



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-03378
)
Applicant for Security Clearance)

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: *Pro se*

07/06/2021

Decision

Curry, Marc E., Administrative Judge:

Although Applicant did not falsify any information about his marijuana abuse history during the 2013 and 2019 investigative processes, his marijuana abuse history continues to generate a security concern. Clearance is denied.

Statement of the Case

On August 19, 2020, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H, drug involvement, and Guideline E, personal conduct, explaining why it was unable to find it clearly consistent with the national security to grant security clearance eligibility. The DOD CAF took the action 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 National Adjudicative Guidelines (AG) effective for any adjudication made on or after June 8, 2017. On September 28, 2020, Applicant answered the SOR, admitting the allegations set forth in Paragraph 1, and denying the allegations set forth in Paragraph 2. (Item 2 at 3 – 5) He

requested a decision without a hearing. On December 2, 2020, Department Counsel amended the SOR, replacing subparagraph 2.c with the following:

You deliberately falsified material facts on an Electronic Questionnaire for Investigations Processing, executed by you on or about March 4, 2019, in response to **Section 23 – Illegal Use of Drugs or Drug Activity** . . . Provide an estimate of the month and year of most recent use.

Applicant answered the Amended SOR on December 18, 2020, and denied the amended allegation. On January 6, 2021, Department Counsel prepared a File of Relevant Material (FORM). On February 3, 2021, Applicant received a copy of the FORM, and he was instructed to file any objections, or to supplement the file within 30 days of receipt. On March 1, 2021, he submitted a response. Subsequently, on March 29, 2021, the case was assigned to me.

Findings of Fact

Applicant is a 38-year-old married man with three pre-teen children. A previous marriage ended in divorce in December 2011. (Item 7 at 26) After finishing high school, he earned an associate's degree in May 2007. Currently, he is working towards finishing college. (Item 1 at 19) He has been working in the security analysis profession since 2009 and has been working for his current employer since 2014. (Item 1 at 19)

Applicant is highly respected on the job and in his community. According to a coworker who has known him for five years, he "has shown time and time again" that he is a dependable associate who "can effectively handle complex tasks with the highest level of professional manner." (Item 1 at 22) Applicant's supervisor characterizes him as a key member of the staff, who "goes out of his way" to accept undesirable work shifts, and to help with tasks that are beyond the skill sets of other employees. (Item 1 at 23) A neighbor describes him as "a 'class act' who is involved in the community, and is frequently helpful to his neighbors." (Item 1 at 26)

Applicant smoked marijuana with various degrees of frequency between 2004 and 2018. The most frequent use occurred between 2004 and 2007 when he used it six to ten times, typically when visiting longtime friends from college. (Item 5 at 46-47; Item 7 at 4) He disclosed this use to an investigator in 2010, and stated that he had no intention of using marijuana in the future. (Item 7 at 4)

Applicant used marijuana again in 2015, four years after being granted a security clearance. (Item 6 at 7) After disclosing this use to an investigative agent as part of another security clearance investigation, Applicant again promised to quit smoking marijuana. Applicant used marijuana on another occasion in 2018. (Item 7 at 6) In March 2019, Applicant completed an updated security clearance application form. He disclosed the 2015 marijuana use, and stated that he had no intention of using it again in the future. (Item 3 at 38) He did not disclose the 2018 marijuana use on his updated security clearance application in March 2019. In April 2019, an authorized investigator interviewed

Applicant. During the interview, Applicant, without confrontation, told the agent about the 2018 use of marijuana. (Item 6 at 7) In responses to interrogatories executed in January 2020, Applicant stated that he had not used any marijuana since 2018, and that he would use “none, going forward.” (Item 6 at 13) In a statement of intent executed in September 2020, Applicant reiterated his intent not to use marijuana again. (Item 1 at 16)

Applicant’s security clearance application, completed in February 2013, contained the following question:

Section 23 – Illegal Use of Drugs or Drug Activity . . . In the last seven years, have you illegally used any drugs or controlled substances?

Applicant answered “no,” failing to disclose his marijuana use from 2004 to 2007. (Item 1 at 3) SOR subparagraph 2.a alleges that this omission constitutes a falsification.

