



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



In the matter of:)
)
) ISCR Case No. 20-02699
)
Applicant for Security Clearance)

Appearances

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

02/14/2022

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, drug involvement and substance misuse. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On February 15, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudication Facility (DCSA CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H. The DCSA CAF acted 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) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on February 16, 2021, and requested a hearing. 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 held as scheduled on November 16, 2021. The Government offered exhibits (GE) 1 and 2, which were admitted into evidence without objection. The Government's exhibit list was marked as a hearing exhibit (HE) I. Applicant testified and offered exhibits (AE) A and B, which were admitted without objection. DOHA received the hearing transcript (Tr.) on November 29, 2021.

Findings of Fact

In Applicant's answer to the SOR, he admitted the Guideline H allegation. I adopt his admission as a finding of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 28 years old. He is single, never married, and has no children. He began working as a systems engineer for a defense contractor in 2017 and that contractor was acquired by his current employer, a defense contractor, subject to the drug-free workplace provisions of 41 U.S.C. 701 *et seq.* He holds a bachelor degree. He is seeking a security clearance for the first time. He received an interim security clearance in approximately June 2018. (Tr. at 6, 27-28, 35; GE 1)

The SOR alleged Applicant purchased and used marijuana, with varying frequency, between May 2014 and October 2020, while holding a security clearance. The allegation is established by his security application admissions, his admissions to a defense investigator during his background investigation, and his admission in his SOR answer. (GE 1, 2; SOR answer)

Applicant described his marijuana use as beginning in approximately 2012, while he was attending college. He acknowledged that his use at the time was illegal under state law. He asserts that the remainder of his marijuana use took place in a state where marijuana use is legal under state law. The frequency of his marijuana use was about four to six times a year. Applicant possessed a security clearance at the time of these uses. He has continued his use of marijuana as recently as in March 2021, after the issuance of his SOR. He characterizes his use of marijuana as spiritual rather than recreational. (Tr. 21, 23; GE 2)

Applicant admitted his marijuana use when he completed his security clearance application (SCA) in September 2019. He also admitted in his SCA that he intended to continue using marijuana in the future. When questioned by a defense investigator during his background investigation in October 2019, he again admitted his intention to use marijuana in the future. In January 2021, he answered interrogatories concerning his answers to the defense investigator and he failed to address whether his intent to use marijuana in the future remained. During his hearing testimony, Applicant acknowledged that he was probably briefed by his employer when he was hired concerning the illegality of using marijuana as an employee for a defense contractor, but

claims he did not fully understand the implications of that information. He further claims that it was not until sometime in early 2021 when he attended a training class held by his employer concerning its drug-use policy that he finally realized that marijuana use violated federal law and his employer's drug-use policy. It was at this time that he revised his intentions and committed to not using marijuana in the future. In Applicant's written statement of intent not to use marijuana in the future, he stated that his full recognition of the legal implications of his employer's drug policy became "very clear" to him when he reviewed new employee training materials in "early 2020." He admitted using marijuana after that date. (Tr. 24-25, 27-30; GE 1-2; AE B)

Applicant offered his job performance appraisals for years 2018-2020. They reflected overall ratings of "significantly exceeded" for 2018, "exceeded" for 2019; and "exceeded" for 2020. As stated above, he also offered a written statement, dated April 2021, expressing that he was not currently using marijuana and that he had no intentions to use it in the future. (AE A-B)

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 Abuse

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.

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

- (a) any substance misuse; and

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant started using marijuana in approximately 2012 and continued to use it after being granted a security clearance in 2018. I find both of the above disqualifying conditions 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 not infrequent and was as recent as March 2021, after the issuance of his SOR, and while holding a security clearance. Since his statements of intent to use in the future from his SCA and his answers to a defense investigator were not alleged in the SOR, I will not use them for disqualification purposes, but I will consider them as they may be applicable to weighing Applicant's credibility, to determine the applicability of any mitigating conditions, and in applying the whole-person factors. Applicant admitted that he was briefed by his employer on its drug-use policy when he was hired, but claims he failed to understand its implications. Given his recent marijuana use, including after his SOR was issued, while holding a security clearance, and his vacillation regarding his future intent to use marijuana, his current reliability, trustworthiness, and good judgment are called into question. AG ¶¶ 26(a) and AG 26(b) 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 guideline 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 considered Applicant's job performance appraisals and his recent April 2021 written statement of his intentions not to use marijuana in the future. However, I also considered that he regularly used marijuana while holding a security clearance and that he expressed his intention to continue using marijuana even after being briefed by his employer when he started his job, after completing his SCA in 2019, in response to questions by a defense investigator during his 2019 background investigation, and even after he was issued his SOR. His recent marijuana use, while holding a security clearance, demonstrates that he does not possess the reliability, trustworthiness, and good judgment to hold a security clearance.

Overall, the record evidence leaves me with questions and doubts about 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.

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
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge