



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 21-00274
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: *Pro se*

01/31/2022

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline H, drug involvement and substance misuse, and the concerns under Guideline E, personal conduct, were not established. Applicant’s eligibility for a security clearance is granted.

Statement of the Case

On April 13, 2021, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. DOD acted 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), implemented by the DOD on June 8, 2017.

Applicant answered the SOR on April 29, 2021, and requested a hearing before an administrative judge. The case was assigned to me on October 20, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 26, 2021, and the hearing was convened as scheduled on November 16, 2021. The Government offered exhibits (GE) 1-3, which were admitted into evidence without objection. The Government's exhibit list was marked as hearing exhibit (HE) I. Applicant testified and offered one exhibit (AE A), which was admitted into evidence without objection. The record remained open until November 26, 2021, but Applicant did not submit any additional evidence. DOHA received the hearing transcript (Tr.) on November 29, 2021.

Findings of Fact

In Applicant's answer to the SOR, he admitted all but one of the allegations, with explanations. However, concerning the Guideline E allegations involving providing false information or failing to provide truthful information, Applicant denies intentionally doing either. I have incorporated those admissions into my findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following additional findings of fact.

Applicant is 33 years old. He is married, but is currently separated. He has two children, ages six and three. He has a high school diploma. He has worked for a defense contractor since March 2020 as an electronic maintenance technician. He has never held a security clearance. He completed his security clearance application (SCA) in May 2020. He was never briefed by the company facility security officer about filling out the SCA. (Tr. 6, 20-22, 39-40; GE 1)

Under Guideline H, the SOR alleged Applicant: used marijuana, with varying frequency, from August 2007 to the present; was arrested in January 2007 and charged with possession of marijuana and drug paraphernalia; and intends to continue using marijuana. (See SOR ¶¶ 1.a-1.c) Under Guideline E, the SOR alleged Applicant: deliberately failed to disclose his 2007 marijuana charge when completing his security clearance application (SCA) in May 2020; falsified answers to a defense investigator during his background investigation in September 2020 when he deliberately failed to disclose his 2007 charge of marijuana and paraphernalia possession; and deliberately failed to disclose his illegal drug use in the last seven years when completing his security clearance application (SCA) in May 2020. The drug allegations were also crossed-alleged under Guideline E. (See SOR ¶¶ 2.a-2.d)

In January 2007, when Applicant was 18 years old and in high school, he and a friend had used marijuana before arriving at school one day. School officials became aware of possible marijuana use by Applicant and notified the police. When the police arrived on scene, a search of Applicant's car revealed the presence of a marijuana "bong" and a small amount of marijuana. The police arrested Applicant and took him to the police station. He was detained there for approximately two hours and then released to his parents. He was never placed in a jail cell. He does not recall going to court to

dispose of the matter. He believes that it was treated similar to receiving a traffic ticket where you just pay a fine. He did not hire an attorney for this matter. His mother paid the fine for him. Applicant had no further involvement with this case. While the Government's evidence documented Applicant's arrest, there is no Government evidence reflecting the disposition of the matter. (Tr. 23, 31-33; GE 2, 3)

Applicant admitted using marijuana infrequently in the past, aside from the 2007 school incident. He testified that his last use was in December 2019, before taking his current job. His use of marijuana occurred in a state where marijuana use has been legal, under state law, since 2012. Applicant asserted his use occurred during this time. Before being interviewed by an investigator during his background check, he was unaware that marijuana use remained illegal under federal law. He has never held a federal job or federal contractor job before his current position. (Tr. 25-26, 32-33)

Also during his background check, he answered questions regarding any future use of marijuana. The investigator attributed the following statements to Applicant:

In the future, [Applicant] will stop using if told by his current employer to stop. However, [Applicant] has not been informed that he is not allowed to use marijuana. If his employer asks, [Applicant] will be honest and report that he is using marijuana. (GE 2)

