



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



In the matter of:)
)
) ISCR Case No. 15-01958
)
Applicant for Security Clearance)

Appearances

For Government: James B. Norman, Esquire, Chief Department Counsel
For Applicant: *Pro se*

February 3, 2017

Decision

MOGUL, Martin H., Administrative Judge:

On November 9, 2015, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H for Applicant. (Item 2.) 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), effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant replied to the SOR (RSOR) in writing and signed it on November 20, 2015, and he requested that his case be decided on the written record in lieu of a hearing. (Item 2.) On January 5, 2016, the Department of Defense (DoD) issued an amendment to the SOR detailing the security concerns under Guideline J for Applicant. Applicant's written answer to the amended SOR is included with the amended SOR. (Item 4.) On February 16, 2016, Department Counsel issued the Department's written case. A complete copy of the file of relevant material (FORM) was provided to Applicant. In the FORM, Department Counsel offered 14 documentary exhibits. (Items 1-14.) Applicant was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. A response was due on March 26, 2016. Applicant

submitted no additional evidence. The case was assigned to this Administrative Judge on September 13, 2016. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Request for Administrative Notice

Department Counsel has requested that I take administrative notice of certain facts relating to the Federal Government's official policy with regard to state legalization of marijuana. The attached documents relating to this request were admitted into evidence as Items 8 through 14. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the FORM, and the admitted documents, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 38 years old and a high school graduate, who has attended college. He has never been married, but he lives with a cohabitant, and he has no children. Applicant has been employed as a Senior Information Security Engineer by his current employer, a defense contractor, since October 2012, and he seeks a DoD security clearance in connection with employment in the defense sector. (Item 1.)

Guideline H - Drug Involvement

The SOR lists two allegations (1.a. and 1.b.) under Adjudicative Guideline H.

1.a. The SOR alleges that Applicant, "used marijuana from approximately February 2010 to December 20, 2012, at least 8 to 10 times per month." Applicant denied this SOR allegation in his RSOR, contending that his frequency of marijuana usage was at most 2 to 8 times per month and only to combat the symptoms of Charcot Marie Tooth (CMT) at night. He also wrote, "Though CMT is an incurable progressive disease I have fortunately not needed to increase frequency of usage over the last 3 years since my original submission [of the SF 86]." (Item 2.)

1.b. The SOR alleges that Applicant, "intend[s] to continue to use marijuana indefinitely." (Item 2.) Applicant admitted this SOR allegation in his RSOR, writing, "I do intend to continue to take medical marijuana when needed as long as it continues to successfully relieve my neuropathic pain, cramping, and muscle spasms caused by CMT which can affect my ability to sleep.

Guideline J - Criminal Conduct

The SOR lists one allegation (2.a.) under Adjudicative Guideline J.

2.a. The SOR alleges that Applicant has engaged in criminal conduct, which creates doubt about a person's judgement, reliability, and trustworthiness. The specific allegations are those outlined in Paragraphs 1.a. and 1.b. of the SOR. (Item 4.) Applicant denied this SOR allegation in his RSOR, writing, "I am aware that marijuana is still classified as a schedule 1 drug and the fact that I am a legal medical marijuana patient in the State [A] can technically constitute criminal activity according to federal law." He also averred that he followed all of the laws of State A for medical marijuana patients, and he has registered with State A's department of public health. (Item 5.)

Current status of the Federal Government's official policy with regard to state legalization of marijuana.

I take administrative notice of the following facts regarding the Federal Government's official policy with regard to state legalization of marijuana. The Controlled Substances Act (CSA) makes it illegal under Federal law to manufacture, possess, or distribute certain drugs, including marijuana. Additionally, the Supreme Court has ruled that, under the Commerce Clause, Congress may ban the use of cannabis even when states approve its use for medical purposes. Use or possession of marijuana continues to be a criminal violation under Federal law - even if such use or possession complies with a particular state law making possession or use for medical purposes lawful in that state. Therefore, any use or possession of marijuana, even for purported medical purposes, continues to raise security concerns under Guidelines H and J. (Items 8 through 14.)

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. 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, 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 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).

Analysis

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 judgement and because it raises questions about a person’s ability or willingness to comply with laws, rules and regulations.

With respect to Guideline H, the Government has established its case. Applicant’s improper and illegal drug abuse, specifically the continued use of marijuana over the course of several years, and his stated intention to continue to use marijuana in the future, which as has been reviewed is a violation of Federal law, is of great concern, especially in light of his continued desire to have access to the nation’s secrets. Applicant’s overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement ¶ 25(a) “any drug abuse,” and (c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.”

Because of his intention to continue using marijuana, I cannot find that any of the mitigating conditions is applicable in this case.

In this case, the Government has met its initial burden of proving that Applicant has used marijuana in the past and will continue using marijuana in the future, under Guideline H. Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation, or mitigation, which is sufficient to overcome the Government's case against him. Accordingly, Guideline H of the SOR is concluded against Applicant.

Guideline J - Criminal Conduct

The Government has established that Applicant used marijuana in the past and will continue using marijuana in the future. Among the disqualifying conditions, I find that ¶ 31(a), "a single serious crime or multiple lesser offenses," applies in this case. ¶ 31(c), "allegations or admissions of criminal conduct, regardless of whether the person was formally charged," is also applicable to this case. I do not find that any of the mitigating conditions under ¶ 32 are applicable. I find Paragraph 2 Guideline J, Criminal Conduct, against Applicant.

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. As reviewed above, Applicant's continued marijuana use and stated desire to continue using marijuana is of great concern. Additionally, no evidence was introduced as to Applicant's character, or his current or past employment records; nor was there any evidence in the record that would give insight as to Applicant's current reliability, trustworthiness or good judgment. Based on all of the reasons cited above as to why the disqualifying conditions are applicable and controlling under Guidelines H and J, I find that the record evidence

leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the security concerns under the whole-person concept.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ 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 J:	AGAINST APPLICANT
Subparagraphs 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.

Martin H. Mogul
Administrative Judge