



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



In the matter of:)
)
) ISCR Case No. 11-11117
)
Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esq., Department Counsel
For Applicant: *Pro se*

01/08/2013

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H, drug involvement, and Guideline E, personal conduct. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On September 6, 2012, the Department of Defense issued to 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 effective within the Department of Defense for SORs issued after September 1, 2006.

On October 24, 2012, Applicant answered the SOR and elected to have his case decided on the written record. On November 8, 2012, Department Counsel submitted the Government's file of relevant material (FORM). The FORM was mailed to Applicant and it was received on November 28, 2012. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant provided additional information. The case was assigned to me on January 4, 2013.

Findings of Fact

Applicant admitted SOR allegation ¶ 1.a and denied allegation ¶ 2.a. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 32 years old. He married in 2011 and has no children. He earned a bachelor's degree in 2002 and a master's degree in 2011. He has held a Secret security clearance since 2003. He has worked for his present employer since 2010.

Applicant admitted he used marijuana while holding a security clearance. In his answer to the SOR he stated:

I admit I used marijuana approximately 15-20 times between August 2007 and December 2007. I recognize this was a serious breach of trust placed in me by the Government, and it is a mistake I am prepared to account for. While my intentions were medical and I did not, at the time, recognize myself as a security risk, I also recognize that this was not my decision to make.¹

He explained the circumstances of his marijuana use as follows:

I began experiencing sleep-onset insomnia in 2006. This corresponded with the start of my graduate studies, which was in addition to my normal full-time work schedule. I was also troubled by the recent suicide of my brother. The symptoms were mild and intermittent until mid-2007, at which time they became much worse. I tried over-the-counter sleep aids and several home remedies, which had no effect. I was also offered Ambien by a family member, which I declined.

An acquaintance of mine at school was a homeopathic specialist who also suffered from a similar affliction. She recommended small doses of medicinal marijuana during a period of relaxation an hour before bedtime, and provided me with a small amount and some instructions for use. I was warned only to take a small dose; otherwise I would potentially make it even more difficult to fall asleep. She had a prescription from her doctor, but I did not have a prescription myself, nor did I consult with a doctor at

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the time. In fact, I did not, at the time, feel comfortable visiting with a doctor at all, and had not been to one in many years.

Marijuana proved to be effective relief from my symptoms at first, and I used it whenever I had significant difficulty falling asleep. This was up to three times a week, although some weeks I went without it entirely. It stopped being effective near the end of use. I did not wish to increase the dosage. My use was private and at home.

During this period I developed two upper respiratory infections, the last of which was the last time I used marijuana. The infection was bad enough that I went to see a doctor, who prescribed antibiotics. I admitted I had smoked marijuana, but only very small quantities. She warned me that even small amounts can cause complications, and that the information I received from my acquaintance about marijuana was not in accord with most medical opinions.

I have since done research into the medical efficacy and the legality of marijuana, and both are highly dubious. There is certainly no federal ambiguity as to the legality of marijuana, nor is it ambiguous in any of the promises I made when I accepted a position of trust with the Government.

I was recommended a change in diet and exercise, since I do not wish to take pharmaceuticals. It took a few months to take effect, but I have not had significant issues with insomnia since. I eat a more-nutrient rich diet, and have taken up rock climbing, jiu jitsu, hiking, biking and swimming.

My wife [S], who I married in July 2011, admonished me for my use, and in our discussion of our future together, has made me promise to seek proper medical attention for all future ailments and to never use marijuana again.

I have not used marijuana since 2007, nor will I ever do so again. I have never used any other illegal drug at any time in my life, nor will I ever do so.

* * *

I no longer associate with my homeopathic acquaintance that provided me marijuana, or anyone else that abuses drugs or alcohol.

I have never lied to or misled an investigator, nor have I ever lied on a questionnaire or form. I have always been honest about my past and my intentions. I self-reported my use in June 2011.

