



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 21-01223
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: Jeffrey S. Gard, Esq.

06/28/2022

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 October 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 November 17, 2021, and requested a hearing. The case was assigned to me on February 18, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 21, 2022, and the hearing was scheduled for April 12, 2022. On March 24, 2022, DOHA issued an amended notice of hearing and the hearing was held as rescheduled on April 11, 2022. The Government offered exhibits (GE) 1-4, which were admitted into evidence without objection. The Government's exhibit list was marked as hearing exhibit (HE) I and its discovery letter was marked as HE II. Applicant testified and did not offer any exhibits at the hearing. I kept the record open and post-hearing, Applicant submitted exhibit (AE) A, which was admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on April 19, 2022.

Findings of Fact

In Applicant's answer to the SOR, he admitted both of the Guideline H allegations, with explanations. I adopt his admissions 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 33 years old. He is single, has never married, and has no children. He works as a project manager for a defense contractor where he began working in 2016. That contractor is subject to the drug-free workplace provisions of 41 U.S.C. 701 *et seq.* Applicant holds a master's degree and he is pursuing a second master's degree. He has held a security clearance since 2016. (Tr. 16-17, 27-28; GE 1, 4)

The SOR alleged Applicant used marijuana in about September 2018, while holding a security clearance. The SOR also alleged that he used marijuana in about November 2013 before he was granted a security clearance. The allegations are established by Applicant's security clearance application (SCA) admissions, his admissions to a defense investigator during his background investigation, and his admission in his SOR answer. (GE 1-3; SOR answer)

Applicant described his 2013 marijuana use as occurring while he was in college. He was 25 years old at the time. He attended a football tailgate party and a pipe containing marijuana was being circulated at the party. Applicant smoked from the pipe on two occasions. He claims this was his first time he ever used marijuana and did so out of curiosity. He felt euphoric after using it. He did not hold a security clearance at the time. (Tr. 23; GE 2, 3)

In July 2016, in connection with his employment with a defense contractor, Applicant completed an SCA. When asked about previous drug use in Section 23 of the SCA, he admitted his 2013 marijuana use and stated the following: "I tried the substance once in life and do not plan on using the substance again due to illegal nature of the substance and lack of enjoyment." Thereafter, Applicant was granted a security clearance, in 2016. (GE 2)

In September 2018, Applicant was on vacation with a group of friends in another state. He believed that his friends were able to use marijuana legally because either they held medical marijuana cards or use was legal under state law where they were located. One of the friends passed around a vape pen, which contained marijuana. During Applicant's background investigation, he admitted to inhaling two to three puffs from the vape pen. During his hearing testimony, he claimed he only took one puff from the vape pen containing marijuana. He knew immediately that doing so was a lapse in good judgment. At the time of his use, he knew marijuana use was illegal and also against his employer's rules and drug policies. He held a security clearance at the time of this use. He did not report his use to his employer at the time. Applicant remains in contact with this group of friends and he believes they still use marijuana. (Tr. 18, 27; GE 3, 4)

Sometime before June 2020, Applicant was made aware that he was being considered for access to top secret classified material. In order for that to happen, he needed to complete a new SCA, which he did in June 2020. On that SCA, he disclosed his September 2018 marijuana use. It was at about this same time, two years after the fact, that Applicant first informed his employer about his marijuana use in 2018. (Tr. 24-25; GE 1)

Applicant explained that growing up he lived with his mother who had a substance-abuse addiction. That experience has made him sensitive to addictive qualities and why he is committed not to use illegal substances in the future. He plans to inform his friends that he will not use illegal substances in the future. (Tr. 19-20; AE A)

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.

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 used marijuana in 2013 and in 2018. He held a security clearance when he used marijuana 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.

Although Applicant's marijuana uses were infrequent and somewhat remote in time, his 2018 use occurred while holding a security clearance. Additionally, the 2018 use was after he pledged not to use marijuana again when he disclosed his 2013 use in his 2016 SCA. Applicant disclosed his 2018 use when he completed his 2020 SCA, but he also waited two years to disclose this illegal marijuana use to his employer. A fair question to ask is, whether he would have ever disclosed the 2018 use, but for his employer's decision to sponsor him for a top secret clearance, which necessitated him completing a new SCA. Applicant admitted that he was aware of his employer's drug-use policy. Applicant provided a statement expressing that he had no future intent to use marijuana. He remains in contact with the friends he used marijuana with in 2018. He is committed to telling them he will not use any illegal substances in the future. Given his 2018 marijuana use, after committing to not using marijuana again in his 2016 SCA, his current reliability, trustworthiness, and good judgment are called into question. AG ¶¶ 26(a) and AG 26(b) 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 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 five years of employment, his mother's addictive history, and his written statement of his intentions not to use marijuana in the future. However, I also considered that he used marijuana in 2018 while holding a security clearance even though he previously expressed his intention to not use marijuana in his 2016 SCA. 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
Subparagraphs 1.a – 1.b:	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