



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



In the matter of:)
)
) ISCR Case No. 14-04667
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Esq., Department Counsel
For Applicant: *Pro se*

02/06/2017

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense's (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. For an extended period of time ending in July 2011, Applicant used marijuana after having been granted a Department of Defense (DoD) security clearance. Due to changes in his life, the fact he self-reported his problem, and the passage of time, he has mitigated the drug involvement security concern. Clearance is granted.

History of the Case

On December 31, 2014, acting under the relevant Executive Order and DoD Directive,¹ the DoD issued a Statement of Reason (SOR) detailing drug involvement security concerns. DoD adjudicators could not find that it is clearly consistent with the

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD 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.

national interest to grant or continue Applicant's security clearance. On January 15, 2015, Applicant answered the SOR and requested a hearing. On December 4, 2015, I was assigned the case. The case was originally assigned to a different judge and set for hearing on September 14, 2015, but the hearing was cancelled. On February 17, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing resetting the hearing to be convened on February 26, 2016. The hearing was held as scheduled.

At the hearing, Government's Exhibits (Ex.) 1, 2, and 3 were admitted without objection. Applicant and his wife testified at the hearing. Applicant provided no exhibits at the hearing; however, the record was kept open to allow Applicant to present additional documents. Additional material was presented and admitted without objection as Ex. A. On March 7, 2016, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he admitted his use of marijuana following the death of his wife. His admissions are incorporated as facts. After a thorough review of the pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 47-year-old team leader who has worked for a defense contractor since July 1988 and he seeks to retain a security clearance. He has been with his company 28 years. (Tr. 24) He received secret clearances in November 1991 and June 2004. In October 2010, he married a second time, and they have three children. (Tr. 24) The marriage occurred 14 months after the death of his first wife.

On Sunday August 9, 2009, Applicant woke up and found that his wife had died next to him in bed of congestive heart failure during the night. (Tr. 20, 21) She was 44 years old. They had been married 18 years. Following his wife's death, during the grieving process, he had problem sleeping. A friend suggested that smoking marijuana prior to bed would help him sleep. (Ex. 2, Tr. 22) The friend provided some marijuana and Applicant used it. Applicant found that a couple of puffs of marijuana were sufficient to help him relax and fall asleep. He purchased a couple of joints a month from his friend. (Ex. 2)

Applicant had previously used marijuana while in high school. From the summer of 1983 through the summer of 1985, while in the ninth and tenth grades, he smoked marijuana. (Ex. 3) One of the problems he had with marijuana at that time was that it made him sleepy. (Tr. 23, 30) He stopped smoking because he wanted to graduate from high school. (Ex. 3) He graduated high school in June 1988 and started working for his current employer, a month later, in July 1988.

For six months, Applicant used marijuana nightly before he began to worry about its possible effects and the impact it would have on his clearance. He sought better ways to handle his stress. His use tapered off to those limited occasions "when he was really having a lot of trouble getting [to] sleep." (Ex. 2) He would attempt to go with using

marijuana and would make it a few days to as much as three weeks before the lack of sleep resulted in him using again (Tr. 32)

After about 14 months, Applicant remarried and his new wife² did not approve of marijuana. At the same time, Applicant was becoming more involved with his church³ and did not believe marijuana use fit in with his Christian beliefs. (Ex. 2)

Applicant sought help for his drinking and marijuana use through the employee assistance program. He was directed to an intense⁴ outpatient treatment program, which helped him to end his marijuana usage. (Tr. 24) He was never diagnosed as drug dependent or an abuser of drugs. He last used marijuana prior to his July 2011 entry into the treatment program. The three-month treatment program involved group counseling three times weekly, weekly family counseling, weekly individual counseling, study, and education. (Ex. A, Tr. 26) He was active with the workbooks and very interested in learning. (Tr. 41) He asserts he received a favorable prognosis.⁵ (Tr. 26) His current wife assisted him in the treatment program. She had no substance abuse problems.

Applicant obtained an Alcoholic Anonymous (AA) sponsor and was active in his involvement with AA. (Ex. A, Tr. 41) Grief support was received from his local church. (Ex. A) He had not sought grief counseling at the time of his wife's death. (Tr. 32)

Since entering the program, Applicant no longer associates with the friend who suggested he use marijuana. He does not associate with individuals who use illegal drugs. Applicant does not intend to use marijuana again and acknowledged it was a mistake to use marijuana. He stated he had learned from his mistake. (Tr. 28) He acknowledged his conduct was entirely his fault and he alone was to blame. (Tr. 28)

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 must be considered in evaluating an applicant's eligibility for access to classified information.