* * *

I had been convinced, at the time that my use for medicinal purposes was excusable. This, I believed, exempted me from reporting requirements. I now recognize it was a serious mistake to use marijuana while in a position of trust, and then to justify not reporting my use directly after. Instead, I waited until my next investigation. I believed that the findings of that investigation were that I had mitigated the security risk, but I understand that I can be held accountable at any time.²

Applicant has been working in hazardous combat conditions. He provided a written statement indicating he has not used marijuana or any other controlled substance since 2007. The statement also included his intent not to use marijuana or any other controlled substance in the future. If he does, he understands and agrees that it will result in the automatic revocation of his security clearance. He provided copies of his performance evaluations for 2010 and 2011, which show he exceeds his employer's expectations.

Applicant also provided character letters. He is described as a person of excellent character, solid resolve, and a very ethical person. He has a keen sense of right and wrong. He is respected as a fellow employee and as a person. He is a self-starter, efficient, and highly productive. He is considered a valued team player. He is extremely reliable and trustworthy. There is no indication in the letters that were provided that the writers were aware of Applicant's prior illegal drug use while holding a security clearance.

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 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 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

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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, 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 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 an applicant may deliberately or inadvertently fail to 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).

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. 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.

I have considered the disqualifying conditions under AG ¶ 25 and concluded the following have been raised:

(a) any drug abuse; and

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

Applicant used marijuana approximately 15-20 times between August 2007 and December 2007, while he possessed a security clearance. I find both of the above disqualifying conditions apply.

I have considered all of the mitigating conditions under AG ¶ 26. The following two are potentially applicable:

(a) the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's 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 are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant decided to use marijuana over a five-month period to help him with his insomnia. He stated he was convinced at the time that his use for medicinal purposes was excusable. He chose not to seek medical treatment, but rather accepted the advice of a homeopathic acquaintance. After developing a respiratory infection, he sought medical attention and was advised that marijuana was not a treatment for insomnia. He later researched the subject and found its medical efficacy was highly dubious. Applicant held a security clearance during the time he used marijuana. Applicant's presumption that his use of marijuana was excusable shows poor judgment. It also cast doubt on his reliability, trustworthiness, and good judgment. I find AG ¶ 26(a) does not apply.

Applicant indicated in his answer that he has not abused illegal drugs since 2007. He stated in his response that he does not intend to use illegal drugs in the future, and he provided a written statement of intent with automatic revocation should a violation occur. He stated that he no longer associates with the homeopathic acquaintance or anyone else who abuses drugs. I find AG ¶ 26(b) applies.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern about personal conduct:

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.

I considered the disqualifying conditions under AG ¶ 16 that could raise a security concern and concluded the following has been raised:

(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.

Applicant used illegal drugs for five months while holding a security clearance. The above disqualifying condition applies.

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

(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;

(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

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

The same analysis provided under the drug involvement guideline is applicable under this guideline. Applicant was granted and entrusted with a security clearance in 2003. In 2007, he chose to violate that trust and repeatedly use illegal drugs. He rationalized his use was for medicinal reasons, but he did not seek medical attention. Applicant acknowledges he made a mistake, but his actions cast doubt about his good judgment, reliability, and trustworthiness. I find AG ¶ 17(c) does not apply.

This was not a situation where Applicant used marijuana once or twice while a teenager, but rather he used it consistently over a five-month period, while employed with a government contractor and holding a security clearance. It is Applicant's thought process and justification for using marijuana that is a concern. He rationalized why his actions were excusable and his conduct permissible. In fact, had he sought legitimate medical treatment, he might have found appropriate and legal relief. It is the aggravating factor that Applicant's use of marijuana was while he held a security clearance that makes his conduct serious. His actions were not minor and his behavior was not

infrequent. Applicant has acknowledged his behavior and has sought other treatment for his ailments. However, his subsequent actions are insufficient to overcome his repeated breach of trust while holding a security clearance. AG ¶ 17(d) and ¶ 17(e) partially 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 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 have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is 32 years old. He is an educated person who holds bachelor's and master's degrees. While holding a security clearance and over a five-month period, he repeatedly used marijuana. He was entrusted with a security clearance and each time he used marijuana he violated that trust. His explanation that his use was for medicinal purposes is not mitigating. Had he truly wanted to use marijuana for medical purposes he would have sought it from a doctor. Instead he received it from an acquaintance that was a homeopath. Applicant knew it was wrong and illegal, but rationalized his use. This is a security concern. 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 failed to mitigate the security concerns arising under 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
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 the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge