



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-01257

Appearances

For Government: Alison O'connell, Esq., Department Counsel
For Applicant: *Pro se*

10/20/2017

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H (drug involvement and substance misuse). Applicant's eligibility for access to classified information is denied.

Statement of the Case

On September 30, 2016, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H. Applicant timely answered the SOR and elected to have his case decided on the written record.

Department Counsel submitted the Government's file of relevant material (FORM) on January 11, 2017. Applicant received the FORM on January 20, 2017, and had 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the Government's evidence, and he provided a one-page response to the FORM dated February 10, 2017 (Response). The Government's evidence, identified as Items 1 through 8, is admitted into evidence without objection. The case was assigned to me on October 1, 2017.

In Part IV, Amendment to the Statement of Reasons, of the FORM, astute Department Counsel withdrew paragraph 2 of the SOR and subparagraph 2 (a). This was merely a redundant cross-allegation of the same conduct alleged in SOR paragraph 1.

Findings of Fact¹

Applicant admitted the allegations in the SOR, and they are adopted herein as findings of fact. Applicant is 55 years old. He was married in 1985 and divorced in 1996, and has two grown sons. He obtained a bachelor's degree in physics in 1984, and has been employed as an orbital analyst by a federal contractor at a major research university since December 2007. Applicant previously worked full time at the same university laboratory, and he had a security clearance from 1985 -1999. Then, he took a job as a science teacher in another state, and remained as a part time consultant at the university laboratory from 1999 – 2003. In 2003, he returned to work full time, for the same federal contractor until his security clearance was revoked in 2005 for financial concerns. Subsequently, Applicant lost his job and was forced to file a Chapter 7 bankruptcy petition in January 2006.

Applicant appealed the previous 2005 revocation of his security clearance to the Defense Office of Hearings and Appeals (DOHA) and had a hearing in 2006.² Applicant appealed the DOHA administrative judge's decision, and eventually his security clearance was reinstated in September 2009. He was re-hired by the university in November 2009. Absent his security clearance from 2006 to 2009, Applicant moved in with his parents and took substitute teaching jobs.

Applicant completed a Personnel Security Questionnaire (PSQ) in September 1985.³ In an addendum page to that PSQ, Applicant provided a more detailed answer about his previous use of marijuana (MJ). He stated: "As far as frequency of use and future intensions (sic), I indulged occasionally in several parties while I attended both high school and college; although I have no intention of future indulgence. I have too many family-related responsibilities in which indulgence would interfere. This employment for [university laboratory] is far too important for me to jeopardize myself and my family."⁴

On September 7, 2015, Applicant completed a Security Clearance Application (SCA),⁵ and in section 23 (illegal drug use) he disclosed his use of MJ in June 2015 while

¹ Unless stated otherwise, the source of the information in this section is Applicant's September 7, 2015 Security Clearance Application (SCA) (Item 5) and his authenticated summary of clearance interview by a background investigator dated December 21, 2015 (Item 6).

² The decision, hearing transcript and statement of reasons and associated documents from the 2006 DOHA hearing are no longer available.

³ Item 8.

⁴ Item 8, p.5.

⁵ Item 5.

he possessed a security clearance.⁶ He volunteered that he suffered from a painful medical condition that required him to make frequent trips to the hospital emergency room where he was prescribed dilaudid (opiate) pills. However, he could not keep these pills down during attacks when his medical condition flared up. “Anyway, in the spring of 2015, it was suggested that I try to use marijuana during these attacks. I didn’t....on the fourth or fifth such attack, I broke down and asked a friend if they could get me a small quantity for me to try.”⁷

In his response to interrogatories, Applicant authenticated the summary of his clearance interview conducted in December 2015, making minor corrections.⁸ At page 6 of that summary, Applicant confirmed his use of MJ in June 2015. He stated that his son, Philip, had suggested he try smoking MJ to help relieve him of some of the pain. He elaborated that “Philip made a few phone calls and was able to get an old friend of another friend, . . . to bring a very tiny ball of marijuana that was contained in a homemade tinfoil pipe.”⁹ Applicant went on to state he was aware that using illegal drugs, to include MJ, goes against all security clearance policies and regulations but he was desperate at the time and knew that there was no chance of him getting caught because he was alone in his apartment at the time.¹⁰ In the same clearance interview, Applicant related that he used MJ once or twice a week in college from 1980 to 1984, but stopped when he was hired by a federal contractor in 1985. Then, between 1987 and 1991, when he returned home to his friends, Applicant again used MJ one to three times a year – while possessing a security clearance.

