



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-00330

Appearances

For Government: Brittany Muetzel, Esq., Department Counsel

For Applicant: *Pro se*

06/11/2018

Decision

LYNCH, Noreen A., Administrative Judge:

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

Statement of the Case

On April 27, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement and Substance Misuse. 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 on September 1, 2006.

Applicant answered the SOR in writing (Answer) on May 26, 2017. He requested a hearing before an administrative judge. The case was assigned to me on December 4, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing

on March 22, 2018, for a hearing on May 11, 2018. The hearing was held as scheduled. The Government offered Government Exhibits 1 through 2, which were admitted without objection. Applicant testified on his own behalf and presented two witnesses. I held the record open for submissions of documentation until May 25, 2018, and Applicant provided one exhibit, which was marked as Applicant Exhibit (AX) A, which was admitted. DOHA received the transcript of the hearing (Tr.) on May 22, 2018.

The SOR in this case was issued under the adjudicative guidelines that came into effect within the DOD on September 1, 2006. Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (December 10, 2016), implements new adjudicative guidelines, effective June 8, 2017. All national security eligibility decisions¹ issued on or after June 8, 2017, are to be decided using the new *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), as implemented in Appendix A of SEAD 4. I considered the previous adjudicative guidelines, as well as the new AG, in adjudicating Applicant's national security eligibility. My decision would be the same under either set of guidelines, although this decision is issued pursuant to the new AG.

Findings of Fact

Applicant is 28 years old. He is an IT manager for a defense contractor. He is married and has no children. He graduated from high school in 2008 and received an undergraduate degree in 2014. He has never held a security clearance. (GX 1) He has been employed with his current employer since 2016. He completed his security clearance application (SCA) in April 2016. On his SCA, he disclosed marijuana use from 2009 to December 2015.

Applicant was aware in January 2016 that his employer had a company policy against illicit drug use. He understands that marijuana is illegal. He used marijuana in college and afterwards with friends. (GX 2) He reported that he and his friend shared a bowl of marijuana. He noted in that interview that he smokes the drug because his current employer does not have a drug policy. His intent was to stop using marijuana should it be required for employment. He has not had any interactions with law enforcement with regard to illegal drugs.

In his SCA, Applicant reported that his last use was December 2015. However, he explained that he ceased all drug activities when he had the opportunity for his current employment. (GX 1) He stated that it was simple and easy to stop smoking the marijuana. (GE 2)

Applicant, at the hearing, testified that he had stopped using marijuana for about 11 months at one undefined period of time. (Tr. 19) He again stated that he never gave

¹ SEAD 4 ¶ D.7 defines "National Security Eligibility" as, "Eligibility for access to classified information or eligibility to hold a sensitive position, to include access to sensitive compartmented information, restricted data, and controlled or special access program information."

money for the marijuana, but would provide food in exchange. He still occasionally sees some of the friends with whom he smoked marijuana. (Tr. 21)

Applicant told his employer about his prior drug use, but not in detail. He remembers discussing it was after he completed his SCA. His current employer does drug testing. (Tr. 22) He has never been drug tested. Applicant acknowledged that he made a decision to use marijuana after he stated in his SCA that he had stopped. (Tr. 24) He said that it was Memorial Day weekend. (Tr. 22)

Upon questioning, Applicant initially admitted that he also used marijuana in 2017 about three times with some of the same friends. (Tr. 27) This was despite his earlier statement that he had matured and had concerns about his health and career opportunity. He was very cavalier that he just made a personal decision and that the usage had lessened. He admitted that he chose to violate company policy and the law. (Tr.29) Applicant stated that his last marijuana usage was in 2018, before the hearing. (Tr. 30)

Applicant's employer (president of the company) testified that he knew of some prior use of drugs by Applicant, but was not familiar with all of it. He stated that Applicant is a prompt, reliable worker. (Tr. 38) He stated that he has done an excellent job. The witness was not familiar with the specifics of the SOR.

A second witness agreed that a referral to the EAP would be a good idea. He emphasized that the current policy at Applicant's place of employment is zero drug tolerance. After hearing the testimony, he believes Applicant is an honest person. He is trusted with various information. (Tr. 46) He stated the company will take measures to see that Applicant adheres to the drug policy. He submitted a letter (AX A) after the hearing referring to random drug testing and a personal performance plan.

Policies

When evaluating an applicant's national security eligibility, 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 AG ¶ 2 describing 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 states 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 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.

Finally, Section 7 of EO 10865 provides that adverse decisions shall be “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 concern relating to the guideline for Drug Involvement and Substance Misuse is set forth at 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.

The guideline at AG ¶ 25 contains seven conditions that could raise a security concern and may be disqualifying. Three conditions are established:

(a) any substance misuse (see above definition); and

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

Applicant used marijuana with varying frequency from 2009 to 2018. He used it after signing the SCA and having an interview. He stated that he would not use it again, but he made the decision to do so on more than one occasion during the clearance, after discussing the drug. He believes his honesty outweighs the use. Therefore, AG ¶ 25 (a), and (f) are established.

The guideline at AG ¶ 26 contains four conditions that could mitigate security concerns. Two conditions may be 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 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's last drug use was as one month before the hearing in 2018. I do not find that sufficient time has transpired for mitigation in this case given the period of time in his life that he illegally used drugs. He told his employers about his marijuana use, signed a letter of intent, and they have agreed to monitor him. However, his lack of concern about breaking rules does not outweigh another promise to stop using marijuana. I did not find him credible about his intent to now stop using marijuana I do not find mitigation under this guideline.

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 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 national security eligibility 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 pertinent facts and circumstances surrounding this case. Applicant is respected by those who know him. He performs well at work. He is married. He reported his drug use to his employers, and disclosed use from 2009 to 2015 on his SCA.

Applicant kept using marijuana after he stated that he would not continue to do so in 2016. This is troubling. His employers are willing to monitor him, but the fact that he disregarded rules, including during the security clearance process leaves me with doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate concerns under Guideline H.

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**

Subparagraph 1.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 access to classified information. National security eligibility is denied.

Noreen A. Lynch
Administrative Judge