



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



In the matter of:)
)
) ISCR Case No. 14-03140
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: Melissa J. Fassett, Esq.

October 23, 2015

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant mitigated the Drug Involvement concerns that arose out of his marijuana use and purchases from May 2009 to March 2013. Eligibility for access to classified information is granted.

Statement of the Case

On May 1, 2013, Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP). On September 12, 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 (EO) 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 after September 1, 2006.

Applicant answered the SOR on September 22, 2014, and requested a hearing before an administrative judge. The case was assigned to me on June 11, 2015. The

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 22, 2015, and the hearing was convened as scheduled on August 26, 2015. The Government offered Hearing Exhibit (HE) I and Exhibit (GE) 1. GE 1 was admitted without objection. The Applicant offered Exhibits (AE) A through V, which were admitted without objection. Applicant testified on his own behalf and called one witness. DOHA received the hearing transcript (Tr.) on September 1, 2015.

Findings of Fact

Applicant is a 48-year-old government contractor. He served on active duty in the Army from 1986 to 1988 and in the Army Reserve from 1988 to 1994. In 1994 he received an honorable discharge. He has worked for his employer for the past 18 years. He is a single parent to his 11-year-old daughter and prides himself on her success in school. (GE 1; AE T; AE U; Tr. 29-34, 53-59.)

The Government alleged that Applicant is ineligible for a clearance under the guidelines for Drug Involvement because he used and purchased marijuana from May 2009 to March 2013. Applicant admitted the sole SOR allegation, ¶ 1.a. (Answer.)

On May 1, 2013, Applicant completed an e-QIP in connection with his position with a government contractor. The e-QIP asked questions in “Section 23 –Illegal Use of Drugs or Drug Activity,” including: “**In the last seven (7) years**, have you illegally used any drugs or controlled substances?” In this section, Applicant voluntarily disclosed that he was “prescribed” marijuana “to sleep better.” (GE 1.)

Applicant testified he experimented with marijuana in high school. However, he claims he did not use it on again until he was 42 years old. He explained that he told his primary physician that he was having problems sleeping and relaxing. His physician referred him to another doctor, who “prescribed” Applicant medical marijuana to treat his symptoms.¹ Applicant used the marijuana that he obtained from medical marijuana dispensaries, approximately three times per week, at home. He often traveled for work, but did not bring the marijuana on his travels. He knew that while medical marijuana was permissible under his state’s law, its use was in violation of Federal laws. The medical marijuana card required renewal every year. Applicant renewed the recommendation card with the original physician on an annual basis until 2012. His medical marijuana card expired in 2013 and was not renewed. (GE 1; AE A; Tr. 63-83.)

Applicant’s last use of marijuana was in approximately March 2013. He discontinued using marijuana when he started the process of applying for a security clearance. He knew from his prior military experience that medical marijuana use would not be permitted while holding a security clearance. (GE 1; AE A; Tr. 65-66.)

Applicant has signed a statement of intent to never use marijuana or other controlled substances again. He avoids situations where marijuana is being used. He

¹ Applicant’s state Health Code provides physicians the ability to recommend medical marijuana, but such recommendations do not constitute a prescription under that law.

uses exercise and meditation to control his sleeplessness and anxiety since discontinuing his marijuana use. (AE A; Tr. 66, 83.) He explained:

I was, I guess, I was ignorant at the time. I did not think that it would adversely affect anything relative to Federal Regulations. I felt I was - - it was a legal thing to do, based on a doctor's recommendation. I lived in [a state], and I thought I was doing the right thing. Obviously, I made a great mistake in thinking that was an okay thing relative to where I'm going now. (Tr. 80.)

Applicant is well respected by those who know him. A vice president from Applicant's company testified that Applicant "has explained and apologized dozens of times how sorry he is and his contrition for the decision to do that prior to applying for a clearance, I have no doubt is heartfelt, and I am extremely confident in his commitment in that regard." (Tr. 90-91.) The witness further explained that Applicant is honest, patriotic, professional, and trustworthy. (Tr. 90-93.) Letters of recommendation from four other colleagues concur with the witness' good opinion of Applicant. (AE P; AE Q; AE R; AE S.) Additionally, Applicant's performance reviews from 1997 to 2012 show that Applicant performs well and is a valued employee. (AE C through AE O.) He earned the Army Achievement Medal in 1987. (AE B.)

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 and mitigating conditions, 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, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2(a) describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense 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.

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 the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable clearance 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.

Section 7 of EO 10865 provides that adverse 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

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.

I have considered all of the evidence in this case and the disqualifying conditions under Drug Involvement AG ¶ 25. The following are potentially applicable:

- (a) any drug abuse; and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The Government presented sufficient information to support all of the factual allegations under Guideline H (SOR ¶ 1.a). Applicant used marijuana from at least May 2009 to March 2013 with varying frequency. He purchased it from openly operating medical marijuana dispensaries. The facts established through the Government’s evidence and through Applicant’s admissions raise security concerns under all of the above disqualifying conditions.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement 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) 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.

Applicant has worked hard to excel in his career, as detailed by the vice president who testified on his behalf and the performance evaluations in evidence. He has not used marijuana since March 2013. Since his last use of marijuana, Applicant has realized the seriousness of his actions. He now understands that, despite having a recommendation for medical marijuana, he was engaging in illegal and improper conduct. He expressed sincere remorse for his actions. He is unlikely to use marijuana in the future. He does not associate with marijuana users or frequent locations in which marijuana is used. He signed a statement of intent with automatic revocation of clearance for any violation. The above mitigating conditions 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 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 used marijuana for five years to treat his sleeplessness, as recommended by a doctor. At that time, he did not fully understand the gravity of his illegal conduct. He has expressed remorse for his marijuana use. Applicant is highly respected by those who know him. He has been honest about his marijuana use with the Government. He served in the Army for eight

years and is considered to be patriotic and trustworthy by those who know him. There is little potential for pressure, coercion, exploitation, or duress in this instance, as his employer is aware of his past illegal conduct.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant mitigated the Drug Involvement security concerns.

Formal Findings

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

Paragraph 1, Guideline H: FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Jennifer I. Goldstein
Administrative Judge