



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-02483

Appearances

For Government: Charles Hale, Esquire, Department Counsel
For Applicant: Victoria Williamson, Esquire

03/19/2018

Decision

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

Statement of the Case

On September 9, 2016, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct).¹ Applicant responded to the SOR on November 11, 2016, admitting all allegations with explanations. He also requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. I was assigned the case on March 28, 2017. DOHA issued a notice of hearing on June 13, 2017, setting the hearing for June 27, 2017. The hearing was convened as scheduled.

The Government offered three documents, accepted without objection as exhibits (Exs.) 1-3. Applicant offered testimony and introduced four character witnesses. The transcript (Tr.) was received on July 5, 2017, and the record was closed. Based on the

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 has been again amended. The present AG, applied here, is in effect for any adjudication on or after June 8, 2017. Applicant was advised before the hearing that this AG would apply in making this decision.

exhibits, testimony, and record as a whole, I find Applicant failed to mitigate security concerns under Guideline E (Personal Conduct).

Findings of Fact

Applicant is a 27-year-old systems engineer who has worked for the same employer since August 2015. He accepted this job after a period of unemployment, from May 2015 to August 2015. (Ex. 1, Security Clearance Application, at 15) Applicant has earned both an associate's and a master's degree. He is presently pursuing additional post-graduate studies. He is single and has no children. Applicant was first granted a security clearance in early 2013.

In about March 2014, Applicant and his former fiancée broke off their engagement after a four year relationship. It had been Applicant's first real relationship, and he thought of the woman as his best friend. Shortly thereafter, she began dating one of Applicant's former friends from work. The breakup was contentious and the two did not speak again for about a year. Meanwhile, Applicant began searching for friends to fill the resultant social void. In particular, Applicant became involved with pick-up games in a locally popular, and very competitive, sport. Those games usually ended in a local bar, where drinks and camaraderie were enjoyed.

One evening in May 2014, while out of town for a championship game, Applicant discovered one of his new teammates smoking marijuana, an illegal drug, in a tent behind a house. Although he had a security clearance at the time, and knew it to be illegal and antithetical to the maintenance of a security clearance, Applicant joined his new friend in smoking the drug. (Tr. 64)

Although Applicant knew "it was probably something [he] shouldn't have been doing," he used marijuana "three or more times" afterward, including once more with this same individual.² (Tr. 64) He continued to use the drug at least two other times more because he "just kind of stumbled upon it while [he] was intoxicated and [other people] were doing it. And then, [he] was like, oh, I'll do this with you guys. . . . [I]t was terrible judgment." (Tr. 65) After his first use of the drug, he next used marijuana with a high school friend of his brother. They used the drug outside Applicant's home. The last time Applicant used the drug was with an acquaintance at a local campground.

Since the period in time when this drug use occurred, from May 2014 through September 2014 or early October 2014, Applicant has had a falling out with the teammate with whom he used marijuana. (Tr. 66) He no longer sees his brother's schoolmate and the other friend has since moved, although the two maintain some impersonal contact through occasional Internet gaming. (Tr. 66) Applicant has no intent to use marijuana again in the future. (Tr. 66-67 75) Today, to deal with stress, he goes to the gym regularly and he has begun playing board games with friends he previously

² At times in the record, Applicant specifies that he used marijuana four times. (e.g., Tr. 72)

knew from undergraduate school. He also keeps busy with graduate studies and going out with his present girlfriend.

Applicant introduced four character witnesses. Each spoke of Applicant in laudatory terms. Three of the witnesses were unaware of the complete circumstances related to Applicant's marijuana usage or did not know about such use until recently. (Tr. 20-22, 31, 42, 53) Learning more about the facts and circumstances related to his marijuana use, however, did not lead any witness to withdraw his support of Applicant.

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 the AG, 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. The AG requires that any 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 the Directive, the Government must present evidence to establish controverted facts alleged in the SOR. In addition, 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.

Here, Applicant admitted he used marijuana, an illegal substance, between May 2014 and September or October 2014, on multiple occasions. This was after he had been granted a security clearance in 2013. This is sufficient to raise disqualifying conditions:

AG ¶ 25(a): any substance misuse, and

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position.

Under Guideline H, conditions that could mitigate security concerns arising from drug involvement and substance misuse are enumerated. The following mitigating conditions potentially apply here:

AG ¶ 26(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

AG ¶ 26(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 used marijuana almost four years ago, the year after he was determined eligible for a security clearance. At the time, Applicant was in his early 20s, well-educated, and had experience working for a defense contractor. He knew marijuana was illegal, and he knew drug use was incompatible while working in support of the Federal government while maintaining a security clearance. Despite these factors, he decided to use marijuana, apparently due to loneliness after a romantic

breakup and, as Applicant reported, “terrible judgment.” Other use was attributed to alcohol. Such factors are not so unique to imply drug use will never recur, despite his expressed intent not to do so again.

