



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-02056

Appearances

For Government: Andre M. Gregorian, Esquire
For Applicant: Alan Edmunds, Esq.

02/21/2018

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Statement of the Case

On December 4, 2016, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct).¹ Applicant answered the SOR allegations on January 12, 2017, and also requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). I was assigned the case on May 24, 2017. That same day, DOHA issued a notice of hearing setting the hearing for July 26, 2017. The hearing was convened as scheduled.

The Government offered three documents, accepted without objection as exhibits (Exs.) 1-3, as well as two hearing exhibits that were accepted without objection as HE

¹ The action was taken under Executive Order 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 or after September 1, 2006. Since that time, the AG were amended. The amended AG are now in effect for adjudications on or after June 8, 2017. This includes the decision here.

1-2.² Applicant offered testimony, two character witnesses, and 16 documents, which were accepted without objection as Exs. A-P. The record was kept open through August 11, 2017, to allow the parties to supplement the record. The transcript (Tr.) was received on August 3, 2017. On August 11, 2017, Applicant submitted one additional document, accepted without objection as Ex. Q, and the record was closed. Based on my review of the documentary evidence, testimony, and the Applicant's demeanor, I find that Applicant mitigated security concerns under Guideline H, but failed to mitigate Guideline E security concerns.

Findings of Fact

Applicant is a 37-year-old assistant engineer who has worked for the same entity since 2016. That business is a drug-free work place. Applicant was first granted a security clearance in 2005 while working for another employer.³ Applicant has earned both a bachelor's degree and a master's degree. He is single and has no children.

In July 2012, Applicant was at a gathering at a friend's home, in anticipation of a tailgate party and a rock concert. As the guests drank alcoholic beverages, somebody offered Applicant a chocolate chip cookie from a kitchen container. Encouraged to try what seemed to be a popular treat, he ate one despite his suspicions regarding its popularity with the pre-concert crowd. About 90 minutes later, Applicant began to feel lightheaded and nauseous. Feeling unwell, he distanced himself from the crowd and slept. He then confirmed that the cookie had been laced with a drug, marijuana. much to the amusement of some of those who knew what he had done.⁴ Applicant was understandably upset. He had never before used marijuana, an illegal drug. He has no desire to use it in the future.

Sometime around June of 2014, Applicant had surgery.⁵ He was prescribed oxycodone for pain relief, which he never used. In July 2014 he went on a brief

² What has been marked and accepted as Ex. 3 was initially proffered as a potential Ex. 4. After objection by Applicant, the Government withdrew its proffer of that document, and the remaining documents were renumbered accordingly.

³ Applicant has worked for at least one other entity since being employed by his original security clearance sponsor. He was aware illegal drug use is incompatible with the obligations of one maintaining a security clearance.

⁴ Applicant sensed that there was something special about the cookie, but he did not know it had marijuana in it. (Tr. 29, 40) After a few beers, and with a weakness for cookies, he readily accepted the cookie. (Tr. 41) In his 2015 SCA, Applicant did not note that he was unaware that the ingested cookie was laced with marijuana; rather, he wrote that he did not "intend to do it [use marijuana] again." (Ex. 1, at 27 of 34)

⁵ A 2016 interview referencing a polygraph test administered to Applicant in September 2014 indicated Applicant had surgery in 2011 and that he let his friend have oxycodone, discussed below, in 2012. Applicant's explanation and the balance of the documentation, however, indicate the years set forth in these findings as being the correct years, and that the inconsistent interview notes are erroneous. (Tr. 53-61, 67-68)

excursion with some pals. Once there, he found the oxycodone bottle in his duffle. When an old friend who suffers from chronic back pain learned that Applicant had oxycodone⁶ in his possession, he pestered Applicant into giving him some of the drug for a back pain flare up. The friend told Applicant he used the same prescription medication for his back issues. Applicant knew the friend had back pain issues and had used the drug. Applicant ultimately let his friend have two pills for pain. Later, however, he saw the friend take a pill with a beer.

At the time, Applicant did not know it was illegal to let another person use some on your own medication when that other individual had a prescription for the same drug. (Tr. 52) Applicant does not recall if the friend immediately swallowed or chewed the pills. (Tr. 31) He is not certain if the friend used them for pain or a “high.”

