana possession arrest. He stated he would probably use marijuana after his probationary period ends in June 2019, but could stop if he needed to. He stated that his family and friends use marijuana. He said that his marijuana use has decreased over the years, and he probably only used it three or four times during the past year. Applicant stated that he usually obtains marijuana from individuals in social settings, typically from a friend or cousin. (Item 6)

Applicant answered government interrogatories on September 12, 2019. He disclosed that his last marijuana use was December 12, 2018. He was “gifted” the marijuana from his cousin. He indicated he did not intend to use marijuana in the future. (Item 6).

Policies

When evaluating an applicant’s suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines (AG). 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(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 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states 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 as to obtaining 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 as to 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

The security concern relating to the guideline 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.

AG ¶ 25 provides conditions that could raise security concerns. The following are potentially applicable:

- (a) any substance misuse;
- (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.

From August 2010 to December 2018, Applicant used marijuana with varying frequency. He was arrested twice for possession of marijuana. He disclosed in his December 2018 SCA that he intended to continue using marijuana as a sleep aid and because it was legal in the jurisdiction where he lived. He told a government investigator in March 2019 that he had stopped using marijuana so he could comply with court ordered drug tests that concluded in June 2019. He further stated that he would probably use marijuana after his probation ended, but could stop if needed. In his September 2019 response to government interrogatories, he stated he did not intend to use marijuana in the future. The evidence supports that Applicant has not clearly and convincingly committed to discontinue marijuana use. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from drug involvement and substance misuse. The following mitigating conditions under AG ¶ 26 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 to overcome the 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 being 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 disclosed in his SCA that he used marijuana from 2010 to 2018 every few days. He stated that he decreased his use in 2018. He asserted in his December 2018 SCA that he intended to continue to use marijuana. He used marijuana after his 2011 arrest for possession of marijuana and after his October 2018 arrest for possession of marijuana and until he started his mandated drug screening in January 2019. He stated he probably would continue to use marijuana after he completed the drug tests required for his criminal charge deferment, but could stop if needed. Applicant has a long history of marijuana use. Applicant's most recent marijuana use was less than two years ago. He failed to provide sufficient evidence that future use is unlikely to recur. AG ¶ 26(a) does not apply.

Applicant has a lengthy history of marijuana use. He stated in his September 2019 response to government interrogatories that he does not intend to use illegal drugs in the future. This was the first time he indicated his intent to cease illegal drug use. His past statements were conditioned upon his being required to stop using them. It is unknown when Applicant last used marijuana. Applicant stated that his family and friends use marijuana and that he continues to associate with them. He disclosed, during his background interview, that he is given marijuana by individuals in social settings. He also stated he was "gifted" marijuana. There is insufficient evidence to establish a pattern of abstinence, disassociation from drug-using friends and family; or changing or avoiding the environment where drugs were used. AG ¶ 26(b) has minimal application because Applicant's statement of intent not to use illegal drugs in the future, was made recently and after repeated statements that he intended to use marijuana in the future.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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 information. Of special interest is any failure to provide truthful

and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I find the following potentially applicable:

(e) personal conduct, or concealment about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing; and

(g) association with persons involved in criminal activity.

Applicant used illegal drugs from August 2010 to 2018. He was arrested in 2011 and 2018 for possession of marijuana. He continues to associate with family and friends who use illegal drugs. The evidence supports the application of the above disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under 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, trustworthiness, or good judgment; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or unwilling to comply with rules and regulations.

Applicant stated that his drug use was legal in the jurisdiction where he lived. However, he was arrested twice for marijuana possession in other jurisdictions, where it was illegal. He continued to use marijuana after his arrests. He continues to associate with family and friends who use marijuana. Applicant's behavior has not been infrequent and insufficient time has not passed to conclude his conduct is unlikely to recur. His conduct raises questions about his good judgment, reliability, and trustworthiness. The above mitigating conditions 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 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 and Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

Applicant is 28 years old. He has worked for a federal contractor since 2017, for which the use of marijuana is prohibited. His past marijuana use from 2010 through 2018; his two arrests for marijuana possession; and his continued association with family and friends, who use marijuana, continue to raise security concerns. Based on that history, his most recent statement that he does not intend to use marijuana in the future is not credible. The record evidence leaves me with questions and doubts as to 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, and Guideline E, personal conduct.

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.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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 security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge