



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-03019

Appearances

For Government: Tara Karoian, Esq.
For Applicant: Todd Hinnen, Esq.

08/27/2018

Decision

DAM, Shari, Administrative Judge:

Applicant used marijuana with varying frequency from December 1971 to August 2015. He did not hold a security clearance during his involvement with marijuana. He mitigated the resulting security concerns. Based upon a review of the record as a whole, national security eligibility for access to classified information is granted.

History of Case

On September 15, 2015, Applicant submitted his first application for a security clearance (SCA). On September 29, 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). Applicant answered the SOR in writing on November 3, 2017 (Answer), and requested a hearing before an administrative judge.

The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on January 26, 2018. DOHA issued a Notice of Hearing on March 14, 2018, setting the hearing for April 14, 2018. Department Counsel offered Government Exhibits (GE) 1 and 2 into evidence. Applicant testified and offered Applicant Exhibits (AE) A through E into evidence. All exhibits were admitted. DOHA received the hearing transcript (Tr.) on May 3, 2018.

Findings of Fact

Applicant is 61 years old. He has been married since 1985. He and his wife have two adult children. In 1982, he earned a bachelor's degree; in 1996, he earned a master's degree; and in 2006, he completed a doctorate degree. He has consistently lived in his current state since about 1996, and for some times before that. (GE 1)

From 1996 to 2008, Applicant held a position of significant responsibility. From 2008 to 2011, he was a senior officer in a regional corporation. From 2011 to 2015, he was a senior officer for a company and taught part-time. In July 2015, he accepted a leadership position within a large organization. He also serves on federal and local commissions. (Tr. 19-24; GE 1)

Applicant disclosed in his September 2015 SCA that he used marijuana from December 1971 to August 2015. He reported that he had "one or two puffs on the weekend." He stated that he intended to use marijuana moderately in the future because it was legal in his state, unless he was "prohibited from using it in order to qualify for a security clearance." (GE 1 at 28-29.)

On June 22, 2017, Applicant was interviewed by an investigator from the Office of Personnel Management (OPM). He told the investigator that after filling out the SCA, he has thought more carefully about using marijuana and has not used it since August 2015, and does not intend to use it in the future. (Tr. 24-26; GE 2; AE A) Applicant values honesty, and based on that principle, he disclosed his history of marijuana use to the federal government and his employer. (Tr. 49)

Applicant began using marijuana when he was 14 years old and in high school. He continued using it over the years once or twice a week on the weekend, but not every weekend. He used it to relax. There were long periods of time when he did not use it. He did not use it for four or five years in the late 1980s and early 1990s, while working in a high-pressure position and having small children. He did not use it between 1998 and 2003, while working for his employer. During his tenure as a senior officer for a private company, between 2008 and 2012, he did not use marijuana because his employer had a zero tolerance policy for substance abuse. (Tr. 34-39, 42-43)

Applicant purchased marijuana while he was in high school, but never since then. He grew it in the early 1990's, when he was about 30 years old. Subsequently, he received it from friends. He no longer associates with people who use marijuana. (Tr. 35-38) Applicant's state has had an on and off history of prohibiting and permitting marijuana possession and use. He thought that sometime between 2006 and 2015, marijuana was legal in his home state. (Tr. 36)

Applicant voluntarily took three drug tests: in December 2017, March 2018, and April 2018. All were negative. (AE C) He submitted a March 2017 affidavit, in which he stated that he has not used marijuana since August 2015, a month before submitting his SCA. He has no intention to use it or other controlled substances in contravention of

federal or state law in the future. He recognizes the potential adverse significance and problems of using marijuana. He agreed to an automatic revocation of his clearance if it were determined that he used it in the future. (AE B)

Applicant has given serious thought to his past use of marijuana since starting his current position and completing the SCA. He acknowledged that his possession and use of marijuana was an error in judgment and inappropriate because of his professional responsibilities. He does not want to jeopardize his employer's ability to carry out its mission. He is committed to not possessing or using marijuana in the future. Marijuana is not an important part of his life. (Tr. 27, 46, 48) He is willing to submit to random drug screenings in the future, although his employer does not have a policy about drug testing. (Tr. 29, 40) His wife is aware of this situation. (Tr. 47)

Applicant submitted four letters of recommendation. Two are from retired military officers who have known Applicant for many years, and two are from former employers in private industry. All authors unequivocally state that Applicant demonstrates a high level of integrity, ethics, and honesty. They have no reservations about Applicant holding a security clearance. (Answer; AE E)

Policies

This case is adjudicated 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 June 8, 2017.

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 possessed and used marijuana from December 1971 to August 2015. The evidence establishes security concerns under both of the above disqualifying conditions.

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

- (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.

AG ¶ 26(a) can mitigate security concerns when drug use is not recent. There are no "bright line" rules for determining when such conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." The Appeal Board further stated that if the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).¹

¹ In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance,

Applicant's most recent admitted use of marijuana was in August 2015, a month before he submitted his SCA. At that time, marijuana was legal in his state, but marijuana possession was a violation of federal law. Prior to that month, he used it for many years and abstained periodically for several years, in particular when it was a violation of his employer's policy. Applicant's drug abuse was frequent over the years and did not occur under unusual circumstances. However, there is evidence of Applicant's consistent and successful professional achievements and standing during the years he used marijuana, which diminish doubts concerning his current reliability, trustworthiness, and good judgment. Mitigation is established under AG ¶ 26(a) because his marijuana use is not recent.

Applicant forthrightly disclosed and acknowledged his past illegal use, possession, and purchase of marijuana. For the past three years, he established a pattern of abstinence and credibly asserted, verbally and in writing, that he has no intention to use marijuana in the future, regardless of its legality in his state. He expressed a strong commitment to his employer and does not want to jeopardize its mission. He no longer associates with people who use marijuana. His wife and employer are aware of his history of marijuana use. He accordingly established 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;

and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

(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. I incorporated my comments under Guideline H in this whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

After listening to his testimony and observing his demeanor, I find Applicant to be truthful and straightforward. He exhibited remorse and embarrassment over his history of marijuana abuse. He understands that the possession of marijuana violates federal law and constitutes criminal conduct. He presented strong letters of recommendation attesting to his trustworthiness and ethics from people who have known and worked with him. He has not used marijuana for three years, and did not consistently use it from 1971 to 2015. He explained that he did not use or possess marijuana for numerous years because of his work environment or employer's drug policies. Although federal law has consistently criminalized marijuana, Applicant's state has a history of decriminalizing and recriminalizing it. These are significant mitigating factors in analyzing this case. However, the most persuasive fact in reaching a favorable decision is that Applicant fully and voluntarily disclosed his long history of illegal marijuana possession and use on his 2015 SCA, which disclosure led to this investigation and hearing. There is no other derogatory information in the file that would lead me to believe Applicant will break his commitment not to use marijuana in the future. His wife and employer are aware of the facts in this case, such that the potential for pressure or duress related to his past conduct is diminished and a recurrence is unlikely. Overall, the evidence does not create sufficient doubt as to Applicant's judgment, reliability, eligibility, and suitability for a security clearance. He met 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:

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 interests of national security to grant Applicant a security clearance. National security eligibility is granted.

SHARI DAM
Administrative Judge