Applicant credibly asserted that this information was misconstrued to indicate that he had a future intent to use marijuana. He denies having such intent. He now knows that marijuana use is illegal under federal law and he has no intention to ever use it. Even if marijuana use became legal under federal law, he would not use it. He is willing to take regular drug tests to verify his commitment not to use marijuana in the future. (Tr. 27, 34-36; SOR Answer)

When Applicant completed his SCA in May 2020, he did not intend to provide false information about the 2007 school-marijuana incident. He truly, albeit incorrectly, believed that his arrest was handled similar to a traffic ticket since he did not go to jail, did not go to court, and his mother just paid a fine. In a similar fashion, Applicant did not list his marijuana use within the last seven years because the question asked for "illegal" drug use and because his use of marijuana was legal under state law and he was unaware of the federal prohibition of marijuana use. I found Applicant's testimony credible. (Tr. 18, 23, 25-26, 28; SOR Answer)

During his background interview in September 2020, he answered negatively when asked if he had been charged with any drug offense, even when he was young. He answered this way because in his mind the 2007 school-marijuana incident was not a charged offense. Once the investigator explained that a police report showed Applicant's arrest, he fully disclosed the details of the incident. There is no documentary evidence to show the disposition of this offense. This is also when the investigator made him aware that marijuana use violated federal law. I found Applicant's testimony credible. (Tr. 18, 23, 25-26, 28; SOR Answer)

Applicant produced his 2020-2021 work performance appraisal. He is rated at the highest level in almost all categories, including initiative, dependability, responsibility, and compliance. His supervisor recognized Applicant as a highly valued team member who sets a positive example. (AE A)

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 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(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 section E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive section E3.1.15, 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 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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

AG ¶ 24 expresses the security concern pertaining to drug involvement and substance misuse:

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Two conditions are potentially applicable in this case, to wit:

- (a) any substance misuse; and

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

Applicant used marijuana and possessed marijuana and a bong at school in 2007, for which he was arrested. At various times between 2012 and 2019, Applicant used marijuana in a state where marijuana use is legal under that state's law. He was not a federal employee or federal contractor employee at the time of those uses. I find AG ¶¶ 25(a) and (c) apply.

AG ¶ 26 provides conditions that could mitigate security concerns. Two potentially apply 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; 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's marijuana use was sporadic, but it ceased in 2019. His marijuana possession charge was over 14 years ago. He has credibly expressed his intent not to use it in the future. He has established an excellent reputation at work where he is a valued and trusted employee. AG ¶ 26(a) applies. His nearly two years of abstinence and commitment to abstinence in the future are sufficient circumstances to demonstrate Applicant's intent not to use in the future. AG ¶ 26(b) applies.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security concern:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying condition is potentially applicable:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;
- (b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;
- (2) any disruptive, violent, or other inappropriate behavior;
- (3) a pattern of dishonesty or rule violations; and
- (4) evidence of significant misuse of Government or other employer's time or resources.

Applicant's sporadic marijuana use and possession is sufficiently covered by the Guideline H concerns making AG ¶¶ 16(c) and 16(d) inapplicable to SOR ¶ 2.a. Applicant was under the mistaken belief that the 2007 school-marijuana arrest was never a formal charge since he did not go to court for its disposition. This led to his erroneous answers on his SCA and to the investigator during his background check. Additionally, he believed his use of marijuana in the time period seven years before he completed his SCA in May 2020 was legal under state law and he was unaware of its federal status. I conclude that Applicant's assertions are credible and that he did not have the requisite intent to deceive when he gave erroneous information in completing his SCA and when he provided answers to the investigator. The evidence does not establish deliberate falsification or omissions as alleged in SOR ¶¶ 2.b-2.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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and circumstances 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 guideline and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. I considered Applicant's abstention from using marijuana, his declared intention not to use it ever again, and his outstanding performance appraisal. Applicant provided sufficient evidence to mitigate the security concerns.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guideline H, drug involvement and substance misuse and the concerns under Guideline E were not established.

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:	FOR APPLICANT
Subparagraphs 1.a-1.c:	For 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 clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Robert E. Coacher
Administrative Judge