



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



In the matter of:	)	
	)	
[Name Redacted]	)	ISCR Case No. 14-03733
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Nicole A. Smith, Esquire, Department Counsel
For Applicant: *Pro se*

10/21/2015

Decision

HOGAN, Erin C., Administrative Judge:

On August 29, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. 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) implemented within the Department of Defense on September 1, 2006.

On December 22, 2014, Applicant answered the SOR and requested his case be decided on the written record. Department Counsel prepared a File of Relevant Material (FORM) on June 26, 2015. The FORM was forwarded to Applicant on August 14, 2015. Applicant received the FORM on August 25, 2015. He had 30 days to submit a response to the FORM. He timely submitted additional matters in response to the FORM. Applicant's Response to the FORM is admitted as Item 5. Department Counsel's reply to the Response to the Form is admitted as Item 6. On September 18, 2015, the FORM was forwarded to the Hearing Office and was assigned to me on

September 22, 2015. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is granted.

Rulings on Evidence

Item 4 of the FORM is a portion of the Report of Investigation (ROI) from the background investigation of Applicant. The five-page document is a summary of an interview of Applicant on December 19, 2013, in conjunction with his background investigation. DoDD 5220.6, enclosure 2, ¶ E3.1.20 states, “An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence.” (see ISCR Case No. 11-13999 (App. Bd., February 3, 2014)).

Although Applicant, who is representing himself, has not raised the issue via an objection, I am raising it *sua sponte* because Item 4 is not properly authenticated. Applicant’s failure to mention this issue in a response to the FORM is not a knowing waiver of the rule because he more than likely was unaware of the rule. Waiver means “the voluntary relinquishment or abandonment – express or implied – of a legal right or advantage, the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it.” *Black’s Law Dictionary*, 1717 (Bryan A. Garner, 9th ed., West 2009).

Although, Department Counsel attempted to inform Applicant of the requirement in ¶ E3.1.20 of the Directive in footnote 1 on page 2, I cannot conclude Applicant expressly waived this rule. He did not mention it in his response to the FORM. I cannot conclude that Applicant read and understood footnote 1 on page 2. In accordance with the Directive, enclosure 2, ¶ E3.1.20, Item 4 is not admissible and will not be considered in this Decision.

Findings of Fact

In his answer to the SOR, Applicant admits to the allegations in the SOR paragraphs 1.a and 1.b. He denies the falsification allegation in SOR paragraph 2.a. (Item 2)

Applicant is a 50-year-old employee of a Department of Defense (DoD) contractor. He has worked for the DoD contractor since August 1996. He has held a security clearance since October 1997. His most recent security clearance was granted in September 2008. The highest level of education achieved is a bachelor’s degree. He has been married to his current wife since July 2013. He was married twice before and has two adult children. (Item 3)

Guideline H – Drug Involvement

The SOR alleges Applicant used marijuana on one occasion in 2010. (SOR ¶ 1.a) It also alleged that his 2010 use of marijuana occurred after he had been granted a DoD Industrial Security Clearance on September 8, 2008. (SOR ¶ 1.b)

In his response to the SOR, dated December 22, 2014, Applicant admits that he used marijuana while holding a security clearance in 2010. He states that marijuana is legal in [State A]. He did not consider it an illegal substance if he could legally purchase and use the product, claiming, "If it is so illegal why isn't the federal government stepping in and enforcing their law? If you really think me smoking marijuana once is a national threat then continue with this denial. One thing to ad [sic] I was not supporting any classified programs during the one time I smoked marijuana." (Item 2 at 2)

Guideline E - Personal Conduct

In response to Section 23: Illegal Use of Drugs or Drug Activity – Illegal Use of Drugs or Controlled Substances: "In the last seven (7) years, have you illegally used any drugs or controlled substances? Use of a drug or controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any drug or controlled substance?" Applicant answered, "No." Applicant also answered, "No." in response to the question in section 23 which asks, "Have you EVER illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed?" He did not list his 2010 illegal marijuana use.