² Applicant and his wife knew each other from the age nine or ten. They went to the same church, were in the same church group, and graduated high school together. (Tr. 38) At one time they worked for the same employer before their lives diverged. In 2007, her husband had died in a motorcycle accident. Following the death of his wife and the death of her husband, their mothers got them together at Christmas 2009. (Tr. 39)

³ Applicant is a Sunday school teacher and, as of February 2014, an ordained deacon. (Tr. 12, 25)

⁴ Applicant had first considered a local treatment program, but he determined it was not as intense a treatment program as he wanted it to be. (Tr. 25)

⁵ Applicant asserts it was difficult getting information about his treatment due to the passage of time and the treatment center he attended no longer exists. (Ex. A) Following his treatment, Applicant threw away the material he had received from the program believing he would not need it in the future. (Tr. 26)

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, 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 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 of 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

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.

Following the death of Applicant's wife, he used marijuana until July 2011. His use occurred while holding a security clearance. AG ¶ 25 describes the applicable conditions that could raise a security concern and may be disqualifying:

- (a) any drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

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

In July 2011, Applicant last used marijuana and never intends to use illegal drugs again. He acknowledged his use was wrong. He realizes how stupid his decision was to use illegal drugs and what he risked. He is remorseful and ashamed of his actions. He takes responsibility for his actions and understands the consequences. He self-reported his usage. His misconduct was not discovered by his employer, but he chose to come forward and admit the problem and seek help for the problem. His usage was wrong and inappropriate, but he is the one to bring the problem to the attention of his employer.

The government has an interest in examining all relevant and material adverse information about an applicant before making a security clearance decision. The government relies on an applicant to truthfully disclose that adverse information in a timely fashion, not when it is perceived to be prudent or convenient. Further, an

applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent violations or other concerns in the future, something the government relies on to perform damage assessments and limit the compromise of sensitive information. Self identifying such a serious problem gives an indication Applicant is willing to put government interests ahead of his personal needs.

Applicant's marijuana use followed the death of his wife of 18 years. On Sunday morning August 9, 2009, Applicant awoke only to find that his wife had died beside him during the night. Following her death, a friend suggested to Applicant that he try marijuana to help him sleep. More than 30 years earlier, while in high school, he had used marijuana and knew it made him sleepy. He used marijuana when he could not get to sleep. For the first six months, he used it regularly taking a puff or two before bed. Then his use tapered off as he worried about his job and the effect marijuana was having on him. He would go days at a time and even up to three weeks before his lack of sleep caused him to use again. He realized he needed help to stop using and sought out an intensive treatment program. His use stopped in July 2011, more than five years ago.

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 within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. 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."⁶

⁶ ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year

Because of his abstention from drug use for five years, and his recognition of the adverse impact on his life that drug abuse could cause, the incompatibility of illegal use with his goals, and his stated desire never to use illegal drugs again, there is reasonable certitude that he will continue to abstain from drug use. Applicant voluntarily sought help for his illegal usage. He disclosed it on his e-QIP. His illegal drug use ending more than two years ago does not cast doubt on his current reliability, trustworthiness, or good judgment. Because he will not use illegal drugs in the future, confidence in his current reliability, trustworthiness and good judgment with respect to drug use is restored. AG ¶ 26(a) applies.

AG ¶ 26(b) applies because he has disassociated from drug-using associates and has not used marijuana in more than five years.

AG ¶ 26(d) applies. He and his wife received three months of intense outpatient treatment and he asserts he received a favorable prognosis. He was never diagnosed as having substance abuse or dependence issues. He had used cannabis to cope with stress and help him sleep.

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. Following the death of his spouse, a very traumatic event, Applicant started using marijuana to help him sleep. He should have sought other way to address his inability to sleep. Applicant self-reported his

from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

marijuana use. He was never arrested for possession of marijuana, and his marijuana use was not detected during urinalysis testing. He realizes his conduct was wrong and inappropriate. He is remorseful about his marijuana use and intends to never use illegal drugs again. He recognized his problem and sought professional help that he completed an intensive treatment program, and the passage of time indicates he will not use marijuana in the future.

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 Applicant mitigated the security concerns arising from his drug involvement.

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, Drug Involvement: 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.

CLAUDE R. HEINY II
Administrative Judge