



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-03736
)
Applicant for Security Clearance)

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: *Pro Se*
09/20/2021

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant did not mitigate the drug involvement security concerns. Eligibility for access to classified information is denied.

History of the Case

Applicant submitted a security clearance application (SCA) on June 19, 2019. On April 22, 2020, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H (Drug Involvement and Substance Misuse). When Applicant initially answered the SOR, in approximately June 2020, he requested a decision based upon the written record. On January 14, 2021, he requested a hearing before an administrative judge (Answer). The case was assigned to me on April 7, 2021. On May 28, 2021, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 28, 2021. The hearing was held as scheduled, via video teleconference on the Defense Collaboration Service (DCS).

At the hearing, Government Exhibits (GE) 1 and 2 were admitted without objection, and Applicant testified. I marked the May 27, 2021 case management order as Hearing Exhibit (HE) I; Department Counsel’s February 27, 2021 discovery letter as HE II; and Department Counsel’s exhibit list as HE III. The record was held open until July 12, 2021, for Applicant to submit documentation. I received the transcript (Tr.) on July 9, 2021. On July 12, 2021, Applicant requested a continuance to July 16, 2021, to submit

documentation, which was granted without objection. He timely submitted ten letters of recommendation, which I marked collectively as Applicant Exhibit (AE) A, and a written closing argument, which I marked as AE B. AE A and B were admitted without objection. The Government chose to rest on the closing statement made at the hearing, and the record closed.

Findings of Fact

Applicant is 37 years old and married. He and his wife have a 10-year-old son and a 4-year-old daughter. He received a Bachelor of Art degree in psychology in 2008 and an Associate degree in computer-aided drafting technology in 2018. Applicant has worked for a defense contractor as a drafting and design associate since May 2019. This is his first security clearance application. (GE 1; GE 2; Tr. 9-11, 15-16)

Applicant admitted all of the SOR allegations. He first used marijuana in 2004, during the summer after his first year of college, and last used marijuana a few days before the hearing. He admitted in his answer to the SOR that he intended to continue to recreationally use marijuana. At the hearing, he confirmed that he intends to continue to use marijuana. (GE 1; GE 2; Tr. 16-17, 24-25, 27-28, 32-33)

In his June 2019 SCA, Applicant disclosed that he used marijuana from June 2012 to March 2019. He indicated that he intended to stop using marijuana as he did not “want to set a bad example for [his] children.” (GE 1; Tr. 25)

In his adopted August 2019 security clearance interview, Applicant admitted that he smoked marijuana almost daily while he was in college. His use gradually decreased as he aged. At the time of the interview, his most recent marijuana purchase was in February 2019, and his most recent use was two weeks before the interview. At that time, he still possessed marijuana at home and intended to use it. (GE 2; Tr. 25)

Applicant used marijuana a few days before the hearing. He regularly uses marijuana two to three days a week alone at home. Most of his social circle uses marijuana. Occasionally, he uses marijuana with his friends; most recently, while playing golf in May 2021. He typically purchases marijuana one to two times a year; most recently in October 2020. As of the day of the hearing, he possessed approximately one eighth of an ounce of marijuana at his home, which he intended to use. He intends to continue to use marijuana regularly. (Tr. 16-18, 23-24, 27-32)

In his answer to the SOR and at the hearing, Applicant characterized his marijuana use as responsible and the laws regarding marijuana as antiquated. He resides in a state in which recreational use continues to be illegal, but medical marijuana use is legal. Applicant did not proffer that his use of marijuana was for medicinal purposes, nor has he ever possessed a medical marijuana prescription. (Answer; Tr. 16-18, 23-24, 27-31, 33-34)

Applicant described his 17-year history of recreational marijuana use, and he rationalized his continued use of marijuana as follows:

