



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



In the matter of:)
)
) ISCR Case No. 17-01173
)
Applicant for Security Clearance)

Appearances

For Government: Brittany Muetzel, Esq., Department Counsel
For Applicant: Jack Roberts, Personal Representative

04/24/2018

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant mitigated the sole drug involvement and substance misuse security concern. Eligibility for access to classified information is granted.

Statement of the Case

On May 3, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing a security concern under Guideline H (drug involvement). The action was taken under Executive Order (Exec. Or.) 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).¹

Applicant responded to the SOR on May 15, 2017, and requested a hearing. The case was assigned to me on December 4, 2017. The Defense Office of Hearings and

¹ I decided this case using the AG implemented by DOD on June 8, 2017. However, I also considered this case under the previous AG implemented on September 1, 2006, and my conclusions are the same using either set of AG.

Appeals (DOHA) issued a notice of hearing on January 4, 2018, scheduling the hearing for January 29, 2018. I convened the hearing as scheduled.

The Government's exhibit list was appended to the record as Hearing Exhibit (HE) I. Government's Exhibit (GE) 1 was admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A and B, which were admitted in evidence without objection. DOHA received the hearing transcript (Tr.) on February 5, 2018.

Findings of Fact

Applicant admitted the sole SOR allegation. He is 44 years old. He obtained his high-school diploma in 1992 and a bachelor's degree in 2007. He served honorably in the U.S. military from 1993 to 2000, during which time he was deployed in 1996 and 1998. He has worked as a software and applications engineer for a defense contractor since July 2002. He has held a DOD security clearance since August 2011. He was previously married from 1992 to 2003, and he remarried in 2007. He has two adult children.²

Applicant first used marijuana when he was a teenager in high school. He next used marijuana in around 2005 when he visited the Caribbean. He again used marijuana four to five times, between July 2013 and December 2014. On each of these occasions in 2013 and 2014, he and his wife were at a neighbor's house party when he was offered marijuana by his neighbor's girlfriend. He was having a good time. His children were no longer living at home. It was the first time since he was a teenager that he was on his own and not responsible for anyone else. His wife did not use marijuana. He did not purchase the marijuana. He failed to consider the security implications of his actions.³

Applicant reported his 2005 marijuana use on his 2011 security clearance application (SCA). After his 2011 SCA, he was unsure whether he was granted a clearance, as he did not recall being told so, he was not read into any classified programs, he did not access any classified information, and he did not receive any security training. The first time he worked in a classified setting was in 2015, and the first time he received any security training was around his 2016 SCA, as discussed below.⁴

In 2014, when his employer asked him if he was interested in working on a classified project and when he was completing another SCA, it occurred to Applicant that he might have been granted a clearance after his 2011 SCA. His employer verified that he had been. As such, he realized that he made a terrible mistake when he used marijuana between 2013 and 2014, and he consequently disclosed it on his 2014 SCA.

² Response to the SOR; Tr. at 19-50; GE 1; AE A.

³ Tr. at 21-50; GE 1.

⁴ Tr. at 21-50; AE A.

He also simultaneously self-reported it to his then-Facility Security Officer (FSO), who entered an incident report on the Joint Personnel Adjudication System (JPAS) database. After he self-reported his marijuana use in 2014, Applicant was, for the first time since he began working for his employer, read onto a classified program and accessed classified information.⁵

When Applicant completed another SCA in March 2016, he continued to report his 2013 to 2014 marijuana use. He maintained therein that he was unsure whether he held a security clearance during the 2013 to 2014 period in which he used marijuana.⁶

Applicant acknowledged that his employer has had a policy against illegal drug use during the duration of his employment. His employer did not have a random drug testing policy, and he had not been drug tested since he was in the military. He acknowledged that he was aware of his employer's drug policy during the periods in which he used marijuana. He was also aware that marijuana is an illegal drug, and that illegal drug use is not permitted while holding a security clearance.⁷

Applicant realizes that his decision to use marijuana in 2013 to 2014 was an immature one. He regrets it. He is remorseful. He had not used marijuana since December 2014 and he had not used any other illicit drugs. He does not intend to use any illegal drugs in the future. He disassociated himself from individuals who use illegal drugs, to include his neighbor. If he ever finds himself in a situation where illegal drugs are being used, he will immediately leave. He signed a statement of intent to abstain from all drug involvement and substance misuse in the future, and he acknowledged that any future drug involvement or substance misuse would be grounds for revocation of his security clearance.⁸

Applicant received medals and awards while he served in the U.S. military. He takes his job seriously. He stated that he would not jeopardize himself, anyone else, or any classified information by participating in illegal activity or impairing his judgment with illegal drug use.⁹

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 to be used in evaluating an applicant's eligibility for access to classified information.

⁵ Tr. at 21-50; AE B.

⁶ Tr. at 21-50; GE 1; AE A.

⁷ Tr. at 21-50; GE 1.

⁸ Tr. at 21-50; GE 1; AE A.

⁹ Tr. at 34; GE 1.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines 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(a), 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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the 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." The applicant 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 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Exec. Or. 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* Exec. Or. 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 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. 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 notes conditions that could raise security concerns under AG ¶ 25. The disqualifying conditions potentially applicable in this case include:

- (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 four to five times between July 2013 and December 2014, after he had been granted a security clearance in 2011. AG ¶¶ 25(a) and 25(f) are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following 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 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.

Since December 2014, Applicant has not used marijuana and he disassociated himself from individuals who use illegal drugs. When he used marijuana between 2013 and 2014, he was unsure whether he had a clearance. Nonetheless, he acknowledged that he made a terrible mistake because he knew he completed an SCA in 2011 for a clearance, he knew that marijuana was an illegal drug, and he knew that his employer had a policy against illegal drug use. He was forthright about his 2013 to 2014 illegal drug use on both his 2014 and 2016 SCAs, and he disclosed it to his then-FSO in 2014.

Applicant credibly testified that he understood the necessity to refrain from using illegal drugs so long as he sought or held a security clearance. He signed a statement of intent to not use illegal drugs in the future. Applicant has demonstrated an appropriate period of abstinence from illegal drug use and that the use of illegal drugs is unlikely to recur. AG ¶¶ 26(a) and 26(b) are applicable.

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 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.

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.

I considered Applicant's demeanor during the hearing. He was sincere in expressing remorse for his actions and credible in stating that he learned his lesson and would abstain from any illegal drug use in the future. I also considered Applicant's honorable military service, to include his deployments in 1996 and 1998 and his receipt of medals and awards while he served in the U.S. military.

Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the drug involvement and substance misuse security concern.

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

Subparagraph 1.a: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant's continued eligibility for a security clearance. Eligibility for access to classified information is granted.

Candace Le'i Garcia
Administrative Judge