



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



In the matter of:)
)
) ISCR Case No. 15-02997
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: Michael L. Francisco, Esq.

02/01/2017

Decision

COACHER, Robert E., Administrative Judge:

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

Statement of the Case

On March 24, 2016, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement. DOD acted under Executive Order (EO) 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) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on April 14, 2016, and requested a hearing. I was assigned the case on May 24, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 22, 2016, and I convened the hearing as

scheduled on August 25, 2016. The Government offered exhibits (GE) 1 through 4, which I admitted into evidence without objection. The Government's discovery letter was marked as hearing exhibit (HE) I. Applicant testified, called two witnesses, and offered exhibits (AE) A and B, which I admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on September 2, 2016.

Findings of Fact

In Applicant's answer, he admitted all the allegations in the SOR (with some explanations). I adopt those admissions as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 46 years old. He is married and has one adult child from a previous relationship. He has worked for his current employer, a defense contractor, since 2009. The record does not contain any information on his educational background. He holds a security clearance.¹

The SOR alleges Applicant: (1) used Percocet without a prescription from approximately December 2012 to approximately September 2014, and sometime in January 2016²; (2) used marijuana from approximately July 2013 to approximately September 2014; (3) attended drug counseling from October 2013 to October 2014, and he was diagnosed with opioid abuse; and (4) in approximately April 2000, he failed a urinalysis test, given by a former employer, by testing positive for marijuana.

Applicant began using marijuana when he was 18 years old. He started using it sporadically on weekends, but by approximately 1990, he was using marijuana daily. He used "all day, every day." He smoked about one ounce of marijuana a month. When his son was born in 1993, he substantially reduced his use of marijuana. In 2000, he failed a urinalysis required by his employer and was fired from his job. This event caused him to stop using marijuana.³

In July 2013, Applicant began using marijuana again when his tenant (who rents Applicant's trailer home) gave him some. He regularly used marijuana four to five times per month. He smoked it at his home or in his tenant's home. Applicant claims he slowed his marijuana use down to twice per month until he completely stopped using it in September 2014. He held a security clearance during this time that he smoked

¹ Tr. 21, 23, 49-50; GE 1.

² Department Counsel moved to amend the SOR to add the January 2016 use, which was based upon Applicant's admission at the hearing. Applicant's counsel did not object to the motion. I granted the motion. See Tr. 56.

³ Tr. 33; GE 2.

marijuana. Applicant's tenant remains in that capacity, but Applicant claims the tenant no longer uses or gives him marijuana.⁴

Applicant began abusing the prescription narcotic Percocet⁵ when a neighbor supplied the drug to him beginning in December 2012. Applicant did not have a prescription for Percocet. His use increased until he was using Percocet every weekend. From January to March 2014, Applicant took a leave of absence from his job. He binged on Percocet taking as many as ten per day. He came back to work in March 2014 and continued to use the drug three days a week taking five pills per day. He claims to have stopped using Percocet in September 2014 when he was required to complete a security clearance application (SCA) for his periodic reinvestigation. He no longer has contact with his drug-supplying neighbor because he moved and they no longer stay in touch. He used Percocet and marijuana together frequently. The reason he used Percocet was to relax, not for any pain issues.⁶

Applicant reported these earlier uses of marijuana and Percocet to his CEO in October 2013 because he knew he would soon have to undergo a periodic reinvestigation for his security clearance. The CEO submitted an incident report describing Applicant's drug use and asked Applicant to attend drug counseling. Applicant saw a licensed clinical psychologist (Dr. F) about his drug use from October 2013 to December 2013. Applicant attended three individual sessions during this time. Dr. F diagnosed him as an opioid abuser. In 2014, Applicant attended three recovery-support-group sessions. Applicant completed his SCA in September 2014 and underwent his background interview in October 2014. In both his SCA and his interview, he stated his intent was never to use prescription drugs again without proper authorization. At hearing, Applicant admitted that he used Percocet without a proper prescription in January 2016. He obtained the drug from his wife without her permission or knowledge. He knew his use was wrong at the time. When asked why he used the drug, he stated that he "fell to temptation."⁷

Applicant reported his 2016 abuse of Percocet to his CEO. The CEO testified "it broke his heart" to hear about Applicant's recent drug use. After Applicant's first reported drug use in 2013, the CEO took it upon himself to meet with Applicant informally on a regular basis to see how he was doing. During this time, the CEO expected Applicant to stay drug free. Applicant and the CEO had worked together for about 16 years and the CEO thinks very highly of him. The CEO testified that Applicant is an outstanding employee and technically one of the best at what he does. He described him as honest and trustworthy. He recommends Applicant retain his security

⁴ Tr. 25-26; GE 2.