Applicant claims he did not list his 2010 marijuana use because the use of marijuana was legal in State A, where he resides. He states he did not knowingly falsify information on the security clearance application that he completed in October 2013. The question did not specifically mention "marijuana." At the time he completed the security clearance application, he believed marijuana was legal in State A. Applicant states that this is why he answered, "No." When the investigator interviewed him for his background investigation, she specifically mentioned marijuana in her questioning regarding the use of illegal drugs. He told her "yes" because he was trying to honestly answer the question. (Item 5)

Applicant restates in his Response to the FORM, that marijuana is legal in State A and several other states. He has not smoked marijuana since his one-time use in 2010. Applicant asks,

Does one time really show my lack of insight to the responsibility and trust given for holding a security clearance? If anything, I have shown more trust because I was honest about my use. All I ever was trying to do was be open and honest, and here I'm getting ridiculed as being unreliable. I'm sure there are thousands upon thousands of people with security clearances who have smoked marijuana and then lied through their teeth to keep their clearances. And you're worried about my admitted one-time use. (Item 5)

On October 25, 2014, a Director of National Intelligence Memorandum, "Adherence to Federal Laws Prohibiting Marijuana Use," advised that legislative changes by some states and the District of Columbia do not alter federal law or existing

National Security Adjudicative Guidelines. An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. Marijuana is identified as a controlled substance under the Federal Controlled Substances Act (title II of the Comprehensive Drug Abuse Prevention and Control Act) 21 U.S.C. 801-971 (1970). In other words, under federal law, use of marijuana remains unlawful.

In State A, the recreational use of marijuana for individuals over age 21 became legal as a result of a ballot initiative 502 in the state legislature. When the legislature failed to take action, it advanced to the November 2012 general ballot. It was approved by popular vote on November 6, 2012. Marijuana dispensaries opened in July 2014. Medical marijuana was approved for the treatment of specific conditions in State A in 1998 through Initiative 692. The statute was amended in 2010 and 2011.

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 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 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 applicant or proven by Department Counsel. . . ." The applicant 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 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 Executive Order 10865 provides that 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).

Guideline H - Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

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.

Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended, (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances;

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

The guideline notes several disqualifying conditions that could raise security concerns. I find the following drug involvement disqualifying conditions apply to Applicant's case.

AG ¶ 25(a) (any drug abuse);

AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia); and

AG ¶ 25(g) (any illegal drug use after being granted a security clearance).

Applicant used marijuana on one occasion in 2010. He possessed a security clearance at the time he used marijuana. AG ¶ 25(a) and AG ¶ 25(g) apply. AG ¶ 25(c) also applies because Applicant possessed marijuana during his use in 2010.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline H, Drug Involvement. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions potentially apply to Applicant's case:

AG ¶ 26(a) (the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment); and

AG ¶ 26(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; and (4) a signed statement of intent with automatic revocation of clearance for any violation).

AG ¶ 26(a) applies because Applicant's one-time use of marijuana occurred in 2010, five years ago. Under AG ¶ 26(a) there are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record with the parameters set by the Directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." (Id.) I find that Applicant's use of marijuana is not recent. Applicant's full disclosure of his marijuana use to the investigator conducting his background investigation and the absence of evidence of more recent or extensive illegal drug use mitigates doubts about Applicant's current reliability, trustworthiness, or good judgment. Applicant was under the mistaken belief that it was okay to use marijuana because he believed that marijuana use was legal in State A where he resides. His misunderstanding of the law is not unreasonable considering he has no legal training.

AG ¶ 26(b) applies because Applicant has not used illegal drugs for five years. This is an appropriate period of abstinence. Applicant met his burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

Guideline E – Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The following disqualifying condition potentially applies to Applicant's case:

AG ¶ 16(a) (deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities).

Applicant is alleged to have deliberately omitted his illegal marijuana use in 2010 in response to Section 23 of his security clearance application dated October 15, 2013. In his response to the FORM, Applicant states he did not knowingly falsify information because he believed that marijuana was legal in State A, the state where he resides and works. The relevant question in Section 23 did not specifically mention marijuana use. He disclosed the 2010 marijuana use to the investigator conducting his background investigation because she specifically mentioned marijuana and he wanted to cooperate as much as possible. I find Applicant did not intentionally falsify his security clearance application, because he believed marijuana use was legal in State A. He was not aware that marijuana use remained illegal under federal law.

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 the facts and circumstances surrounding this case. In addition to Applicant's illegal drug use, I considered he fully disclosed his illegal marijuana use to the investigator conducting his background investigation. He has not used marijuana for five years. He never purchased marijuana. In hindsight, Applicant should have used better judgment and looked into the Department of Defense policy regarding marijuana use in states where it is legal. Now that Applicant is informed that marijuana use remains illegal under federal law, he likely understands that additional illegal drug use may result in the revocation of his security clearance. He met his burden to overcome the security concerns raised by his one-time illegal drug use five years ago.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.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. Applicant is warned that any future use of marijuana violates federal law and remains a security concern which could result in the revocation of his security clearance. Eligibility for access to classified information is granted.

ERIN C. HOGAN
Administrative Judge