In June 2014, Applicant completed a security clearance application (SCA). In response to a question inquiring whether he had illegally used any controlled substances, to include marijuana, in the preceding seven years, Applicant answered “No.” He also answered “No” to a question inquiring whether he had ever used an illegal substance while possessing a security clearance. He did not mention the cookie incident in response to either question. Later, during a September 2014 polygraph test, Applicant reluctantly conceded, and corrected, his omission regarding the marijuana cookie. This occurred after one of his answers triggered a questionable result on the test. Applicant was evasive in these instances because he feared the two drug-related incidents would make him “look really bad” and possibly jeopardize his professional aspirations. (Tr. 48-49)

At the time the two drug-related instances at issue occurred, Applicant was unsure whether the security clearance granted to him in 2005 while working for a different entity was still in force. He has no intention of knowingly using marijuana in the future. He has not had contact with the individuals involved in these incidents for two years. He has never intentionally sought out drugs or drug-related venues.

Applicant has thrice passed drug tests in the seven months preceding the hearing. (Ex. G) He has never failed a drug test in the past. On his own volition, he sought a substance abuse assessment. He was found not to be at risk for substance abuse. (Tr. 28; Ex. H) He has never been clinically diagnosed as a substance abuser. He submitted 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. (Tr. 63; SOR Response) He has submitted positive recommendations, and witnesses describe him as conservative, trustworthy, and an excellent worker. (Tr. 13-24)

⁶ At various points in the record and in the transcript, the drug at issue is referred to as oxycodone, a generic medication, and OxyContin. The two are related, with OxyContin being a brand name, extended-release, version of oxycodone.

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. 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 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. The Government reposes a high degree of trust and confidence in those granted access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard such information. Decisions shall be in terms of the national interest and do not question the loyalty of an applicant.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern for this guideline is set forth in AG ¶ 24, where it is noted that the illegal use of a controlled substance, and the use of other substances that can 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. This is 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. Such use also raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

Here, Applicant admitted he used marijuana on one occasion in July 2012 and provided a friend with oxycodone, an opioid previously prescribed to Applicant, in July 2014. Both incidents occurred while he maintained a security clearance. Such facts have the potential to raise AG ¶ 25.

(a) any substance misuse, and

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

The Government's substantial evidence raises security concerns under Guideline H. Therefore, the burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate related security concerns. Under Guideline H, conditions that could mitigate security concerns arising from drug involvement and substance misuse are enumerated. The following mitigating conditions under AG ¶ 26 potentially apply:

(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 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 only use of marijuana was in 2012, almost six years ago. He permitted his friend to use two of his oxycodone tablets for back pain in 2014, about four years ago. These are not insignificant periods of time in the life of a now 37-year-old Applicant. He was correct in noting that the incidents regarding marijuana and the oxycodone could make him look bad. Taken together, however, these two isolated and distinctly different incidents are seemingly unrelated and do not represent a clear behavioral pattern, except to the extent that some kind of drug was involved both times.

These circumstances, however, are relatively unique. Applicant had no history of drug abuse before 2012. Regardless of whether he knew or suspected the cookie he ingested contained marijuana before eating the treat, his adverse reaction to the drug,

and his visible remorse concerning the matter, persuasively indicate he will stay clear of the drug in the future. As for the incident regarding oxycodone, it seems to have been the result of naïveté.

While Applicant did not know it was illegal to share prescription drugs, he did know his friend had legitimate back pain. While the drug could also be used to provide a “high,” there is no evidence that was the friend’s intent. More importantly, it is clear Applicant had no inclination to personally use the medication for any purpose. Applicant is now on notice that sharing controlled substances such as opioids is illegal, even amongst family and friends. Therefore, I find it highly unlikely he will again jeopardize his career and share prescriptions.

Today, Applicant is savvy about the significance of his two drug-related incidents, and of the security concerns they pose. He understands another incident could trigger the revocation of any security clearance granted. He acknowledges his drug involvement and substance misuse. He now understands the law as it pertains to prescription drugs. He has not again used marijuana or shared a prescribed drug in multiple years.

