



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 20-00767
)
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 failed to mitigate the security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On April 7, 2021, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. The 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 23, 2021, and initially requested an administrative determination without a hearing, but on August 27, 2021, he requested an in-person hearing. 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 4, 2021, and the hearing was held as scheduled on December 14, 2021. The Government offered exhibits (GE) 1 through 5, which were admitted into evidence without objection. The Government's exhibit list and pre-hearing discovery letter were marked as hearing exhibits (HE) I and II. Applicant testified and offered exhibits (AE) A-D, which were admitted without objection. His exhibit list was marked as HE III. The record remained open until December 30, 2021, to allow Applicant to submit additional evidence. He submitted AE E-G, which were admitted without objection. DOHA received the hearing transcript (Tr.) on December 22, 2021.

Findings of Fact

Applicant admitted all the SOR allegations. His admissions are adopted as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 41 years old. He has worked for a defense contractor since March 2003. He holds a master's degree. He is married and has two children, ages 13 and 8. He has held a security clearance since 2004. (Tr. 6, 21-22; GE1, 4)

Under Guideline H, the SOR alleged Applicant used marijuana from 2007 to October 2017, while having access to classified information. (SOR ¶ 1.a) Under Guideline E, the SOR alleged that Applicant deliberately gave false information on his March 2013 security clearance application (SCA) when he failed to disclose his illegal drug use as stated in SOR ¶ 1.a above. (SOR ¶ 2.d)

Applicant admitted all of his illegal drug use, and his deliberate false answers given on his 2013 SCA. Applicant began using marijuana in high school and continued his use through his college years. He graduated from college in 2002. He was hired by his current employer in 2003 and was investigated for and received a security clearance in 2004. He claims he listed his previous high school and college drug use on his first SCA, however, that document is not part of the record so it cannot corroborate his assertion. He also asserts that he stopped using marijuana from the time of his hiring (2003) until approximately 2007, when he began using marijuana again. He started using marijuana in 2007 on a recreational basis approximately two to five times a year. He used it with college friends and while on vacation with his friends. He remains friends with some of the people with whom he smoked marijuana, and they continue to use marijuana in his presence. He claims they respect his decision not to use marijuana any longer. Applicant was aware that marijuana use violated his company's drug policy and that using marijuana was illegal in the state where he was using it. He now lives in a state where marijuana use is legal under state law. His wife works for the same employer and also holds a security clearance. She did not and does not use marijuana and was unhappy about Applicant's use of it. He continued to use marijuana until approximately October 2017, when he stopped using it. He testified that there was no monumental event that led to his cessation of marijuana use. Shortly thereafter, he reported his marijuana use to his employer. In April 2018, he received a letter of reprimand for violating the company's drug

policy. He has never received any drug treatment or counseling. He provided a written statement of his intent not to use illegal drugs in the future. (Tr. 23, 26-33, 41-43; SOR Answer; AE E-G)

Applicant admitted that he knowingly falsified his 2013 SCA by not listing his marijuana use. He claims he was embarrassed to disclose this information at the time and he knew his use of marijuana was wrong. He continued to use marijuana after completing this SCA. After his disclosure to his employer in 2017-2018, he completed an SCA in March of 2018 where he disclosed his previous marijuana use. (Tr. 31-33; GE 1, 5)

Applicant is involved in community activities such as coaching youth activities, helping out at school activities, and serving as a substitute teacher. His volunteer work at his children's school was commended by the school principal and assistant principal. Applicant was characterized as a valuable school asset and positive influence. He provided letters of support from two work supervisors who describe Applicant as honest, trustworthy, and very remorseful for his conduct that led to this point. They recommend him for a position of trust. Applicant also provided letters of commendation where he was recognized for his contributions to team successes. His work evaluations from 2003 to 2020 characterize him as follows: satisfactory contributor (2003), high contributor (2004-2006), exceptional (2007-2011), 20% (2012), exceeded (2015, 2018), significantly exceeded (2013-2014, 2016-2017, 2019-2020). (Tr. 22-23; AE B-D)

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 careful weighing 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 ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ 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;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant's use and possession of marijuana, between 2007 and 2017 is supported by his admissions and other evidence. He used marijuana after being granted a security clearance in 2004. I find all 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 used marijuana 20 to 60 times between 2007 and 2017. Given his pattern of use, his claimed abstinence beginning in 2017 is not sufficient to overcome his prolonged marijuana use. Although he provided a signed statement of intent to abstain from all future illegal drug use, he remains in contact with marijuana users who continue to use the substance in his presence. Applicant's claimed abstinence is insufficient to convince me that recurrence is unlikely. The frequency and recency of his past use, and his uses while holding a security clearance, and after he completed a second SCA in 2013 cast doubt upon his current reliability, trustworthiness, and good judgment. AG ¶ 26(a) does not apply, but AG ¶ 26(b) has some application.

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.

16. Conditions that could raise a security concern and may be disqualifying include:

(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.

Applicant admitted that he deliberately provided false information on his 2013 SCA because he knew his marijuana use was wrong. AG ¶ 16(a) applies.

I have also considered all of the mitigating conditions for personal conduct under AG ¶ 17 and considered the following relevant:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant's use of marijuana after he was granted a security clearance and his failure to disclose his continued use of marijuana to his employer for over ten years causes significant concern. He was well aware of his responsibilities to disclose his drug use in 2013 when he completed his SCA, but he failed to do so because of personal concerns. He did not make a prompt, good-faith effort to correct his previous falsifications. Deliberately providing false information on a SCA is not a minor offense. It strikes at the heart of the security clearance investigation process. These actions raise questions about

Applicant's reliability, trustworthiness, and judgment. Although Applicant claims he will not use illegal drugs in the future, he remains in contact with drug-using friends. Also, he has not obtained counseling to help correct his aberrant behavior. AG ¶¶ 17(a), 17(c), and 17(d) do not fully 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 considered Applicant's work record, his letters of support, and his community involvement. However, I also considered Applicant's history of marijuana use and his continued use after obtaining a security clearance. He also deliberately falsified his 2013 SCA in order to retain a security clearance. Applicant failed to provide sufficient evidence to mitigate the drug involvement and personal conduct security concerns.

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 under Guidelines H and E.

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

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraph 2.a:

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 interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge