



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



In the matter of:)	
)	
)	ISCR Case No. 17-00258
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

11/29/2017

Decision

BENSON, Pamela, C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H (Drug Involvement and Substance Misuse). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 17, 2016. On March 1, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued him 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 (AG) effective within the DOD on September 1, 2006. On June 8, 2017, new AG were implemented and are effective for decisions issued on or after that date.¹

¹ I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same if the case was considered under the previous AG.

Applicant answered the SOR on March 27, 2017, and elected to have his case decided on the written record in lieu of a hearing. On May 15, 2017, Department Counsel submitted the Government's file of relevant material (FORM). Applicant received it on May 24, 2017. The Government's evidence is identified as Items 1 through 3. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. Applicant did not provide a response to the FORM, object to the Government's evidence, or submit documents. The case was assigned to me on September 26, 2017.

Findings of Fact

Applicant admitted all of the allegations in his Answer to the SOR. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 30 years old. He has never married and has no children. He earned a high school diploma in May 2004. He has been employed by his present employer, a federal contractor, since February 2016. In his SCA, Applicant disclosed that he had previously worked for federal contractors and he had been issued a DoD security clearance in June 2005. Applicant also disclosed that he used THC (marijuana) recreationally from about June 2007 through December 2015. He listed that he intended to use it in the future since it helped with his muscular pain and his anxiety. He also listed that marijuana had been recently legalized in his state. Applicant disclosed that he illegally purchased marijuana from August 2011 through February 2012. He also noted that he was technically eligible for a secret security clearance during his use and purchase of marijuana, but he believed it was inactive.²

Applicant was issued Interrogatories by the Defense Office of Hearings and Appeals which he answered in January 2017. He listed that he first used marijuana in June 2007 and his last use of marijuana occurred in December 2016. He listed that he no longer preferred to use marijuana since December 2016. He admitted that some of his friends continue to use marijuana and the possibility of encountering the use of marijuana in social settings was frequent since his state of residence had legalized the use of marijuana. Applicant had not completed or was currently involved in any type of recognized substance-abuse program. He listed that he had no intention of continuing his use of marijuana while working on a government contract. His last use of marijuana occurred in December 2016, and he listed that his recent use was due to a temporary lapse of judgment, as he had not used marijuana since approximately November 2015.³

In addition to his Interrogatory response, Applicant also affirmed that he had read the enclosed summary of his interview conducted on July 26, 2016. He also attached a one-page document to note the inaccuracies in the summary of interview. Applicant

² Item 2, 3.

³ Item 3.

signed before a Notary Public on January 30, 2017, affirming that with his added corrections noted in the attachment, he had found the interview report to be accurate.⁴

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG 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(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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. 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.

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

⁴ Item 3.

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 concern relating to the guideline for drug involvement and substance misuse is 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.

AG ¶ 25 provides conditions that could raise security concerns. The following are potentially applicable:

(a) any substance misuse; and

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

Applicant knowingly used marijuana beginning in June 2007 at the age of 20, and he continued to use it on occasion until his last use in December 2016, at the age of 29. He illegally purchased marijuana from 2011 through early 2012. He used marijuana after being granted a DoD security clearance in approximately June 2005. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 26 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; and

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions to overcome the 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 being 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.

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant's last use of marijuana was less than a year ago. He used marijuana from the age of 20 and continued to use marijuana for nine years. He acknowledged his use of marijuana in his SCA, and during his interview, however, he has listed in his January 2017 Interrogatory response that he continued to associate with select friends who are current users of marijuana in a state where it is legal. He also listed that he had not completed or was currently involved in a recognized substance-abuse treatment program. AG ¶ 26(a), (b) and (d) do not apply.

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 that guideline, but some warrant additional comment.

Applicant is 30 years old and has worked for his current employer since February 2016. He was issued a DoD security clearance in about June 2005. Applicant listed that he had a lapse in judgment and used marijuana in December 2016 for the last time. He chose to use marijuana despite holding a DoD security clearance while working on a government contract. He used marijuana after he submitted his SCA in January 2016,

and after his interview with a DoD authorized investigator in July 2016. In January 2017, just one month after his last use of marijuana, Applicant listed that it was his intention to never use marijuana again. He has not yet established a track record of abstention. His abstinence since December 2016 is an excellent start toward demonstrating his intent to remain drug free, but is not compelling in the context of his extensive drug use over the preceding nine-year period.

Applicant provided no evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his work history with respect to handling sensitive information and observation of security procedures. He submitted no character references describing his judgment, trustworthiness, integrity, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing. There was no evidence submitted by Applicant to mitigate any of the drug involvement concerns. In addition, there was no indication that Applicant had reported his most recent use of marijuana to his employer's security officer, as required. Although marijuana use had been legalized in the state where Applicant resides, marijuana use remains illegal under Federal law.⁵ The record evidence leaves me with questions and doubts as to 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 and Substance Misuse.

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 presented by the record in this case, it is not clearly consistent with the national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge

⁵ In a memorandum dated October 24, 2014, the Director of National Intelligence reaffirmed that the disregard of federal law concerning use, sale, or manufacture of marijuana is relevant in national security determinations regardless of changes to state laws concerning marijuana use.