



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



In the matter of:)
)
) ISCR Case No. 20-03324
)
Applicant for Security Clearance)

Appearances

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

03/23/2022

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline H, drug involvement and substance misuse. Applicant’s eligibility for a security clearance is granted.

Statement of the Case

On January 22, 2021, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse. 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 August 16, 2021, and requested a hearing before an administrative judge. The case was assigned to me on October 21, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 5, 2021, and the hearing was convened as scheduled on December 15, 2021. The Government offered exhibits (GE) 1-2, which were admitted into evidence without objection. The Government's exhibit list and the discovery document sent to Applicant were marked as hearing exhibits (HE) I and II. Applicant testified, but did not offer any documentary evidence. DOHA received the hearing transcript (Tr.) on December 30, 2021.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations, with explanations. 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 52 years old. He has a high school diploma and two years of technical school. He has been married four times (to wife 1 (W1): 1995-2014; W2: 2015-2016; W3: 2017-2021; W4: 2021 to present). He has two children and two stepchildren. He has worked for a defense contractor as a database administrator since June 2019. He served in the U.S. Army for two years and received an honorable discharge due to medical reasons. He has never held a security clearance. He completed his security clearance application (SCA) in July 2019. (Tr. 6, 15-18; GE 1)

The SOR alleged Applicant: purchased marijuana from December 2018 to about May 2019; used marijuana, with varying frequency, from 2012 to May 2019; used mushrooms in December 2018; and used ecstasy in August 2018. (See SOR ¶¶ 1.a - 1.d.)

Applicant credibly testified that his marijuana use was very limited. When he was 17 years old, his first exposure to marijuana was when a girl blew marijuana smoke in his face. He did not ask her to do it at the time. His only other uses of marijuana were in approximately 2017 when he inhaled it from an e-pen (device used for smoking marijuana), inhaled it from a joint, ate a pastry laced with marijuana, and ate marijuana gummy bears on two occasions. All these uses occurred in 2017, when he was living with W3 and used it at her urging. They also occurred when they lived in a state which legalized marijuana use under state law. At the time of these uses, Applicant did not have a security clearance, or any affiliation with a defense contractor. He has not used marijuana since beginning to work for his current employer. He voluntarily disclosed his marijuana use to a defense investigator when interviewed in September 2019. (Tr. 20-23; GE 2)

Applicant credibly testified that he purchased marijuana from December 2018 to May 2019 as gifts to W3. She is approximately 12 years younger than Applicant and was very involved in using marijuana. He was trying to make her happy and believed

that his purchases of marijuana as gifts might help that cause. His purchases were made at state-legalized marijuana dispensaries. Applicant and W3 separated in August 2019. He has not purchased marijuana since their separation and has no intention to do so. He has no further contact with her other than to pay spousal support from the divorce. He provided a signed sworn statement indicating his intent not to use or possess illegal drugs in the future (he understands marijuana is illegal under federal law) when he completed interrogatories sent to him by DOHA. (Tr. 18-19, 25, 28; GE 2)

When completing the DOHA interrogatories, Applicant also disclosed his one-time use of psychedelic mushrooms (December 2018) and ecstasy (August 2018). He testified that he used these drugs while on vacation and on his birthday when he was with W3. He has not used them since and has no intention to do so. He did not hold a security clearance nor work for a defense contractor at the time of these uses. (Tr. 26-27; GE 2)

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 and purchased marijuana on several occasions from 2017 to 2019. He also used illegal mushrooms and ecstasy one time each in 2018. 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 used marijuana on a limited basis and ceased using it in approximately 2017. He used mushrooms and ecstasy one time each in 2018. He purchased marijuana in state-legalized dispensaries as gifts for W3 on several occasions between 2017 and 2019. He is divorced from W3 and does not associate with her. He has credibly expressed his intent not to use illegal drugs in the future. He voluntarily self-reported all of his drug activities to the Government. He has not been involved with any drug activity since 2019. AG ¶ 26(a) applies. His three years of abstinence and his distancing from his drug-associated ex-wife are sufficient to demonstrate Applicant's intent not to use in the future. AG ¶ 26(b) applies.

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.

On December 21, 2021, the Director of National Intelligence signed the memorandum, Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position. It emphasizes that federal law remains unchanged with respect to the illegal use, possession, production and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the “whole-person concept” to determine whether the applicant’s behavior raises a security concern that has not been mitigated.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. I considered Applicant’s limited drug activity, his distancing from his drug-using ex-wife, and his three years of drug abstinence. I also considered Applicant’s statement of intent not to use drugs in the future. 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.

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.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