In his response to the FORM, Applicant noted “one factual error at page 5” of the FORM. In the opening sentence of paragraph 2. He states: “It was not my son Philip that had suggested the use of marijuana during one of my attacks, it was my Primary Care Physician that had given me that advice during an office visit in early 2015. On that occasion of my use, it was a medical emergency, and unrelated to any prior use.”¹¹ However, Applicant provided no medical prescription for MJ, or letter from his Primary Physician to corroborate this assertion, and I do not find it to be credible. He provided no medical documents to substantiate his painful condition. He provided no witness statements from his son Philip or any character references or performance evaluations. He provided no evidence of counseling or unequivocal statement of intent to abstain from using MJ in the future, on condition of automatic revocation of his security clearance.

⁶ Item 5, p.33.

⁷ Item 5, p.33.

⁸ Item 6.

⁹ Item 6.

¹⁰ Item 6, p. 7.

¹¹ Response.

Policies

DOD took action in this case 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 (AGs) implemented by DOD on September 1, 2006.

On December 10, 2016, the Director of National Intelligence signed Security Executive Agent Directive 4 (SEAD 4), implementing new AGs effective within the DOD on June 8, 2017.¹² Accordingly, I have applied the June 8, 2017 AGs in this decision.

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, 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 adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is 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.

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 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 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.

¹² Although I have decided this case under the adjudicative guidelines (AG) effective June 8, 2017, I also considered the case under the former AG effective on September 1, 2006, and my decision would be the same under either AG.

Analysis

Guideline H, Drug Involvement and Substance Misuse

¶ 24: The security concern for drug involvement and substance misuse is set out in AG

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.

¶ 25: The guideline notes several conditions that could raise security concerns under AG

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and

Applicant disclosed his collegiate use of MJ in his earlier 1985 PSQ. He signed an addendum page to question 15 of that 1985 PSQ, expressing his intent to refrain from future indulgence. He understood the importance of this issue. Yet, Applicant used marijuana while holding a security clearance repeatedly from 1987 to 1991. He knew that this violated security clearance policies and regulations. He smoked MJ again, purportedly ingesting one hit, in June 2015. He claims that this was a medical emergency and that he was desperate to get relief, but provides no substantiating documentation. Moreover, he provided contradictory accounts of who suggested that he use the MJ. This calls into question his ability or willingness to follow rules. The above-mentioned AG ¶ 25 disqualifying conditions apply and the focus shifts to which, if any, of the mitigating conditions apply.

AG ¶ 26 provides conditions that could mitigate security concerns. 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) 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 has continued to use MJ as recently as June 2015, even after he signed the earlier addendum page to his 1985 PSQ stating his intent not to indulge in the future. He has not abstained or signed a recent letter of intent to abstain in the future. He provided no evidence of completion of a substance-abuse- course or a medical MJ prescription from a medical professional. He has produced no evidence of disassociation from his former drug-using associates or a change in environment. Applicant claims to have an undocumented illness, but that is insufficient, without more, to mitigate his well-established pattern of illegal drug use. His conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) is not applicable, and AG ¶ 26(b) is partially applicable since he did self-report his MJ use in his 2015 SCA.

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. I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines. Notably, Applicant has worked over 25 years for a federal contractor directly supporting DOD's mission. He disclosed his MJ use in 1985, and again in his 2015 e-QIP. He concedes that he violated security clearance policies and regulations by using MJ while he possessed a security clearance from 1987 to 1991. Nonetheless, he deliberately smoked MJ again in June 2015, at age 53. Most importantly, Applicant has not unequivocally declared his intention to refrain from further use of illegal drugs. He undermined his own credibility by breeching earlier promises in his PSQ to abstain from future indulgence. He has not met his burden of persuasion.

Applicant's drug involvement and substance misuse remain a security concern. These offenses were not minor or infrequent, and they were not committed under such unusual circumstances that they are unlikely to recur. There is insufficient evidence to conclude that Applicant has acknowledged the egregiousness of his drug involvement or taken steps to alleviate the stressors or circumstances that contributed to his behavior to insure that it does not recur. He has not met his burden of persuasion. The record evidence leaves me with serious questions and doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under Guideline H.

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
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Subparagraphs 1.a through 1.c:	Against Applicant
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Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Robert J. Kilmartin
Administrative Judge

