



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



In the matter of:)
)
) ISCR Case No. 21-00043
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

12/02/2021

Decision

RICCIARDELLO, Carol G., Administrative Judge:

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

Statement of the Case

On May 7, 2021, the Defense Counterintelligence and Security Agency issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (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 June 1, 2021, 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 August 17,

2021. 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 4 through 6. (Item 1 is the SOR; Item 2 is a transmittal letter, and Item 3 is a receipt) Applicant provided a response to the FORM, and it is marked as Applicant's Exhibit (AE A). Applicant objected to the Department Counsel's comments in the FORM on the frequency of his use of marijuana, which he stated was incorrect. Department Counsel's comments in her brief that are part of the FORM are not evidence. Applicant's objection is overruled. There were no other objections to the evidence offered, and Items 4 through 6, and AE A are admitted into evidence. The case was assigned to me on October 26, 2021.

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 48 years old. He graduated from a military service academy and served for 20 years, retiring as a lieutenant colonel in 2014. He earned a master's degree in 1999. He is divorced with two children who are 17 and 14 years old. He stated in his answer that while on active duty he held a security clearance without incident. (Item 4)

Applicant admitted that he used marijuana every other week from approximately 2016 to July 2020. He admitted that from June 2016 to December 2017, incident to his employment with Company A, he engaged in the cultivation and sale of marijuana. He admitted that from October 2018 until January 2020, incident to his employment with Company B, he engaged in the commercial manufacture and sale of marijuana and marijuana products. He admitted that since June 2020, incident to his employment with Company C, he has engaged in the commercial manufacture and sale of marijuana and marijuana products. (Items 4, 5, 6)

Applicant primarily provided argument in his answer to the SOR and response to the FORM stating that because cannabis is legal in the state and Canada where he used it and conducted business, his conduct was not illegal. He provided a narrative citing policy memos by the federal government for not pursuing federal marijuana laws in states that had legalized it. He provided further argument in his response to the FORM to show that the federal government has chosen not to shut down the cannabis industry in states where it is legal under state law. He also noted that medical marijuana is legal in 19 states. (Item 4; AE A)

Applicant completed his security clearance application (SCA) in July 2020. During Applicant's September 2020 background interview with a government investigator he stated that he had not used marijuana since July 2020. (Items 5, 6) In his answer to the SOR, he stated:

I admit to the legal consumption of legal cannabis in small quantities approximately every other week on average for the stated time period in

U.S jurisdictions with legal adult-size cannabis programs and in Canada with a legal adult-use federal program (after Canada legalized federally). (Item 4)

Applicant has not made any statement in his answer, response to interrogatories, or response to the FORM that he does not intend to use marijuana in the future. (Items 4, 5, 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; and

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

Applicant admitted to using marijuana from 2016 to July 2020. He admitted to being involved in the manufacture, distribution, and cultivation of marijuana while employed with different companies from June 2016 to December 2017, October 2018 to January 2020 and since June 2020. 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.

Under the Federal Controlled Substances Act (21 U.S.C. § 801), marijuana is a Schedule I drug and illegal to manufacture, possess, or distribute. Regardless of some state laws decriminalizing the use of marijuana, it remains illegal under federal law, which is controlling over state law. Despite Applicant's arguments for why the law should be changed, it is well settled that marijuana use, possession, manufacture, cultivation, and distribution are illegal under federal law. In addition, DOHA's Appeal Board (ISCR Case No. 14-03734 (App. Bd. Feb. 18, 2016)) has held that state laws permitting the use of marijuana do not preempt the Industrial Security Program, and DOD is not bound by the status of applicants' conduct under state law when adjudicating eligibility for access to classified information.

Applicant provided a well-researched analysis of the different federal policy positions regarding state legalization of marijuana use and the manufacture and distribution of it. It is clear through his detailed research, analysis, and passionate argument that he understands that despite his hope, marijuana remains illegal under federal law.

I find his marijuana use, every other week over a four-year period ending in July 2020, when he completed his security clearance application, as recent and frequent. Applicant made a passionate argument and carefully noted that all of his marijuana use, possession, manufacture, and cultivation was legal under state law. I did not have an opportunity to make a credibility determination. However, Applicant did not provide a signed statement of intent to abstain from all drug involvement and substance misuse in the future. I am not convinced future illegal drug use is unlikely. He continued as of June 2020 to work in the business of selling marijuana. He failed to provide evidence that he no longer associates with others who use illegal drugs or has changed his environment. 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 in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant is 48 years old and retired from the military. He has not met his burden of persuasion. 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.

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 |

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