



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



In the matter of:)
)
) ISCR Case No. 16-00347
)
Applicant for Security Clearance)

Appearances

For Government: Andrew W. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

04/19/2018

Decision

COACHER, Robert E., Administrative Judge:

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

Statement of the Case

On August 29, 2016, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse. The 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, 2006.¹

¹ I decided this case using the AG implemented by DOD on June 8, 2017. However, I also considered this case under the previous AG implemented on September 1, 2006, and my conclusions are the same using either set of AG.

On November 10, 2016, Applicant answered the SOR and requested a hearing. The case was assigned to me on February 15, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 13, 2017, and the hearing was held on January 18, 2018.² The Government offered exhibits (GE) 1 and 2, which were admitted into evidence without objection. The Government's exhibit list was marked as hearing exhibit (HE) I. Applicant testified, but offered no exhibits. DOHA received the hearing transcript (Tr.) on January 29, 2018.

Findings of Fact

In Applicant's answer, he admitted the SOR allegations, with explanations. I adopt his 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 64 years old. He is married for the second time and has three adult children. He has worked in the same position since 1984, although his employer has changed over the years. He earned a Ph.D. in 1985. He has held a security clearance continuously since 1985.³

The SOR alleges Applicant used marijuana, about four to six times a week, from January 2015 to May 2015, during which time he held a security clearance.

Applicant testified that he began experiencing severe gastrointestinal (GI) pain about five years ago. His doctors associated the pain with a problem with his adrenal glands. He was prescribed medication, but it failed to alleviate his pain. He did not provide any documentary evidence of his medical condition. His internist suggested that he use marijuana to help with the pain. He explained to the doctor that he could not use marijuana because he held a security clearance. He also was aware that use of marijuana was prohibited by his employer. His internist opined that she did not think it would be a problem as long as he complied with state law. Applicant lives in a state where state law has decriminalized marijuana use. Early in 2015, when his GI pain persisted, Applicant applied for and received a medical marijuana license. The license allowed him to purchase marijuana in state-authorized dispensaries. After purchasing the marijuana, he would use it in his home in the evenings. Its use alleviated the pain for him. He used marijuana between four to six times a week from January to May 2015. He did not inform his facilities security officer or any other person at work about his decision to use marijuana. Applicant thought about his use every day and was concerned about the risk such use was to his employment. For this reason, and because his psychiatrist suggested an alternative to marijuana by using a cognitive

² This case was scheduled for hearing on two other earlier occasions, June 21, 2017, and August 15, 2017. Each time, the case was rescheduled and ultimately heard on January 18, 2018.

³ Tr. at 5, 19-20; GE 1.

approach to treating the pain, Applicant stopped using marijuana in May 2015. He claims not to have used since that time.⁴

Applicant did not list his marijuana use in his September 2015 Electronic Questionnaires for Investigations Processing (e-QIP) because he felt his use of marijuana was not illegal based upon state law. He voluntarily disclosed his marijuana use to a defense investigator during his December 2015 background interview. He testified and provided a statement that he never intends to abuse drugs of any sort; that he never intends to use medical marijuana, whether allowed by state law, so long as it remains a Schedule I drug or is otherwise forbidden by federal law or regulation; and he will refrain from using marijuana as long as it is forbidden by his employer.⁵

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(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.

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."

⁴ Tr. at 21-26, 29, 33, 35-36; Answer; GE 2.

⁵ Tr. at 33-34; GE 1-2.

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 about 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 and Substance Abuse

AG ¶ 24 expresses the security concern pertaining to drug involvement:

The illegal use of controlled substances, 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.

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

(a) any substance misuse; and

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant used marijuana on approximately four to six times weekly between January 2015 and May 2015 while holding a security clearance. I find both disqualifying conditions apply.

AG ¶ 26 provides conditions that could mitigate security concerns. Two potentially apply in this case:

(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; and

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

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

(2) changing or 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 future involvement or misuse is grounds for revocation of national security eligibility.

Applicant's use of marijuana was frequent during the time frame he used it. He claims abstinence since his last use in May 2015. Given the circumstances of his use (i.e. starting marijuana use after holding a security clearance for 30 years and knowing such use was against federal law and in violation of his employer's drug free policy), insufficient time has passed to determine if recurrence is unlikely. Although Applicant provided a signed statement of intent to abstain from all future illegal drug use, he failed to acknowledge within that statement that any future misuse would be grounds for revocation of his security clearance. Therefore, he does not receive full credit under this mitigating condition. Applicant's claimed abstention is insufficient to convince me that recurrence is unlikely. The recency of his past use while holding a security clearance and complete disregard for federal law casts doubt upon his current reliability, trustworthiness, and good judgment. AG ¶¶ 26(a) does not apply and 26(b) partially applies.

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 guideline 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 Applicant's medical issue, his lengthy service as a defense contract employee, and that he voluntarily disclosed his marijuana use to an investigator. However, I also considered that he made a conscious and calculated choice to violate federal law and his employer's drug policy by engaging in marijuana use while holding a security 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 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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge