



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 21-01797
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*
09/21/2022
Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Department of Defense’s intent to deny his eligibility for access to classified information. Applicant has not mitigated the security concern raised by his use of illegal drugs and his personal conduct. Eligibility is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 9, 2020. The Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) on November 30, 2020, detailing security concerns under Guideline H, Drug Involvement and Substance Misuse, and Guideline E, Personal Conduct. The DOD CAF acted 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

On January 7, 2022, Applicant submitted an answer to the SOR (Answer) and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On February 15, 2022, Department Counsel submitted the Government’s file of relevant material (FORM), including documents identified as Items1 through 6 (Items). Applicant was sent the FORM on March 18, 2022, and he

received it on April 4, 2022. He was afforded 30 days after receiving the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not respond to the FORM. The SOR and the Answer (Items 1 and 3, respectively) are the pleadings in this case. Items 2, and 4 through 6 are admitted without objection. The case was assigned to me on June 24, 2022.

Findings of Fact

Applicant is 48 years old. He is married and has two children, a 7-year old daughter and a 15-year old son. Applicant has a bachelor's degree (2002). From March 1991 until March 1999, he served in the Army Inactive Reserve and was honorably discharged. Since August 2019, Applicant has been employed by a defense contractor. (Item 3.)

Under Guideline H, the SOR alleged that Applicant (1) used marijuana with varying frequency from about February 1994 to present; (2) currently uses marijuana daily; (3) has grown marijuana from about 2002 to present; (4) used marijuana after completing his SCA on June 9, 2020; (5) purchased marijuana from about February 1994 to at least 2002; (6) was arrested in about August 1998 for possession of marijuana and charged with violating the Uniform Controlled Substances Act and possessing instruments of a crime. (Item 1.)

Applicant admitted the Guideline H allegations, noting that his use was primarily medicinal and personal, which is legal in his home state. He also corrected the year he began growing marijuana to 2012, not 2002, as alleged. Finally, Applicant answered that he did not recall the exact charges of his 1998 arrest. (Item 3.) The record supports the SOR offenses charged in Applicant's 1998 arrest. (Item 6.) In his SCA, Applicant stated that he grows his own marijuana in quantities that are within his home state's legal limits. He has not sold or purchased marijuana in a decade. (Item 4.)

Applicant uses marijuana daily, because it helps relax him and controls his anxiety. He only uses it in the evening after his children have been put to bed. Applicant has never engaged in drug trafficking or the misuse of prescription drugs. His use has not affected his personal, professional, emotional health, reputation, judgment, or financial responsibility. Applicant could stop his use at any time, if it were required by his employment. (Item 5 at Personal Subject Interview (PSI).) He intends to use marijuana in the future, unless he is actively holding a security clearance. (Item 4.)

Under Guideline E, the SOR cross-alleged SOR ¶¶ 1.a. through 1.d. Applicant answered that he "was completely honest and forthcoming ... and did not attempt to hide anything." (Item 3.) The SOR did not allege any falsification issues. (Item 1.)

Law and Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held, "the clearly consistent standard indicates that security

determinations should err, if they must, on the side of denials.” *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

The adjudicative guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines 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 A2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information 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 avoided drawing 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 as to obtaining 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 as to potential, rather than actual, risk of compromise of classified information.

Guideline H – Drug Involvement and Substance Abuse

Under AG H for drug use, suitability of an applicant may be questioned or put into question a person’s ability or willingness to comply with laws, rules, and regulations. AG ¶ 24 sets forth the concern, as follows:

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 analyzing the facts of this case, I considered the following disqualifying and mitigating conditions or factors:

AG ¶ 25(a) any substance misuse (see above definition);

AG ¶ 25(c) illegal possession of a controlled substance . . . including cultivation . . . ; and

AG ¶ 25(g) expressed intent to continue drug involvement and substance abuse

The only potentially applicable mitigating factor here is quoted below:

AG ¶ 26(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.

Applicant admitted that he has been using marijuana with varying frequency from about February 1994 to present, including daily use currently, that he has grown marijuana from about 2012 to present for his personal use, and purchased marijuana from about February 1994 to at least 2002. He was arrested in about August 1998 in possession of marijuana and charged with violating the Uniform Controlled Substances Act and possessing instruments of a crime. He also admitted he intended to continue using marijuana in the future, unless it is prohibited by his employer or he is actively holding a security clearance. Facts admitted by an applicant in an SCA, an answer to an SOR, or in an interview require no further proof from the Government. ISCR Case No. 94-1159 at 4 (App. Bd. Dec. 4, 1995) (“any admissions [applicant] made to the SOR allegations . . . relieve Department Counsel of its burden of proof”); ISCR Case No. 94-0569 at 4 and n.1 (App. Bd. Mar. 30, 1995) (“[a]n applicant's admissions, whether testimonial or written, can provide a legal basis for an Administrative Judge's findings”).

Marijuana is a Schedule I controlled substances, and possession of it is regulated by the federal government under the Controlled Substances Act. 21 U.S.C. § 811 *et seq.* The knowing or intentional possession and use of any such substance is unlawful and punishable by imprisonment, a fine or both. 21 U.S.C. § 844. In an October 25, 2014 memorandum, the Director of National Intelligence affirmed that the use of marijuana is a security concern. James R. Clapper, Director of National Intelligence, Memorandum: *Adherence to Federal Laws Prohibiting Marijuana Use* (October 25, 2014). See also <http://www.dea.gov/druginfo/ds.shtml>

More recently, 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 medicinal, or recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the “whole-person concept” stated under SEAD 4, to determine whether the applicant’s behavior raises a security concern that has not been mitigated.

Because of Applicant’s past use of marijuana and his expressed intent to use in the future, disqualifying conditions AG ¶¶ 25(a), (c), and (g) apply here. The next inquiry is whether any mitigating factors apply.

I have considered mitigating factor AG ¶ 26(a). Applicant began using marijuana almost 30 years ago. Therefore, the inception of his use was long ago. He has, however, continued his regular use to the present day. And Applicant intends to continue to use marijuana. His use has been frequent, and Applicant plans to continue using marijuana in the future, unless it conflicts with his employment or his security clearance. His use is not mitigated by AG ¶ 26(a).

Guideline E – Personal Conduct

In assessing an allegation of detrimental personal conduct, I consider not only the allegation and applicant’s answer but all relevant circumstances. AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6) (explaining the whole person concept). Under Guideline E for personal conduct, the concern is that “[c]onduct involving questionable judgment ... or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability classified or sensitive information.” Guideline E and Guideline H have common concerns relevant to an applicant’s care in handling classified or sensitive information. Those concerns must be carefully observed in the national security arena. Therefore, Applicant’s conduct has not been mitigated.

Whole Person Concept

The record raises doubts about Applicant’s reliability, trustworthiness, judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept. AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6). Accordingly, I conclude that Applicant has not met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the SOR allegations:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a.- 1.f:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant access to classified information.

Philip J. Katauskas
Administrative Judge