



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



In the matter of:

ISCR Case No. 14-04106

Applicant for Security Clearance

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel

For Applicant: *Pro se*

09/17/2015

Decision

COACHER, Robert E., Administrative Judge:

Applicant did not mitigate the drug involvement or the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On September 17, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H, drug involvement, and Guideline E, personal conduct. DOD acted 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 within the DOD on September 1, 2006.

Applicant answered the SOR on October 2, 2014, and elected to have his case decided on the written record. Department Counsel submitted the Government's File of Relevant Material (FORM) on May 19, 2015. The FORM was mailed to Applicant and

he was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He received the FORM on June 11, 2015. He did not submit any information objecting, refuting, explaining, or mitigating the information contained in the FORM. The Government's evidence (Items 1-4) was admitted into evidence without objection. The case was assigned to me on September 1, 2015.

Findings of Fact

Applicant admitted all the allegations in his answer to the SOR. Those admissions are adopted as findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 34 years old. He is single and has no children. He has worked for his current employer, a defense contractor, since November 2013. He earned a bachelor's degree in December 2007. He has never served in the military or previously held a security clearance.¹

Applicant's admitted conduct raised in the SOR concerning Guideline H includes using marijuana three to four times a year from 1998 through December 2013. He also purchased two to three grams of marijuana once or twice a year from 2004 through 2013. He admitted these uses and purchases in his January 2014 security clearance application. He also indicated that he intended to continue his use since he lived in a state where marijuana use is legal. In March 2014, he was interviewed by a defense investigator during his security clearance investigation. He told the investigator that he continues to use marijuana three to four times a year when he is skiing or camping with friends. When the investigator informed Applicant that marijuana use was illegal under federal law and asked him whether he intended to continue his use, Applicant gave an affirmative answer unless his employer tells him to stop. He is unaware of what his company's drug policy is and he has never been drug tested by the company. In his October 2014 answer to the SOR, he reaffirmed that he intended to continue his marijuana use unless told to stop doing so by his employer. His marijuana use and his future intentions to continue marijuana use were also cross-alleged as a personal conduct allegation. (SOR ¶ 2.a).²

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

¹ Item 1.

² Items 1-4.

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 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, 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 to obtain 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 about 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).

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the drug involvement security concern:

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 AG ¶ 25 and found the following relevant:

- (a) any drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Appellant illegally used marijuana from 1998 until 2014 and purchased marijuana from 2004 to 2014. He expressed his intent to continue his marijuana use. I find that the above disqualifying conditions apply.

I have considered all of the evidence in this case and the mitigating conditions under drug involvement AG ¶ 26 and found the following relevant:

- (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; and,
 - (4) a signed statement of intent with automatic revocation of clearance for any violation;

Applicant's admitted marijuana drug use and purchase happened as recently as 2014. His regular drug use over 16 years is troubling and a cause for concern. However, even more troubling was his expressed intent to continue his drug use unless told to stop by his employer. Even when told by the defense investigator that marijuana use was in violation of federal law, he still indicated he would continue his use.³ These circumstances lead me to conclude that his actions cast doubt on his current reliability, trustworthiness, and especially his judgment. AG ¶ 26(a) does not apply. Clearly, the

³ Regardless of state law, marijuana remains a controlled substance under schedule I of the Controlled Substance Act. Federal employees who use illegal drugs are not suitable for federal service. (See Memorandum of Director of U.S. Office of Personnel Management, Subject: Federal Laws and Policies Prohibiting Marijuana Use, May 26, 2015)

evidence does not support a demonstrated intent not to abuse drugs in the future, since he stated his intent was just the opposite. AG ¶ 26(b) does not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security concern:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying condition is potentially applicable:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant criminal use and purchase of marijuana and his expressed future intentions to continue such use creates a vulnerability to exploitation, manipulation, or duress. AG ¶ 16(a) applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

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

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

I considered all of the facts and circumstances surrounding marijuana use and his future intentions. Applicant's contact is likely to recur and he has not taken positive steps to reduce or eliminate his vulnerabilities. AG ¶¶ 17(c) and 17(e) do not 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 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 guideline and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant engaged in recent drug use and intends to continue his use in the future. Therefore, he failed to provide sufficient evidence to mitigate the security concerns.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the concerns for Guideline H, drug involvement, and Guideline E, personal conduct.

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
Subparagraphs 1.a – 1.b:	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 the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge