



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



In the matter of:)
)
) ISCR Case No. 13-01391
)
)
Applicant for Security Clearance)

Appearances

For Government: Gregg A.Cervi, Esq., Department Counsel
For Applicant: *Pro se*

09/22/2014

Decision

CREAN, THOMAS M., Administrative Judge:

Based on a review of the case file and pleadings, I conclude that Applicant failed to provide sufficient information to mitigate security concerns under Guideline E for personal conduct and Guideline H for drug involvement. Eligibility for access to classified information is denied.

Statement of the Case

On October 1, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his employment with a defense contractor. (Item 5) The Department of Defense (DOD) could not make the affirmative findings required to issue a security clearance. On February 19, 2014, DOD issued Applicant a Statement of Reasons (SOR) detailing security concerns for drug involvement (Guideline H) and personal conduct (Guideline E). (Item 1) The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective in the Department of Defense on September 1, 2006.

Applicant answered the SOR on March 18, 2014. (Item 4) He admitted all allegations under both Guideline H and Guideline E. Applicant requested a decision on the written record. (Item 4) Department Counsel submitted the Government's written case on May 7, 2014. Applicant received a complete file of relevant material (FORM) on May 20, 2014, and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant did not submit additional information. The case was assigned to me on September 12, 2014.

Findings of Fact

After a thorough review of the case file and the pleadings, I make the following essential findings of fact.

Applicant is a 51-year-old 1997 college graduate employed since November 2002 as a computer systems analyst for a defense contractor. He has had access to classified information since 2003. He is also self-employed as a bookkeeper. He has been married since 1993 and has one child. (Item 5, e-QIP)

The SOR alleges security concerns under Guidelines H and E because Applicant used and possessed marijuana while holding a security clearance. (SOR 1.a and 2.a).

Applicant answered "Yes" to question 23 on the e-QIP asking if he had used any illegal drug in the last seven years. He provided information that in July 2011 he used marijuana a few times over a week after knee reconstruction surgery instead of prescribed pain killers. He felt the prescribed pain killers would make him nauseous. He commented on the e-QIP that he no longer has knee pain so he no longer uses marijuana. (Item 5)

In his answer to the SOR, Applicant added that when advised by his surgeon that he would be given painkillers and muscle relaxants after surgery, he was concerned about the negative effects of the drugs. He consulted his father who was a toxicologist and researched for himself the effect of the drugs. He decided not to take the drugs but to use marijuana. He did not indicate in his response that he consulted with his surgeon about his decision. Applicant provided no information on any advice from his surgeon on his use of marijuana. Applicant did not provide any information on what he thought were the side effects of the pain killers and muscle relaxants. He only stated that they may cause him nausea. He notes that he is not a drug user, and he has not used marijuana before his knee surgery. He does not currently use marijuana and does not intend to use marijuana in the future. He wrote that he is an honest person, and he believes he has good judgment, complies with rules and regulations, and is trustworthy. (Item 4)

As part of the FORM, Department Counsel provided information on marijuana from the Office of National Drug Control Policy. The information shows that marijuana is classified as a Schedule 1 drug, meaning that it has a high potential for abuse and there is no currently accepted medical use for marijuana. The active ingredient in marijuana, delta-9-tetrahydrocannabinol or THC, causes a "high" in the brain areas affecting

pleasure, memory, thinking, concentration, sensory, and time perception, and coordinated movement. It can cause distorted perception, impaired coordination, difficulty with thinking and problem solving, and learning and memory problems. Long term use may increase the risk of schizophrenia and may produce acute psychotic reactions. Marijuana use also impairs the quality of life, including physical and mental health, cognitive abilities, social life, and career status.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the administrative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial, and common sense decision. According to AG ¶ 2(c), 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 access to classified information will be resolved in favor of 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, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by department counsel. . ." The applicant has the burden of persuasion 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 the applicant may deliberately or inadvertently fail to protect or 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.

