



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



In the matter of:)	
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)	ISCR Case No. 14-02556
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline E. Heintzelman, Esquire, Department Counsel
For Applicant: Ryan C. Nerney, Esquire

03/08/2016

Decision

WHITE, David M., Administrative Judge:

Applicant has infrequently used marijuana for more than 30 years, including while holding a security clearance since 2008. He knew that the drug abuse violated Federal law, security clearance requirements, and his employer’s policies. The evidence is insufficient to mitigate resulting security concerns. Based upon a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SF 86) on November 26, 2012. On December 22, 2014, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H (Drug Involvement). 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 for Determining Eligibility for Access to Classified Information*, effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing (AR) on April 20, 2015, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on June 29, 2015. The case was assigned to me on July 9, 2015. DOHA issued a Notice of Hearing on July 21, 2015, and I convened the hearing, as scheduled, on August 13, 2015. The Government offered Exhibits (GE) 1 through 3, which were admitted without objection. The Government also offered three summaries of Office of Personnel Management (OPM) interviews from Reports of Investigations (ROI), GE 4 through 6, to which Applicant objected. No witness authenticated these ROI, and they were not admitted, although Applicant answered some questions concerning them during the hearing. Applicant offered Exhibit (AE) A, which was admitted without objection, and testified on his own behalf. I granted Applicant's request to leave the record open until August 27, 2015, to permit submission of additional evidence. DOHA received the transcript of the hearing (Tr.) on August 21, 2015. On August 27, 2015, Applicant submitted AE B, which was admitted without objection and the record closed.

Findings of Fact

Applicant is a 51-year-old part-time employee of a defense contractor, where he has worked as a software engineer with a security clearance since October 2007. Until about May 2011 this position involved working full time. He has never married, and has no children. He earned a bachelor's degree in 1990, and has no history of military service. He held a security clearance from about 1998 through 2000 while employed by a different defense contractor. (GE 1; GE 2; GE 3; Tr. 22-23, 34-35.)

In his response to the SOR, Applicant admitted the truth of the allegations set forth in SOR ¶¶ 1.a and 1.b, with some clarification of terminology that he considered to be, "vague and misleading," and with six pages of additional commentary about his marijuana use. Applicant's admissions and comments are incorporated in the following findings.

Applicant started using marijuana in the early 1980s with friends. He used it only occasionally on a recreational basis, but did not like the bad side-effects that he experienced. There were some periods as long as five or six years between uses. He has developed a number of physical ailments that sometimes cause him substantial pain. Smoking marijuana gives him some temporary relief from some of these symptoms, but he resorts to it infrequently because he still suffers adverse side-effects from smoking it. His testimony and earlier disclosures on security clearance applications were inconsistent concerning some dates and details, but he appeared to be attempting to honestly disclose his drug use. My findings are based on evaluation of all the evidence presented by Applicant concerning this history. (AR; GE 1; GE 2; GE 3; AE B; Tr. 25-29.)

Applicant first applied for a security clearance in 1998. On that SF 86 he disclosed that he had used marijuana 12 times from 1980 through 1995. In response to Department Counsel's question concerning the subsequent OPM interview, Applicant agreed that he told the investigator that marijuana made him feel sleepy. Department

Counsel next asked Applicant whether he remembered saying that he didn't like the effects of marijuana, similar to his hearing testimony, and that at that time he had no intention to use marijuana in the future. Applicant responded, "No," to that awkwardly worded question, but that response seemed intended to communicate agreement that he said he did not intend to use marijuana in the future. His subsequent SF 86 indicated that his employment with that defense contractor ended in late 2000, and available evidence consistently shows that he did not use marijuana during that employment or while holding that security clearance. (GE 2; GE 3; Tr. 37-38, 57.)

On his 2007 SF 86, Applicant disclosed that he used marijuana about seven times between January 2001 and August 2003, but that he could not remember the exact circumstances or dates. Applicant testified that during his subsequent OPM interview he told the investigator that he had no intention to use marijuana in the future, because it made him sleepy and didn't make him feel well. He said, "It's not part of my habit. It's not something I do normally." (GE 2; Tr. 58.)

After being granted his security clearance in 2008 in connection with his present employment, Applicant was fully aware that marijuana use would be a violation of both Federal law and his employer's policy against drug abuse. Nevertheless, he admitted to voluntarily using marijuana, that was shared with him by acquaintances in efforts to achieve pain relief, on at least two occasions in about 2010 and 2012. He first disclosed this on his November 2012 SF 86, in which he admitted using it while holding a security clearance and said, "My lifetime usage frequency is about one instance/occasion every two years. It is listed here mostly in the name of complete disclosure." He also stated that he did not intend to use marijuana in the future because, "it usually just makes me feel like I have heartburn or I am going to throw up." (GE 1; Tr. 24-29, 40-55.)

Applicant testified during his hearing that he had no intention to use marijuana in the future. When asked if he would do so if his pain became really bad again and a friend offered to give him some, he replied that maybe he would use it if the pain was really bad and no medical help was available. (Tr. 31, 58.)