⁵ Percocet is a Schedule II narcotic under the Controlled Substance Act. See 21 CFR §§ 1308.11-1308.15.

⁶ Tr. 23-24, 37-38, 47; GE 2.

⁷ Tr. 27-30, 45, 48; GE 1-2, 4; AE B.

clearance despite his drug use. The CEO believed Applicant showed his integrity by reporting his drug use.⁸

The company president also testified for Applicant (wife of the CEO). She stated other employees in the company think highly of Applicant. He has one of the “cleanest” employee files in the company. She recommends that he retain his security clearance.⁹

Applicant went back to see Dr. F in July 2016. Dr. F provided a letter dated August 25, 2016, describing Applicant’s status. No updated diagnosis was stated. He stated Applicant attended a recovery support group in August 2016. Applicant testified that he is attending Narcotics Anonymous (NA) meetings. He also provided a letter stating his intent not to use illegal drugs or abuse prescription drugs. It further stated that he committed to automatic revocation of his security clearance upon any future violation.¹⁰

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.

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

⁸ Tr. 59, 63, 73-74, 79.

⁹ Tr. 82-83, 87, 90.

¹⁰ Tr. 44-45; AE A-B.

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 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 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 drug involvement AG ¶ 25 and found the following relevant:

- (a) any drug abuse;
- (b) testing positive for illegal drug use;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;
and
- (g) any illegal drug use after being granted a security clearance.

Applicant testing positive for marijuana when tested by an employer in 2000. Between August 2013 and September 2014, Applicant illegally used marijuana on multiple occasions. Between December 2012 and September 2014, and in January

2016, Applicant illegally used Percocet on multiple occasions. In December 2013, a licensed clinical psychologist diagnosed Applicant as being opioid dependent. His uses during these times occurred while he was holding a security clearance. I find that all the above disqualifying conditions apply.

I have considered all of the evidence in this case and the drug involvement mitigating conditions under 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; (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.

Applicant used marijuana on a regular basis between July 2013 and September 2014. All these uses were when he held a security clearance. He used marijuana after he reported such use to his CEO and after he began counseling with Dr. F. His extensive history of using marijuana weighs against him even though some amount of time has passed since his last use of marijuana. This coupled with his 2016 illegal use of Percocet is insufficient attenuation to demonstrate that future use of either drug is unlikely to occur. Great doubt is cast upon his current reliability, trustworthiness, and good judgment because of his recent use of Percocet after his CEO went to bat for him, after taking part in drug counseling, and after committing to not use illegal drugs in the future pursuant to his SCA statement and his statement during his background interview. AG ¶ 26(a) does not apply.

His statement of intent not to use illegal drugs in the future carries little weight since he has made similar statements in the past and continued using drugs despite those statements. Applicant's last admitted use of Percocet was in January 2016, which is an insufficient period of abstinence under these circumstances, particularly since he was undergoing his periodic security review and he held a security clearance when he used the drug. He did not establish that recurrence is unlikely. While he apparently has abstained from marijuana use for several years and stated he does not intend to use drugs in the future, his past actions, particularly his conscious decision to use marijuana and Percocet while holding a security clearance, cast doubt on his current reliability, trustworthiness, and good judgment. It is too soon to tell whether his use will recur. AG ¶ 26(b) does not apply.

There is insufficient evidence in the record to establish whether Applicant competed a prescribed drug treatment plan. The evidence from Dr. F only shows and Applicant attended three individual sessions and several group sessions. There is no information about a specific treatment plan, and there certainly is no evidence showing completion of any plan. Even if there was such a completed program in 2013 to 2014, Applicant's recurrence of Percocet abuse in 2016 is an action that precludes application of this mitigating condition. AG ¶ 26(d) does 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 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 considered the supportive testimony of Applicant's CEO and company president, along with Dr. F's letter of support. However, I also considered that he used marijuana and Percocet on multiple occasions while holding a security clearance and most recently in January 2016. Additionally, he was 45 years old at the time of his last use and was in the process of reapplying for a security clearance. Applicant provided insufficient evidence to mitigate the security concerns.

Overall, the record evidence leaves me with questions and doubts about 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.

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:
Subparagraphs 1.a-1.d:

AGAINST APPLICANT
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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge