



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



In the matter of:)
)
) ISCR Case No. 19-02484
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

05/11/2022

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s 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 December 20, 2019, the Defense Counterintelligence and Security Agency Consolidated Adjudication Facility (DCSA CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. 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 January 21, 2020, and requested a 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 8, 2021, and the hearing was held as scheduled on December 17, 2021. The Government offered exhibits (GE) 1-2, which were admitted into evidence without objection. Two hearing exhibits (HE I and II) reflecting the Governments exhibit list and discovery letter were marked accordingly. Applicant testified and offered exhibits (AE) A-Q, which were admitted without objection. Applicant's exhibit list was marked as HE III. 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. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 39 years old. He is single, never married, and has no children. He began working as an engineer for a defense contractor in 2004. His employer is subject to the drug-free workplace provisions of 41 U.S.C. 701 *et seq.* He holds a master's degree. He has held a security clearance for 14 years. (Tr. 18-21; GE 1)

Under Guideline H, the SOR alleged Applicant used marijuana between July 2014 and July 2018, while granted access to classified information. In his answer to the SOR, Applicant admitted using marijuana during this time and stated his use was experimental. Under Guideline E, the SOR alleged Applicant used marijuana after he submitted his April 2017 security clearance application (SCA) in which he reported his previous uses between 2014 and 2016 and in which he expressed his intent not to use marijuana in the future. Applicant admitted using marijuana in 2018, after he completed his SCA. He further explained in his SOR answer that he was not trying to be deliberately misleading when he stated in his April 2017 SCA that he would not use marijuana in the future. (SOR answer)

Applicant admitted using marijuana a total of six times between 2014 and 2018, five times before completing his April 2017 SCA and one time after its completion. All uses were while he held a security clearance. Applicant stated that his first five uses were by smoking marijuana four times and by eating a marijuana edible one time. The marijuana was supplied by a friend or his then girlfriend. He was on vacation when he used on these occasions. He claimed that he was not aware marijuana use was wrong for a security clearance holder. Given his education, length of employment by a defense contractor subject to the drug-free workplace provisions of the federal statute, and his 14 years as a clearance holder, I do not find his claim of ignorance of the prohibition of marijuana use credible. He also claimed his first five marijuana uses were experimental and then stated in his April 2017 SCA, "Experiment completed. Not needed for future use." Contrary to this statement, Applicant used marijuana again when he was on vacation in July 2018. He met some people while partying on the street who offered him marijuana, which he accepted and used. He explained his action as simply making a

bad decision. He has had no further contact with the people who supplied him marijuana on this occasion. He also claims he no longer associates with his former girlfriend or friend who provided him with marijuana in the past. He admitted all six uses during his background interview in July 2018. He claims not to have used since July 2018. (Tr. 21-23, 27-28, 32, 36; GE 1-2)

Applicant provided three self-procured drug tests showing negative results for the presence of illegal drugs. These tests results were from January 2020, November 2021, and December 2021. He does not think he has ever taken an employee-mandated drug test. Applicant also provided a written statement of intent “never to use illegal drugs again.” (Tr. 23, 31; AE A, B, J, Q)

In September 2020, Applicant underwent a self-procured substance-abuse evaluation by a licensed clinical social worker and certified substance abuse counselor, Ms. B. The evaluation consisted of an interview, a standardized drug assessment screening test, and a review of the SOR. Using the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5), Ms. B opined that Applicant presented with “no use disorder” and further opined that “no treatment was warranted.” In her evaluation report, Ms. B did not address Applicant’s broken pledge not to use marijuana in the future stated in his April 2017 SCA. (GE 1; AE K-L)

Applicant offered character letters from six current or former coworkers with his current employer. They discussed his good character, trustworthiness, job knowledge, honesty, reliability, and integrity. Several recommended the granting of his security clearance. Although Applicant testified that he told the authors the reason why he was seeking their letters, none of the statements referenced that the authors knew about Applicant’s use of marijuana while holding a security clearance. (AE I, P)

Applicant offered his job performance appraisals for years 2016-2020. They reflected overall ratings of “significantly exceeded” for 2016; “achieved/substantially achieved” for 2018 and 2019; and “exceeded” for 2017, 2020. Applicant also offered several certificates of appreciation noting his selection as employee of the month (twice) and as a significant contributor to the mission. He also provided a photo showing his involvement with a civic organization. (AE F-H, M)

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.

In Between July 2014 and July 2018, Applicant used marijuana on six occasions while holding a security clearance. 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;
- (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; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant's marijuana use was infrequent and his last use occurred over three years ago, however, there are two troubling aspects about his actions that go straight to the heart of his reliability, trustworthiness, and his willingness to comply with laws, rules, and regulations. First, when he revealed his 2014-2016 use of marijuana in 2017, he pledged not to use it again. He broke that pledge with his July 2018 use of marijuana. Second, he claims that he was unaware of the prohibition against drug use, yet he has held a security clearance for 14 years and his employer is bound by the federal statute requiring a drug-free workplace. He had just completed his 2017 SCA less than a year before his use in 2018. I find his claim of ignorance not credible. AG ¶ 26(a) does not fully apply.

Applicant acknowledged his multiple uses of marijuana between 2014 and 2018. He explained his uses between 2014 and 2016 as experimenting with marijuana. In 2014, he was 31 years old and already held a security clearance. Even if he was experimenting between 2014 and 2016, he stated in his 2017 SCA that his experimenting was over. Thus, his 2018 use cannot be characterized as experimentation. One thing Applicant offers to overcome his past actions is his pledge not to use illegal drugs in the future. However, based upon his past broken pledge from 2017, that is not a reliable option. While he received a substance abuse evaluation, there is no evidence of his completion of a drug treatment program. AG ¶¶ 26(b) and AG 26(d) do not fully apply.

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 denied that he deliberately provided false information in his 2017 SCA when he pledged not to use illegal drugs in the future, but then did so anyway in 2018. Since it cannot be established whether Applicant's stated intent at the time he completed his SCA was false, or whether he simply changed his mind after he stated his intent in the SCA, the evidence does not support a deliberate falsification. Therefore, AG ¶ 16(a) is not established.

Applicant's use of marijuana after pledging not to do so in his 2017 SCA, demonstrates questionable judgment and an unwillingness to comply with rules and regulations, which raise questions about Applicant's reliability, trustworthiness, and ability to protect classified information under the general provisions of AG ¶ 15.

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

(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, as recently as 2018, while holding a security clearance, and his poor judgment as demonstrated when he used marijuana despite his SCA written pledge not to do so cast doubt on his reliability, trustworthiness, and judgment. AG ¶17(c) does not apply. Although Applicant claims he will not use illegal drugs in the future, he has not obtained counseling to help correct his aberrant behavior. AG ¶ 17(d) does 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 negative drug tests, his written statement of intent not to use illegal drugs in the future, his substance abuse evaluation conducted by Ms. B, his education, his letters of recommendation, and his job performance appraisals and awards. However, I also considered that he used marijuana in between 2014 and 2018, while holding a security clearance. I also considered that in 2017 Applicant pledged not to use marijuana in the future and that he broke that pledge with his use in 2018, thereby undercutting his reliability, trustworthiness, and good judgment.

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 and Guideline E, personal conduct.

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, 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