



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



In the matter of:

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ISCR Case No. 15-04359

Applicant for Security Clearance

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel

For Applicant: *Pro se*

03/29/2017

Decision

MURPHY, Braden M., Administrative Judge:

Applicant has not provided sufficient evidence to mitigate the security concerns under Guideline H, drug involvement, due to his marijuana use while holding a security clearance. Applicant's eligibility for access to classified information is denied.

Statement of the Case

On March 1, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement. The action was taken 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) effective within the DOD on September 1, 2006.

Applicant answered the SOR on April 15, 2016. He admitted both allegations and elected to have his case decided on the written record, in lieu of a hearing. On May 12, 2016, Department Counsel submitted the Government's File of Relevant Material

(FORM). The Government submitted documents identified as Items 1-3. The FORM was mailed to Applicant, who received it on June 13, 2016. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the Government's evidence. He did not reply to the FORM. The SOR and the Answer (combined as Item 1) are the pleadings in the case. FORM Items 2 and 3 are admitted into evidence. The case was assigned to me on March 13, 2017.

Findings of Fact

Applicant admits both SOR allegations and provides a narrative statement. His admissions and other comments are incorporated into the 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 31 years old. He earned a bachelor's degree in December 2009. He works as a senior engineer for a defense contractor. He has worked for the same employer since February 2010. He was granted a security clearance in August 2012. He has never married and has no children.¹

Applicant submitted his most recent security clearance application (SCA) in August 2014. In it, he disclosed that he smoked marijuana twice: once in about May 2013 and once in about February 2014. He disclosed using drugs while possessing a security clearance.²

Applicant's Answer includes the following statement:

As explained during my investigation, I was struggling with situational depression, which impacted my good judgment. The occurrences of marijuana use was [sic] very infrequent (again, as explained during my investigation) to two (2) instances. The resolution of my usage was resolved by seeking help through a therapist and my primary care physician in addition to removing the cause of my situational depression (finding satisfying work and moving back to [City 1]). I have not used or acted in such a manner since the dates noted above and do not plan to fall back to such circumstances.³

Applicant has offered no documentary evidence to corroborate or detail his medical treatment, or any prognosis. He has offered no character evidence.

¹ Items 1, 2.

² Item 2.

³ Item 1 at 2.

In May 2013, while Applicant was living in City 1, State 1, he was at a friend's home, and the friend offered him marijuana in a pipe. Applicant took two puffs from it. In his interview, he referred to this person as his "then friend" but provided no details.⁴ In October 2013, Applicant moved to City 2, State 2, for his job. In February 2014, he went to a retail marijuana outlet in City 2 and purchased a marijuana-laced piece of chocolate candy for \$20.00. He went home and ate it. Afterwards, he felt lethargic and light-headed for about three hours.⁵

In his interview, he admitted knowing that his marijuana use was unlawful in City 1, State 1, but he used marijuana anyway. Under the laws of State 2, marijuana use was legal, but Applicant acknowledged that he was aware that marijuana use was prohibited for persons holding a security clearance and was considered a security violation. He used marijuana anyway. He did not disclose his drug use to his employer or to DOD until he filled out his SCA. After becoming depressed about his move, Applicant saw a therapist from February to May 2014. He was also prescribed medication for depression by his primary care physician from April to September 2014. Applicant indicated in his SCA and in his interview that he did not intend to use marijuana or other controlled substances in the future.⁶

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

⁴ Item 3 at 5.

⁵ Item 3.

⁶ Items 1, 2, 3.

on the evidence contained in the record. Likewise, I have not drawn 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 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 EO 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 for 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

- (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.

Applicant used and possessed marijuana on two occasions.⁷ The second instance came after he purchased a marijuana-laced candy bar. Both occurred while he held a security clearance. The above disqualifying conditions apply.

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

(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.

The Directive does not define "recent" and the DOHA Appeal Board has declined to adopt a "bright-line" rule as to the recency of conduct raising security concerns. The extent to which security concerns are mitigated through the passage of time is a question that must be resolved based on the evidence as a whole.⁸

Applicant used marijuana about three years ago, about two years before he answered the SOR. His use is not particularly recent. However, this is outweighed by the fact that Applicant knew on both occasions that marijuana use was against federal law, and that it was prohibited for those possessing a security clearance. His use of marijuana in 2014 also was the result of several conscious decisions: he sought out a marijuana retail outlet, went in and purchased the drug in candy form, and then went home and consumed it. Knowing what he was doing was wrong, he had several opportunities to alter his course, yet he did not do so. Considering these factors, Applicant's marijuana use cannot be mitigated solely because it is three years old.

Applicant's marijuana use occurred when he was depressed. Though he sought counseling and medical assistance for a time, there is no evidence that any counseling

⁷ The language of SOR ¶ 1.a suggests that Applicant's marijuana use "from May 2013 to February 2014" was more frequent. In fact, the record supports a finding that he used marijuana on two occasions nine months apart during this period.

⁸ See ISCR 15-02479 at 3 (App. Bd. Jul 27, 2016) (citing ISCR Case No. 14-01847 at 3 (App. Bd. Apr. 9, 2015)).

has continued (or that it is no longer necessary). There is no evidence beyond Applicant's own assertions that he will not find himself in similar circumstances again, or, if he does, that he now has the appropriate tools and insight for handling his depression more appropriately. Thus, there is insufficient evidence that his drug use occurred under circumstances that are unlikely to recur. His use of marijuana while holding a clearance casts doubt on his current reliability, trustworthiness and good judgment. Applicant has not set forth sufficient evidence that AG ¶ 26(a) applies.

Applicant has not shown sufficient evidence that he no longer associates with the person with whom he used marijuana in fall of 2013. He has not shown sufficient evidence that he has changed or avoided the environment where drugs were used. Even though his last marijuana use was about three years ago, Applicant has not set forth sufficient evidence that AG ¶ 26(b) applies.

Applicant sought counseling related to his depression, and was prescribed medication for it by his primary care physician. He provides few details, and no corroborating documentation, either about the circumstances of his treatment or of any prognosis. The evidence shows he twice succumbed to using marijuana, despite knowing that such use was illegal and prohibited while holding a security clearance. There is some evidence of mitigation under AG ¶ 26(d), but it is insufficient and does not outweigh the choices Applicant made in willingly violating state and federal law as well as the rules and regulations for those entrusted with access to classified information by twice using marijuana while holding a security clearance.

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 relevant 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 Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is 31 years old. After being granted a security clearance in August 2012, he chose to use marijuana twice over a nine-month period in 2013-2014, despite knowing it was illegal and prohibited for those possessing a clearance. 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 the drug involvement guideline.

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

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 a security clearance. Eligibility for access to classified information is denied.

Braden M. Murphy
Administrative Judge