



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



In the matter of:

ISCR Case No. 16-02180

Applicant for Security Clearance

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel

For Applicant: *Pro se*

03/13/2018

Decision

WHITE, David M., Administrative Judge:

Applicant failed to mitigate the security concerns arising from his lengthy history of marijuana use. Based upon a review of the record as a whole, national security eligibility for access to classified information is denied.

History of Case

On June 1, 2015, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On November 16, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) 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 effective within the DoD after September 1, 2006.

Applicant answered the SOR in writing on December 12, 2016 (Answer), and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on February 13, 2017. DOHA issued a Notice of Hearing on May 2, 2017, setting the hearing for May 17, 2017. On that date, Department Counsel offered Government Exhibits (GE) 1 and 2 into evidence. Applicant testified and offered Applicant Exhibits (AE) A through D into evidence. All exhibits were admitted without objection. I granted Applicant's request to leave the record open until June 7, 2017, for possible submission of additional evidence. DOHA received the hearing transcript (Tr.) on May 23, 2017. No additional evidence was submitted by either party, and the record closed as scheduled.

Findings of Fact

Applicant is 46 years old. He is married with no children. He earned a bachelor's degree in 1995. He has been employed by a U.S. Government contractor since 2002, and seeks a security clearance for the first time in connection with that employment. He has no former military service. (GE 1; Tr. 6-7, 25.)

Applicant admitted that he was charged with the misdemeanor offenses of Possession of Marijuana and Possession of Drug Paraphernalia after a January 1996 police drug raid on the house he shared with a marijuana-growing roommate. In March 1996, he was convicted of Possession of Drug Paraphernalia, and sentenced to pay a fine and serve two years of probation. He was not required to undergo substance abuse assessment, counseling, or treatment. (Answer; GE 1; GE 2.)

Applicant stated on his June 2015 e-QIP that he had illegally used marijuana for both recreational and therapeutic purposes since September 1990. He reported that his most recent use was during November 2014; but in responding to the same question he also said, "In the past few months I have been using it to alleviate symptoms of . . . restless leg syndrome" and, "I use it for recreation in the evening 3-4 times a week. Whenever I feel the symptoms of RLS, I will use it then." He further said that he did not intend to use marijuana in the future because, "I am now in a position where it is financially beneficial to have this security clearance. Using marijuana is not as important as my family's financial position." (GE 1 at 28-29.)

Applicant also admitted on his June 2015 e-QIP that he illegally purchased marijuana for recreational use once or twice a year from September 1990 to May 2011. He said that after May 2011 he began using marijuana that a friend shared with him, so he had not illegally purchased that marijuana. He further said, "Since it has become legal in [his state of residence], I intend to purchase it through a licensed vendor when needed." He did not clarify why additional marijuana would be "needed" if, as he had previously stated, he did not intend to use it in the future. (GE 1 at 29.)

On March 21, 2016, Applicant was interviewed by an investigator from the Office of Personnel Management (OPM). He told the investigator that he had used marijuana in his residence, either alone or with his wife, three to four days per week from

September 1990 to April 2015, and then two days per month from April 2015 to mid-February 2016. He said that he was not sure why he listed November 2014 as the end date of his drug use on his e-QIP. He said that he had purchased the drug illegally from September 1990 through May 2011, and purchased it legally from marijuana stores from May 2011 to February 2016. He told the investigator that he stopped using marijuana in February 2016 because he wanted to work with, and obtain a security clearance from, the Federal Government if it was required of him to stop using the drug in order to hold the clearance. He further said that he does not keep in contact with any illegal drug users, and his wife and friends use marijuana legally since his wife does not hold a clearance or position with the government. In his September 26, 2016 response to DOHA interrogatories, Applicant reported using marijuana "3-4 days per week" from September 1990 to February 2016; and said that he does not associate with persons who use illegal substances or frequent places where they are used in his presence, with the clarification that marijuana use is legal in his state of residence. (GE 2.)

In Applicant's December 12, 2016 Answer, he provided a sworn statement of intent, "to cease all use and involvement with the drug marijuana." He said, "Although the drug is legal in the state of [his residence], I am now fully aware that its use is not consistent with federal standards for security clearance and positions of public trust. I have limited my exposure to the drug from friends who use it and currently refuse to use it if they offer." He further offered to complete a prescribed drug treatment program including aftercare requirements and obtain a favorable prognosis by a duly qualified medical professional, if that was deemed necessary by an administrative judge. I informed Applicant on the record that it was neither my function nor within my authority to impose any "necessary" conditions or actions with respect to his clearance eligibility. However, I offered and agreed to leave the record open for him to decide whether he wanted to obtain a professional prognosis or to undergo any assessment or treatment program. He did not submit any post-hearing information in that regard. (Answer; Tr. 36-37, 48-50.)