To his credit, however, Applicant was a highly credible witness, and his expression of intent not to use drugs again in the future seemed highly genuine. He only maintains contact with one of the individuals with whom he used marijuana, and that contact is limited to occasional Internet games. He does not intentionally frequent places where marijuana is present, nor does he seek out the company of those who use marijuana. He has been abstinent for nearly four years. He has made changes in his lifestyle with regard to socialization that help reduce stress without resorting to drugs. He has made new friends and is happily with a new girlfriend. In light of these factors, I find AG ¶ 26(b)(1)-(2) apply.

Guideline J, Criminal Conduct

The concern raised by criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Applicant admits he used marijuana, an illegal drug, on multiple occasions in 2014. This is sufficient to raise disqualifying conditions:

AG ¶ 31(a): a pattern of minor offenses, any of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness, and

AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

The following mitigating conditions are potentially relevant:

AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment, and

AG ¶ 32(d): there is evidence of successful rehabilitation; including but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or

higher education, good employment record, or constructive community involvement.

The incidents at issue occurred about four years ago. Applicant appears contrite in expressing his intention not to use illegal drugs again in the future. Such factors weigh in his favor with regard to the diminished possibility he will again indulge in marijuana use. Moreover, after four years, Applicant has demonstrated that he is capable of abstinence. He has moved on to a fuller life, found a new girlfriend, made new friends, and rekindled old acquaintances. He has returned to college to pursue more post-graduate studies and is excelling at work. Applicant has committed himself to a healthier lifestyle and he no longer socially interacts with his past drug-using friends. Therefore, I find that AG ¶ 32(a) and AG ¶ 32(d) 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. Here, Applicant admits he used marijuana on multiple occasions in 2014, after having been granted a security clearance in 2013. Therefore, the following disqualifying condition applies:

AG ¶ 16(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard classified or sensitive information.

This guideline provides seven potential mitigating conditions under AG ¶ 17. Two are potentially applicable under these facts:

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, trustworthiness, or good judgment; and

AG ¶ 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to

untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

While a period of nearly four years is adequate for demonstrating abstinence, here, more than illegal drug use is at issue. Under this guideline, Applicant admitted that he knowingly and willingly used that drug after being granted a security clearance. At the time, he was in his early 20s and had already embarked on a career. He knew marijuana was an illegal substance. He knew that its use was antithetical to the maintenance of a security clearance, and that his security clearance, at least in part, was dependent on his avoidance of such illegal drugs. His only explanations appear to be that he was lonely and in search of friends, intoxicated, or still distraught after a broken engagement.

None of Applicant's excuses are unique, nor are they sufficient to justify a knowing and actively volitional breach of the trust extended to him when he was granted security clearance eligibility. Under such facts, and given his disregard of the trust previously extended to him by the U.S. Government, more time to demonstrate successful abstinence and further evidence of both maturation and responsibility are needed for him to reestablish appropriate levels of reliability, trustworthiness, good judgment, and a willingness to comply with rules and regulations.

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(a). The final determination must be an overall commonsense judgment based on 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, and conducted a whole-person analysis based on the record. In addition to Applicant's past illegal drug involvement, criminal conduct, and personal conduct, I considered his present life, candor at the hearing, and credible explanations.

Applicant is a 27-year-old systems engineer. He has worked for the same defense contractor since 2015. Applicant has earned both an associate's and a master's degree, and is currently pursuing further post-graduate studies. He is single.

Applicant was first granted a security clearance in early 2013. In the following year, he and his fiancée had a bitter break up that was followed by her dating one of his friends. In search of new friends, he threw himself into local sports where, while out of town for a competition, he discovered a teammate using marijuana. Applicant joined him in using the drug. That year, he then used marijuana "three or more times."

Nearly four years of abstinence, combined with genuine contrition and appropriate lifestyle changes, are sufficient for a man of Applicant's years to mitigate drug involvement and criminal conduct security concerns. Personal conduct security concerns, however, bring the focus of Applicant's activities not just to his illegal drug use, but to his use while maintaining a security clearance. To use marijuana while maintaining a security clearance, whether carelessly or intentionally, constitutes a grievous breach of trust that strikes at the heart of the relationship between the U.S. Government and an applicant. This is because that relationship is fundamentally predicated on candor, honesty, reliability, and trustworthiness. More time demonstrating successful and an otherwise clean record in terms of personal conduct and behavior is, under these facts, not unreasonable demonstrate and reestablish the appropriate level of trust. Therefore, I find personal conduct security concerns remain unmitigated.

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:	FOR APPLICANT
Subparagraphs 1.a-1b:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	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 a security clearance. Eligibility for access to classified information is denied.

Arthur E. Marshall, Jr.
Administrative Judge