I've stopped numerous times throughout my youth for months here and there, for various reasons. But at that point I had stopped for the drug-test for the hiring at [current employer]. . . . I've always gone back and forth about using it or not, mostly because my wife...doesn't love it either. So at the time during that, the initial interrogatories, eQIP questionnaire, I strongly considered stopping entirely for that and for the security clearance and most other things. Like I said, I find that I'm not as angry of a person, and like I said, I'm just a better person and a better father when I do use it. (Tr. 26)

Applicant's current employer required him to take a pre-employment drug test, which he passed. According to its company policy, the employer is supposed to conduct random drug testing of its employees. However, Applicant has learned from other employees that the company does not, in fact, conduct random drug screening or testing other than during the pre-employment phase. Applicant knows that it is against his employer's company policy to use drugs, including marijuana, and is aware that his marijuana use could adversely affect his employment and ability to obtain and maintain a security clearance. Applicant has not disclosed his drug involvement to his security officer or anyone else at his current employer, because he is aware his marijuana use is not permitted. (GE 1; Tr. 17-20, 31-32)

Two of Applicant's prior employers also had drug-free workplace policies, and at least one of these employers required him to take a pre-employment drug-screening urinalysis. He admitted that he used marijuana while working for both of these prior employers. According to Applicant, if his employers had regularly drug tested him, he would have stopped using marijuana. However, despite the criminality of recreational marijuana use in his state and at the federal level and his employer's company policies, he feels that "the benefits" he gets "from [using marijuana] are quite beneficial." (Tr. 20-24)

Applicant's friends and family members find him to be dependable, trustworthy, reliable, organized, efficient, and honest. In his written closing statement, he asserted that he a responsible, trustworthy, and hardworking individual. He currently uses marijuana to reduce stress rather than to party. He values his job and the value it adds to protecting the United States. (AE A; AE B)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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(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."

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 EO 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* 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:

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.

Applicant's admissions and the record evidence establish the following disqualifying conditions under AG ¶ 25:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The burden shifted to Appellant to prove mitigation of the resulting security concerns. AG ¶ 26 provides conditions that could mitigate security concerns 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;
- (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; and
- (d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant first started using marijuana in 2004, after his first year of college. Not only did he continue to use marijuana regularly up to a few days before the security clearance hearing, but he expressed his intent to continue using marijuana on a regular

basis. He used and purchased marijuana after he married, after he had children, after he started his career, after he worked for employers with drug policies, after he applied for a security clearance, and after he was interviewed by a government investigator. He knew that drug involvement violated the drug-use policies of his current and former employers. Applicant's regular purchase and use of marijuana cannot be considered a minor lapse in judgment, but rather a pattern of behavior that reflects his unwillingness to follow rules and regulations.

Security clearance decisions are not limited to conduct during duty hours. Off-duty conduct, especially where it reflects poor judgment, provides a rational basis for the government to question an appellant's security worthiness. (See, e.g., *Cole v. Young*, 351 U.S. 536, 550 n.13 (1956); *Croft v. Department of Air Force*, 40 M.S.P.R. 320, 321 n.1 (1989)). Applicant's behavior showed a disregard for not only the drug policies of his employers, but also federal and state law.

Applicant continues to associate with individuals who use marijuana, and he continues to purchase, possess, and use marijuana. His 17-year history of drug involvement raise significant concerns. He failed to establish mitigation under AG ¶ 26(a), 26(b), and or 26(d).

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. I considered that Applicant self-disclosed his drug involvement during the security clearance process. I also considered the comments offered by Applicant in his closing statement and the favorable opinions of his friends and family. However, there has not been a sufficient passage of time to overcome the concerns with his drug involvement. Applicant has not met his burden of proof and persuasion. He did not mitigate the security concerns or establish his eligibility for a security clearance.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H: AGAINST APPLICANT

Subparagraphs 1.a - 1.c: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security of the United States to grant or continue Applicant's national security eligibility for access to classified information. Eligibility for access to classified information is denied.

CAROLINE E. HEINTZELMAN
Administrative Judge