Applicant testified that he regularly used marijuana throughout college, but his use was "sporadic" thereafter for recreation and stress relief from one to three times per week. He further testified:

I am not a social marijuana smoker. That's not something that I do among groups. It's just not a drug for me that's a social drug. It's very much like having a drink at home and relaxing. That's what I use it primarily for, or used it primarily for, I should say.

He then restated that he had stopped using marijuana in February 2016 because he was made aware by the investigator that there's no allowance for state legalization versus Federal legalization. (Tr. 27-28.) According to GE 2, Applicant's entire security investigation lasted from March 2 through March 23, 2016, and his personal interview with the investigator took place on March 21, 2016. While Applicant testified that the investigator conducted a follow-up interview, the summary of the March 21 interview indicates that it was his original contact with the investigator. (GE 2; Tr.31.)

Applicant also testified that his wife had stopped using marijuana because she did not feel it was appropriate considering his not being able to use it. He said that he is rarely around friends using marijuana, because it ends up at parties and things like that, but he was never a social marijuana smoker and most of them are aware that he is “going through this process” so they do not offer it to him. He has never participated in drug treatment, counseling, or a 12-step program regarding drug use. (Tr.29.)

Applicant provided evidence of his excellent credit rating and his earnings history showing steady raises from 2009 through 2016. His performance reviews from 2012, and 2014 through 2016, reflected strong professional performance and a good reputation within his company. He also provided volunteer services in community theater productions, narrating books on tape, and as a “Foster Parent, Old Dog Haven.” (AE A through D.)

Policies

When evaluating an applicant’s national security eligibility, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant’s national security 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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(b) and 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 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.

According to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person who applies for national security eligibility seeks to enter 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 eligibility for access to classified information or assignment in sensitive duties. 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, "Any determination under this order adverse to an applicant shall be a determination 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 Misuse

The security concerns under the guideline for drug involvement and substance misuse are set out in AG ¶ 24:

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.

AG ¶ 25 describes two conditions that could raise security concerns and may be disqualifying in this case:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant admitted that he regularly misused marijuana, which he illegally purchased and possessed, from September 1990 through February 2016. The evidence supports security concerns under both of these disqualifying conditions.

AG ¶ 26 provides two conditions that could possibly mitigate the drug-related security concerns raised in this case based on Applicant's explanations:

(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;

(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 admittedly abused marijuana for more than 25 years on a regular basis, three to four times per week. His most recent admitted use was in February 2016, eight months after he submitted his application for a security clearance. This established pattern of frequent and recent drug abuse did not occur under such circumstances that recurrence is reasonably unlikely. Insufficient evidence was submitted to diminish the resulting doubts concerning his current reliability, trustworthiness, and good judgment. Mitigation under AG ¶ 26(a) was not established.

Applicant acknowledged his illegal use, possession, and purchase of marijuana, but failed to provide evidence of actions to overcome these problems, or establish a pattern of abstinence. He now claims, without evidentiary corroboration, that he has not used marijuana since February 2016. That was the month before his security interview when he now says he first learned that state legalization did not supersede Federal laws and policies criminalizing the use of marijuana and prohibiting security clearances for unlawful users of controlled substances.¹ However, he claimed on his June 2015 e-QIP that he had stopped using marijuana in November 2014 because having a security clearance to benefit his family's financial position was more important to him than smoking marijuana. Applicant referred to his marijuana use in the present tense on multiple occasions throughout this clearance adjudication process, while contemporaneously asserting that he had stopped using it many months previously. These contradictory statements greatly reduce the credibility of his uncorroborated claims to have permanently stopped misusing marijuana, and of his stated intention not

¹ See 50 USC § 3343 (the "Bond Amendment").

to resume such drug abuse in the future. He accordingly failed to establish mitigation under AG ¶ 20(b). Other potential mitigating conditions are inapplicable in the absence of prescription drug abuse or any form of drug treatment.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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(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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is a mature adult, who is accountable for his choices. He illegally abused marijuana on a regular and frequent basis for more than 25 years, until at least February 2016, and provided insufficient evidence to demonstrate rehabilitation or other permanent behavioral changes. The potential for pressure, exploitation, or duress related to this pattern of conduct remains undiminished, and recurrence was not shown to be unlikely.

Overall, the evidence creates significant doubt as to Applicant's judgment, reliability, eligibility, and suitability for a security clearance. He failed to meet his burden to mitigate the security concerns arising under the guideline for drug involvement and substance misuse.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:

AGAINST APPLICANT

Subparagraphs 1.a and 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 interests of national security to grant Applicant a security clearance. National security eligibility is denied.

DAVID M. WHITE
Administrative Judge