Applicant submitted the results of a urinalysis test for which he submitted a sample on July 22, 2015. The test was negative for amphetamines, cocaine metabolites, marijuana metabolites, opiates, and phencyclidine. (AE A.) He also submitted the results of a substance abuse evaluation and chemical dependency assessment that he underwent, at a state-certified chemical dependency treatment center, on August 3, 2015. He provided another sample for urinalysis testing in connection with this evaluation. It also yielded negative results. The case manager and clinical director involved in this assessment found no signs or symptoms of a substance use disorder, and no indication that any detoxification, biomedical, or treatment services were needed. However, this report states that Applicant reported his last use of marijuana was in 2013 - the year following the last use he had previously disclosed. (AE B.)

Other than Applicant's SF 86 descriptions of the circumstances under which he was fired or resigned from previous jobs under unfavorable circumstances in 1993, 2005, 2006, and 2007, the record lacks any evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to handling sensitive information and observation of security procedures.¹ No character witnesses provided statements describing his judgment, trustworthiness, integrity, or reliability. I considered his testimony to be a credible reflection of his often imperfect recollection of past events, without dissimulation or dishonesty.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions (DCs) and mitigating conditions (MCs), which are to be 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 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, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

¹Applicant admitted that he did not report his drug use to his Facility Security Officer when it happened, but has an unusual work arrangement as the sole representative of a geographically remote subcontractor, so his failure to do so was satisfactorily explained. Tr. 48-50, 59-60.

A person applying for access to classified information seeks to enter 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

AG ¶ 24 expresses the security concern pertaining to drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

Drug abuse is defined as, "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. The DCs supported by the evidence in this case are:

- (a) any drug abuse; and
- (g) any illegal drug use after being granted a security clearance.

Applicant admitted that he has used marijuana about every other year from the early 1980s through 2012 or 2013. Some years he used more than once, and sometimes he went as long as five or six years between incidents. Applicant has held a security clearance since 2008, during which time he used marijuana at least twice while knowing that it was illegal under Federal law, contrary to his company's drug-free policy, and in violation of personnel security guidelines.

AG ¶ 26 provides conditions that could mitigate security concerns:

- (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;

- (b) a demonstrated intent not to abuse any 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;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended;
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

The last incident of drug abuse about which Applicant testified was in 2012, although he reported that his most recent marijuana use was in 2013 while undergoing his August 2015 chemical dependency assessment. In either case, this drug use is a recent continuation of a pattern of infrequent usage over more than 30 years. Applicant failed to convincingly demonstrate that this drug use is unlikely to recur, or that it does not cast doubt on his current reliability, trustworthiness, or judgment. Mitigation was not established under AG ¶ 26(a).

Applicant's equivocal testimony that he had no intention to use marijuana in the future, but that he might do so under circumstances similar to his previously disclosed incidents, was insufficient to demonstrate a commitment to remain abstinent. This conclusion is buttressed by his pattern of previous declarations of intent not to use marijuana in the future because he does not like its effects, after which he abused the drug on multiple occasions. Mitigation was not established under AG ¶ 26(b).

Applicant acknowledged that marijuana is not a prescription medication, although he claimed that numerous medical treatment providers had hinted to him that it might ease some of his pain. In any event, he did not demonstrate that such abuse has ended, so mitigation under AG ¶ 20(c) was not established.

Applicant has not undergone any drug treatment program, and was evaluated as exhibiting no signs or symptoms of a substance abuse disorder. He simply chooses to use marijuana on rare occasions. He failed to convincingly demonstrate that he would not do so again, whenever he decides that he wants to. No mitigation under AG ¶ 26(d) was established.

Finally, Applicant failed to convincingly establish either remorse for, or mitigation of, his disregard for the security implications of his voluntary drug abuse while holding a security clearance, and the demonstrated unwillingness to comply with laws, rules, and regulations inherent in those choices.

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(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 pertinent facts and circumstances surrounding this case. Applicant infrequently but voluntarily chose to use marijuana a number of times over more than 30 years. His most recent incidents of drug abuse occurred while holding a security clearance; and with full knowledge that such conduct was both illegal and violated the policies of his employer and the U.S. Government. He is a mature and experienced individual who is accountable for such choices.

Applicant stated that he has no intention to abuse drugs in the future, but has made that assertion several times previously without following through. The absence of demonstrated rehabilitation or of permanent behavioral changes support continuing concerns about his judgment, reliability, and trustworthiness. He says that he does not like the side effects of marijuana, but uses it to ease symptoms of chronic medical conditions. Those conditions have not changed, and he testified that they might cause him to use marijuana again. Recurrence was not shown to be unlikely.

Applicant's illegal conduct while holding a position of trust and confidence subjects him to ongoing potential for coercion, exploitation, and duress. Overall, the record evidence creates ongoing doubt as to his present eligibility and suitability for a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant

Conclusion

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

DAVID M. WHITE
Administrative Judge