Analysis

Guideline H, Drug Involvement

The use of an illegal drug can raise questions about an individual's reliability and trustworthiness, because it may impair judgment and raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Drugs are mood and behavior altering substances, and include those listed in the Controlled Substances Act of 1970. Marijuana is listed in the Act. Drug abuse is the illegal use of a drug or the use of a legal drug in a manner that deviates from approved medical direction (AG ¶ 24). Applicant admits to possessing and using marijuana in July 2011 instead of prescribed painkillers and muscle relaxants after knee surgery. Applicant has been eligible for access to classified information since 2003. Applicant's marijuana use raises the following Drug Involvement Disqualifying Conditions under AG ¶ 25:

- (a) any drug use;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

I considered the following Drug Involvement Mitigating Conditions under AG ¶ 26:

- (a) the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and
- (b) a demonstrated intent not to abuse drugs in the future, such as; (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

These mitigating conditions do not apply. While there is no "bright line" rule for determining when conduct is recent or sufficient time has passed since the incidents, a determination whether past conduct affects an individual's present reliability and trustworthiness must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without evidence of drug involvement, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation.

Applicant admits using marijuana in July 2011 after knee surgery. He was prescribed pain killers and muscle relaxants by his surgeon. He decided from his personal research and after consulting with his father, a toxicologist, the side effects of the drugs prescribed by his doctor for pain control were not acceptable. He decided to use marijuana for the pain. There is no indication that he consulted with his doctor about his decision and what, if any advice, the doctor gave him. Applicant must have realized his doctor would not approve since use of marijuana for pain is not a medically recommended course of treatment. Applicant could decide to use marijuana for pain or for other reasons on his own again without consulting doctors. His use of marijuana under the circumstances can occur again and it could cast doubt on his reliability, trustworthiness, and good judgment. While he has not used marijuana since July 2011, and has signed a statement he would not use marijuana in the future, his use of marijuana could happen again. He ignored the National Drug Policy guidance that marijuana also has drastic side effects.

Applicant's abstinence from marijuana use for three years and his statement that he will not use marijuana in the future must be set off against his willing and voluntary possession and use of marijuana to control pain without consulting his doctor while holding a security clearance. Applicant has not met his burden to show changed circumstances or conduct that indicates he has reformed and will no longer use illegal drugs. There is no compelling evidence of intent not to use drugs in the future, except his statement. There is no compelling evidence of a changed circumstance indicating reform or rehabilitation. AG ¶¶ 26(a) and 26(b) do not apply.

Guideline E, Personal Conduct

A security concern is raised for personal conduct based on Applicant's information on his use of illegal drugs on his security clearance application. Personal conduct is a security concern because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Such personal conduct is always a security concern because it reflects negatively on whether the person can be trusted to properly safeguard classified information. (AG ¶ 15)

Applicant willingly and voluntarily used marijuana while he knew he was eligible for access to classified information. He has been cleared for access for over 20 years before he used marijuana. He had to know that drug use was a serious security concern. Yet he deliberately used marijuana. Applicant's use of marijuana while being eligible for access to classified information raises Personal Conduct Disqualifying Condition AG ¶ 16(c) (credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information).

17: I considered the following Personal Conduct Mitigating Conditions under AG ¶

(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 is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(f) the information was unsubstantiated or from a source of questionable reliability.

These mitigating conditions do not apply. The willing and deliberate use of marijuana while having eligibility for access to classified information is not minor and is likely to recur because of Applicant's attitude to disregard sound medical practice and decide himself how to deal with post-operative pain. Applicant has not acknowledged that his decision to use marijuana, rather than follow the doctor's orders concerning prescribed pain killers, is a serious issue. He has not taken sufficient steps to change his behavior. The information on marijuana use came from Applicant himself so it is reliable. The use of marijuana raises issues concerning Applicant's questionable judgment and willingness to comply with rules and regulations. His decision and use of marijuana raises questions concerning Applicant's reliability, trustworthiness, and ability to protect classified information. More time without illegal drug use is needed to establish that access to classified information is warranted. Applicant has not mitigated security concerns for personal conduct.

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(a):

(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 guidelines 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 over ten years of service for the government contractor, and his stated intention not to use drugs in the future. Applicant used marijuana willingly and deliberately for relief of post-operative pain without consulting his doctor. Applicant has not presented sufficient information to establish he has changed his attitude towards use of marijuana that would indicate that he will not use illegal drugs in the future. Applicant has not met his burden to show that his drug use in July 2011 no longer reflects adversely on his reliability, honesty, trustworthiness, and good judgment. His knowing and intentional use of marijuana shows that he may not properly safeguard classified information. For all these reasons, I conclude Applicant has not mitigated the security concerns for illegal drug use while holding a security clearance. Overall, the record evidence leaves me with questions and doubts as to Applicant's judgment, reliability, and trustworthiness. He should not be granted access to classified information.

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 presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

THOMAS M. CREAN
Administrative Judge