Applicant credibly articulated his intent to not be illegally involved with drugs in the future. He has not had contact with any of the individuals involved in these two incidents. He does not seek out venues where drugs are used. He provided 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. In light of the foregoing, I find that both AG ¶ 26(a) and AG ¶ 26(b)(1)-(3) apply.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified or sensitive information.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities, and

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

Here, Applicant answered “No” on his June 2014 SCA in response to questions a) inquiring whether he had illegally used any controlled substance, for example marijuana, since the age of 16 or in the preceding seven years, and b) asking whether he had ever illegally used a controlled substance while maintaining a security clearance.⁷ In truth, Applicant consumed marijuana in 2012 while maintain a security clearance. Moreover, Applicant was initially not forthcoming regarding all relevant facts about his marijuana use during a September 2014 polygraph, revealing previously concealed information only after being questioned specifically. Therefore, these two disqualifying conditions apply.

AG ¶ 17 describes conditions that could mitigate security concerns. Potentially applicable in this matter is AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, untrustworthiness, or good judgment.

Applicant knew that providing correct answers on his SCA and proactively volunteering candid answers during the polygraph could make him “look really bad” and possibly jeopardize his professional aspirations. Therefore, he did not mention the 2012 cookie incident. Under this guideline, it is not Applicant’s drug use that poses security concerns, it is the concealment of the facts related to that use. Granted, as noted under the preceding guideline, the facts related to his drug involvement are unique; the facts related to his lack of candor are not.

Applicant’s testimony and demeanor at the hearing, and the favorable impressions of his witnesses, all reflect that Applicant is presently capable of future good judgment. He now appreciates the significance of a reliable and forthcoming nature when maintaining a security clearance. I find that AG ¶ 17(c) applies in part.

Whole-Person Concept

Under the whole-person concept, one must evaluate security clearance eligibility by considering the totality of the applicant’s conduct and all relevant circumstances. Consideration shall be given to the nine adjudicative process factors listed at AG ¶ 2(d). The final determination must be an overall commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

⁷ As noted *infra*, the facts contained in SOR allegation 1.d are inconsistent with the rest of the record, and the Allegation, along with the corrected record on the years noted in a 2016 subject interview, are found in favor of Applicant.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and conducted a whole-person analysis based on the record. In addition to Applicant's past drug involvement and substance misuse, as well as issues of personal conduct, I considered his present life, candor and bearing at the hearing, and the entire record as a whole.

Applicant is a 37-year-old assistant engineer. He completed his post-secondary education at the master's level, worked for the same employer since 2016, and was first granted a security clearance in 2005 while working for another employer. He is single and has no children.

In July 2012, Applicant was at a gathering with friends. Despite his suspicions regarding what appeared to be a popular-pre concert treat, he set aside his concerns and ingested marijuana. The effect was unpleasant. After the fact, Applicant decided to be more conscientious, as well as to never use the drug in the future.

In 2014, he permitted a friend to take two of his prescribed oxycodone pills, ostensibly for back pain. What the intentions of the friend were regarding these tablets is unknown. What was credibly shown, however, was that Applicant was not aware of the repercussions from sharing prescribed medications with a friend who had the same prescription and a legitimate medical history regarding his need for the drug. Now aware of why this was both ill-advised and illegal, it is highly unlikely Applicant will again share prescription medications with others. Applicant mitigated drug involvement and substance misuse security concerns.

Applicant's personal conduct security concerns arise from concealing his drug use. Such intentional omissions are particularly worrisome. Most troubling, however, is that Applicant was maintaining a security clearance when he withheld relevant information on his June 2014 SCA and, initially, during his September 2014 polygraph test. He had maintained a security clearance since 2005. He knew or should have known that regardless of how he viewed or rationalized the instances at issue, he was obligated and expected to be candid with regard to all relevant facts.

Candor, in this matter, should have included disclosing his use of marijuana, intentional or unintentional. Instead, he purposefully withheld information that he felt would make him "look really bad" and possibly jeopardize his professional aspirations. Given these facts, and the time line of the events leading from the time of his drug use to his ultimate disclosure, I find that less than five years is insufficient to reestablish the needed level of trust to mitigate personal conduct security concerns. Clearance 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:

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|---------------------------|-------------------|
| Paragraph 1, Guideline H: | FOR APPLICANT |
| Subparagraphs 1.a-1.b: | For Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |
| Subparagraphs 2.a-2.c: | Against Applicant |
| Subparagraph 2.d: | For 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.

Arthur E. Marshall, Jr.
Administrative Judge