



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



In the matter of:)
)
) ISCR Case No. 21-00915
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

08/04/2022

Decision

Hyams, Ross D., Administrative Judge:

Applicant has ceased using marijuana and has clearly committed to refrain from future use. The security concerns under Guideline H (drug involvement and substance misuse) are mitigated. Applicant's eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on July 16, 2020. On July 6, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse). The DOD issued the SOR under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4 (SEAD 4), *National Security Adjudicative Guidelines (AG)*, effective June 8, 2017. Applicant answered the SOR on July 11, 2021, and requested a hearing before an administrative judge. After a delay because of the COVID-19 pandemic, the case was assigned to me on March 17, 2022.

The hearing was convened as scheduled on May 20, 2022. Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. Applicant did not provide any documentation at the hearing. I held the record open to provide him with the opportunity to submit documentary evidence after the hearing. He timely submitted documents that I marked as Appellant's Exhibits (AE) A-F, and admitted into evidence without objection.

Findings of Fact

In his Answer, Applicant admitted SOR ¶¶ 1.a and 1.b concerning his history of marijuana use and use after submitting his SCA. He denied SOR ¶ 1c, concerning his future intent to use marijuana. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, evidence submitted, and testimony, I make the following additional findings of fact.

Applicant is 57 years old. He earned a bachelor's degree in 1989. He works as a senior cyber and software expert and executive for a computer software company that contracts with the U.S. Government. He was married in 1999 and has no children. This is his first application for a security clearance. (Tr. 16-19; GE 1)

Applicant disclosed on his SCA that he used marijuana from May 1979 to July 2020. He reported that he has lived in states where marijuana use was legal and that he intended to continue his use it. Applicant was interviewed by a government investigator in September 2020, and he disclosed historical information about his marijuana use, and stated that he saw no reason to stop using marijuana. He was told by a government investigator that illegal drug usage is incompatible with maintaining a security clearance regardless of any particular state law, and his use would preclude him from holding a security clearance. He asserted that he is not dependent on marijuana usage and could stop if someone from the government told him that he needed to refrain from use. (GE 1, 2)

Applicant testified that he has been forthright about his history of marijuana use. He stated that his use has been sporadic over time, and he has never had an addiction or a problem with marijuana. He asserted that he has never been a daily user, and that he used it more frequently when he was living in states where it was legalized. He stated that he now understands that the marijuana prohibition in federal law supersedes state legalization. (Tr. 20-22)

Applicant used marijuana a limited number of times after filling out his July 2020 SCA, and his September 2020 interview with a government investigator. He asserted that he stopped using marijuana in June 2021, when he filled out his interrogatory response. He stated that he knows that he cannot change the past, but he made a decision when he submitted his interrogatory response to discontinue use. He respects his employer and his role with them, and since he used marijuana so infrequently, his decision to abstain was not difficult. (Tr. 23-25, 42)

Applicant stated that he has not used other illegal drugs. When he moved from State A where marijuana was legal and available, to less permissive State B in February of 2020, the frequency of his marijuana use dropped. He asserted that he has only used marijuana ten times since moving to State B, and he has only used it at home with his wife. He claims they purchased it only one time after moving to State B, through a dispensary. His wife still uses marijuana, and has used it more frequently than he has. (Tr. 23-30, 33-36)

His employer's drug and alcohol policy prohibits use or possession or both at work, as well as use before work or while conducting business. It also states that criminal convictions involving either will not be tolerated. He stated that he has never had a random drug screening by his current employer, but has passed drug tests given in two prior positions. His employer and FSO is aware of his past marijuana use, and the specific allegations in the SOR. (Tr. 26-33; AE A)

When asked why he still used marijuana after filling out his SCA and his interview with a government investigator, Applicant stated that he thought that he would be precluded from receiving a security clearance because of his history with marijuana. He stated that his answers about his future intent for use on his SCA and to the investigator, which did not present him in a positive light, were also rooted in that belief. He expressed this belief at the start of his hearing. He asserted that even after forty years of sporadic use, he was able to abstain from marijuana use for the last year, because it is not important to him. He asserted that he has gone years without using marijuana in the past, and it was not a problem for him. (Tr. 19-21, 26-33)

He stated that he understands why marijuana use creates risks and vulnerabilities beyond the issue of impairment. He knows that his requirement to refrain from marijuana use, and the obligations and behavior expected of a security clearance holder transcends duty hours, and is required whenever and wherever he may be. (Tr. 37-44)

Applicant stated that since he moved in early 2020, the circumstances where he had used marijuana changed, as he is no longer in social situations or environments where it was used. He is still in contact with friends with whom he used marijuana in State A, but they live 2000 miles away. He stated that he would not be obliged to use marijuana if offered; it was never important to him, and he will continue to abstain. (Tr. 37-44)

Applicant claims that his career history shows that he has good judgement, and can follow rules and regulations. He submitted four letters of recommendation and a personal profile, career history, and performance review package into the record. The letters highlighted his character, judgement, honesty, and professional skills. (Tr. 37-44; AE A-F)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” 484 U.S. 518, 531 (1988).

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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline H, Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern regarding drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including... purchase; and
- (g) expressed intent to continue drug involvement and substance misuse or failure to clearly and convincingly commit to discontinue such misuse.

The Controlled Substances Act ("CSA") makes it illegal under Federal law to manufacture, possess, or distribute certain drugs, including marijuana. (Controlled Substances Act, 21 U.S.C. § 801, et seq. See § 844). All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. §§811, 812. Marijuana is classified as a Schedule I controlled substance, §812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment. §812(b)(1). See *Gonzales v. Raich*, 545 U.S. 1 (2005).

SOR ¶¶ 1.a and 1.b is established by the SCA, background interview, and Applicant's admissions. AG ¶¶ 25 (a) and (c) apply. Applicant has clearly and convincingly committed to abstain from future marijuana use, and has abstained for the last year. SOR ¶ 1.c is not established, and AG ¶ 25(g) does not apply.

I have considered the mitigating conditions under AG ¶ 26. The following are potentially applicable:

- (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 is grounds for revocation of national security eligibility.

Applicant used marijuana with varying frequency, over a forty-year period. He asserted that he has gone periods where he did not use marijuana for years, and claims he has never had an addiction to it. He used marijuana more frequently when he lived in a place where it was permitted under state law and socially acceptable. After moving to a less permissive place, his use was sporadic, and he has abstained for a year. He credibly stated that marijuana is not important to him, and he has committed to abstain. He has provided sufficient evidence showing that his past marijuana use occurred under circumstances that are unlikely to recur. AG ¶¶ 26 (a) applies.

Applicant has been forthcoming with his history of marijuana use. He made a late decision during his security clearance application process to abstain from further marijuana use. He assertion that he has not used marijuana for a year, and that he would maintain abstinence is credible. Friends who he used marijuana with now live 2000 miles away. Since his move, he is longer in social situations where marijuana is used. While his wife may continue to sporadically use marijuana, he has convincingly stated that her use of marijuana would not affect his commitment to abstinence. In this case there is an acknowledgment of his history with marijuana, a change in circumstances, and an established pattern of abstinence. 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 relevant 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.

