



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-06571

Appearances

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

10/23/2017

Decision

CREAN, THOMAS M., Administrative Judge:

Based on a review of the pleadings, I find that Applicant failed to mitigate drug involvement security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on May 5, 2015, to obtain a security clearance required for a position with a defense contractor. (Item 3) This is Applicant's first request for a security clearance. Applicant was interviewed by a security investigator from the Office of Personnel Management (OPM) on June 17, 2015 (Item 4, Interview (PSI)). After reviewing the results of the background investigation, the Department of Defense (DOD) could not make the affirmative findings required to issue a security clearance. On June 14, 2016, DOD issued Applicant a Statement of Reasons (SOR) detailing security concerns for drug involvement (Guideline H). (Item 1) The action was taken under Executive Order (EO) 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 in the Department of Defense on September 1, 2006.

Applicant answered the SOR on July 5, 2016, admitting the allegation of marijuana use from April 2014 until at least April 2015 (SOR 1.a). He also admitted the allegation that he intended to use marijuana in the future (SOR 1.b). Applicant elected to have the matter decided on the written record. (Item 2) Department Counsel submitted the Government's written case on October 19, 2016. Applicant received a complete file of relevant material (FORM) on November 2, 2016, and he was provided the opportunity to file objections and to submit material to refute, extenuate, or mitigate the disqualifying conditions. (Item 5) Applicant did not provide additional information in response to the FORM. I was assigned the case on October 1, 2017.

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing National Security Adjudicative Guidelines for *Determining Eligibility for access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs) which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the September 1, 2006 AGs, and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's security clearance eligibility under the new AGs.

Procedural Issues

Applicant was advised in the FORM that the summary of the PSI (Item 4) was not authenticated and could not be considered over his objection. He was further advised that he could make any corrections, additions, or deletions to the summary to make it clear and accurate, and could object to the admission of the summary as not authenticated by a Government witness. He was additionally advised that if no objection was raised to the summary, the administrative judge could determine that he waived any objection to the admissibility of the PSI summary. Applicant did not respond to the FORM (Item 5), so he did not object to consideration of the PSI. Since Applicant did not object to consideration of the PSI, I will consider the information in the PSI in my decision.

Findings of Fact

After a thorough review of the case file, I make the following findings of fact. Applicant is 35-years-old. He graduated from high school in May 2001, and received a bachelor's degree in May 2005. He completed the academic requirements for his master's degree in December 2008, and started working for his defense contractor employer as a structural analysis engineer in January 2009. He received his master's degree in May 2009. He married in June 2006, and divorced in May 2010. He has no children. (Item 3, e-QIP, dated May 5, 2015)

Applicant admits, in response to question 23 of the e-QIP, that he used marijuana three times from April 2014 until April 2015. (SOR 1.a) He admits to once eating a brownie made with marijuana, once smoking a marijuana cigarette, and once being in a closed room inhaling while others smoked marijuana. He wrote that he never

used marijuana in such a way as to impede his responsibilities. He only used marijuana recreationally. (Item 3)

Applicant told the security investigator in the PSI that he used marijuana three times from April 2014 until April 2015 with two friends. His use was social and experimental, and he is not dependent on marijuana. He intends to recreationally use marijuana in the future if marijuana is legalized, or when he retires and he no longer requires a security clearance. He does not intend to use marijuana at any time so as to impede his job performance or responsibilities. He would not use marijuana if it impedes his eligibility for access to classified information. He needs a security clearance to reach his career objectives. (Item 4 at 4)

Applicant wrote in his response to the SOR that he used marijuana with varying frequency from April 2014 to April 2015. He noted that the drug was purchased where it could be purchased legally. He intends to use marijuana in the future. He used marijuana to better inform himself about marijuana because of the pending legislation to legalize marijuana. He believes the legal purchase of marijuana, and the responsible and moderate use marijuana is no different than the legal purchase and responsible and moderate use of alcohol. He stated that when the acquisition and use of marijuana is legalized, he would use marijuana responsibly and moderately. (Item 2)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the Administrative Guidelines. 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 common sense decision. According to AG ¶ 2(a), 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 national security eligibility will be resolved in favor of the 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 burden of persuasion 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 EO 10865 provides that decision 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 and sensitive information).

Analysis

Drug Involvement

The illegal use of a controlled substance to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Controlled substance means any “controlled substance” as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above. (AG ¶ 24)

Applicant admits that he used marijuana three times from April 2014 until April 2015. He also stated his intent to use marijuana in the future if it is declared a legal drug. Marijuana is a controlled substance. To use marijuana it had to be possessed. These facts raise the following Drug Involvement Disqualifying Conditions under AG ¶ 25:

(a) any substance misuse; and

(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

26: I considered the following Drug Involvement Mitigating Conditions under AG ¶

(a) the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome his problems, and has established a pattern of abstinence, including but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) avoiding the environment where drugs were used; and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any further involvement or misuse is grounds for revocation of national security eligibility.

While there is no "bright line" rule for determining when conduct is recent or sufficient time has passed since the incidents, a determination whether past conduct affects an individual's present reliability and trustworthiness must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without evidence of drug involvement, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation.

The mitigating conditions do not apply. Applicant admits to using marijuana three times from April 2014 until April 2015. It should be noted that Applicant completed his e-QIP in May 2015 and was interviewed in June 2015. The last information in the case file is as of June 2015. Applicant had an opportunity to update and amend the information in the file when he responded to the FORM in November 2016. Other than his statement that he only used marijuana three times, there are no other indications that this was his only use and that he stopped using illegal drugs. The timing of his self-reported use of marijuana shows his misuse to be frequent, recent, and deliberate.

Applicant stated an intent not to misuse controlled substances in the future, but he did not execute an agreement to that effect. The only evidence of his intent is his statement. His intent to not use marijuana in the future was conditioned on marijuana use being legal. His misuse could start at any time that he determines that the use is legal. Applicant has not provided sufficient information for me to be convinced that he has stopped misusing marijuana and will not use the illegal drug in the future. There is no evidence of the extent of his participating in and the results of drug treatment and

counseling programs. There are no evaluations from counselors as to his prognosis for not using illegal drugs in the future. He did not present any evidence that would bolster or corroborate his non-use of marijuana. Since Applicant provided no documentation to verify that he no longer uses illegal drugs; that he successfully completed a drug abuse treatment program; and that his statement of intent not to use illegal drugs in the future is unreliable, Applicant has failed to mitigate drug involvement security concerns.

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(d):

(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. Applicant admitted substance misuse from April 2014 until April 2015. He presented no evidence of counseling and rehabilitation. He stated an intent to use marijuana in the future if marijuana use is declared legal. There is no indication that he would not use until then. Overall, these facts leave me with questions and doubts about Applicant's judgment, reliability, trustworthiness, and eligibility and suitability for access to classified information. For all these reasons, I conclude that Applicant has not mitigated drug involvement security concerns. Eligibility for access to classified information is denied.

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

THOMAS M. CREAN
Administrative Judge