During an interview with an investigative agent in April 2013, Applicant, when asked if he had ever used marijuana in the past seven years, answered affirmatively, stating that he used it in approximately fall 2006. (Item 6 at 9) SOR subparagraph 2.b alleges that his failure to disclose use in 2004, 2005, and 2007, constitutes a falsification.

Applicant contends that his 2013 security clearance omission and his underreporting of his marijuana use in the mid-2000s were unintentional oversights. (Item 1 at 3) Applicant disclosed his marijuana use between 2004 and 2007 on an earlier security clearance application in 2010. (Item 5 at 46) He “was under the impression that already reported uses did not need to be reported again.” (Reply at 1)

SOR 2.c, as amended, alleges that Applicant falsified a security clearance application completed in March 2019, when he disclosed marijuana use in February 2015, but failed to disclose marijuana use in December 2018. Applicant admits that he did not include the December 2018 use on the 2019 security clearance application, as alleged in the SOR. (Item 1 at 33) According to the investigative agent who interviewed him in April 2019, Applicant disclosed this information without being asked about it.

Applicant did not disclose his marijuana use between 2004 and 2007 when he interviewed with an agent in April 2019. (Item 6 at 5) SOR subparagraph 2.d alleges that this omission constituted a falsification. Applicant admits that he did not disclose this marijuana use during the 2019 interview; however, he explained that he believed that the agent was only asking him about use within a seven-year scope of the date of the interview. (Item 1 at 4) Applicant had disclosed his marijuana use from 2004 to 2007 during an investigative process in 2010. (Item 7 at 4)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall 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, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

Under the whole-person concept, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). They are as follows:

- (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.

Analysis

Guideline H: Drug Involvement and Substance Misuse

The security concerns about drug involvement are set forth in AG ¶ 24, as follows:

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.

Applicant used marijuana approximately 12 times from 2004 to 2018. During some of this period of use, he held a security clearance. AG ¶ 25(a), "any substance misuse," and AG ¶ 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position," apply.

Applicant expressed an intention never to use marijuana in the future. He memorialized this intention in a signed statement of intent to abstain from all drug involvement in the future. Under these circumstances, AG ¶ 26(b)(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," applies.

Applicant has promised to quit using marijuana twice before. On both occasions, he resumed marijuana use. Under these circumstances, the application of AG ¶ 26(b)(3) has minimal probative value.

Although Applicant's marijuana use occurred over a 14-year time period, it was infrequent. However, its nature and seriousness were significant because some of the use occurred after he was granted a security clearance. I conclude that the nature and seriousness of the use combined with his repeated broken promises to stop using marijuana outweigh any positive security inference generated by the infrequency of use, and his signed sworn statement to discontinue use. Applicant has failed to mitigate the drug involvement security concern.

Guideline E: Personal Conduct

Under this guideline, "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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

Applicant omitted his marijuana use 2004 to 2007 on his security clearance application in February 2013, as alleged in subparagraph 2.a. In light of his disclosure of this drug use on an earlier security clearance application in 2010, I find credible his explanation that it was an unintentional oversight. I resolve subparagraph 2.a in Applicant's favor. Similarly, Applicant's explanations for underreporting his marijuana use during 2013 and 2019 interviews are credible in light of the 2010 disclosure. I resolve subparagraphs 2.b and 2.d in Applicant's favor. In sum, I conclude that Applicant's responses on various security clearance applications and interviews were due in part to a misunderstanding about what was required, and as such, were inattentive, but not duplicitous. Applicant has mitigated the personal conduct security concern.

Whole-Person Concept

Applicant is an outstanding worker in addition to a civic-minded individual who actively volunteers in the community and helps his neighbors. However, these positive attributes are insufficient to outweigh the negative security inference generated by the recurrent use of marijuana, including after being granted a security clearance, and the recency of his last use. Upon considering this case in the context of the whole-person concept, I conclude Applicant has failed to mitigate the security concerns raised by his drug involvement.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the amended 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
Paragraph 2, Guideline E	FOR APPLICANT
Subparagraphs 2.a – 2.d:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge