



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



In the matter of:)
)
) ISCR Case No. 20-03138
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

06/28/2022

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 February 19, 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 February 26, 2021, and initially requested an administrative determination in lieu of a hearing. In March 2022, he subsequently requested a hearing. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 21, 2022, and the hearing was convened as scheduled on April 13, 2022. 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, and offered exhibits (AE) A-B, which were admitted into evidence. DOHA received the hearing transcript (Tr.) on April 21, 2022.

Findings of Fact

In Applicant's answer to the SOR, he admitted both allegations, with explanations (contained in the attachment to his answer). 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 47 years old. He was awarded a bachelor's degree. He is married and he has two children, ages 14 and 17. He volunteers in his community and has coached youth soccer. He is a consultant to several Government agencies, including the DOD. He has worked for his current employer since 2016 (his current employer acquired the company who hired him in 2016). He was granted a security clearance in 2016, after completing his security clearance application (SCA) in July 2016. (Tr. 6, 21, 29-30; GE 1)

The SOR alleged Applicant used marijuana, with varying frequency, from 2014 to about 2019, and he used marijuana, with varying frequency, from about 2016 to about 2019, while holding a security clearance. (See SOR ¶¶ 1.a - 1.b.)

Applicant credibly testified that his marijuana use was very limited. While he admitted using recreationally in college, his 2014 to 2019 uses were all due to his decision to use marijuana rather than prescribed opioids to manage his pain after four oral surgery procedures during that timeframe. His first two oral surgeries were in 2010 or 2011 and 2014 timeframe, and he took the prescribed opioid pain medicine. He became concerned about the addictive effect of these drugs and talked to his doctors about alternative pain management, including using marijuana. His third oral surgery was in 2016, after he filled out his SCA in July 2016. He admitted using marijuana rather than opioids for pain management after this surgery. He lives in a state where marijuana use is legal under state law. He did not list his marijuana use on the SCA because, he believed his use was legal under state law and the question asked about "illegal" drug usage. Even though he did not have to do so, Applicant applied for and received a medical marijuana card. He only used marijuana after the dental surgeries for pain management. He did not use it recreationally. (Tr. 22-24, 36, 38; GE 2; AE A)

Applicant testified that sometime in 2018 he first became aware that using marijuana violated federal law and was advised by a coworker that he should report his previous uses to his employer. Later in 2018, Applicant believed he self-reported to his employer his marijuana pain-management use after his 2016 surgery. (Tr. 39, 42-43; GE 2, AE A)

In 2019, Applicant had a fourth oral surgery. He once again used marijuana rather the opioids for pain management after the surgery. This was the last time Applicant used marijuana. While he has not informed his employer about this marijuana use, during his January 2020 background investigation, he disclosed this information to the investigator. Applicant admitted that he was confused as to what his obligations were regarding the prohibition on marijuana use given the legality differences between federal and state jurisdictions. He admitted that he did not seek clarification from his facilities security officer or other company officials. (Tr. 25, 27, 41-42, 44-45)

Applicant provided a signed statement indicating his intent not to use illegal drugs, including marijuana in the future. He expects to have at least one more oral surgery in the future, but he will not use marijuana for pain management after that procedure. He will talk with his doctors about other pain management options and if he has to, he will take the prescribed opioids. (Tr. 46, 49; AE 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 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

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

Applicant used marijuana on several occasions between 2014 and 2019, some uses, after 2016 were when he possessed a security clearance. I find AG ¶¶ 25(a) and (f) 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. His uses while holding a security clearance occurred after he had two oral surgeries (in 2017 and 2019) and he used marijuana for pain management rather than using prescribed opioids. He has not used marijuana since his 2019 oral surgery. He does not intend to use it in the future, even if that means taking prescription opioids after his next surgery. He signed a written statement in 2021 pledging not to use marijuana in the future. I found Applicant's testimony credible. He has not been involved with any drug activity since 2019. AG ¶ 26(a) applies. His three years of abstinence and his written commitment 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 marijuana use for pain management, his written commitment not to use marijuana in the future, and his three years of marijuana abstinence. 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.b:	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