



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



In the matter of:

ISCR Case No. 17-03022

Applicant for Security Clearance

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: *Pro se*

07/10/2018

Decision

DAM, Shari, Administrative Judge:

Applicant mitigated the drug involvement and substance misuse, and personal conduct security concerns. National security eligibility for access to classified information is granted.

History of Case

On September 12, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). 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 June 8, 2017.

Applicant answered the SOR in writing on September 27, 2017 (Answer), and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on February 14, 2018. DOHA issued a Notice

of Hearing on March 13, 2018, setting the hearing for April 16, 2018. Department Counsel offered Government Exhibits (GE) 1 through 3 into evidence. All exhibits were admitted without objection. Applicant testified but did not offer any exhibits into evidence. DOHA received the hearing transcript (Tr.) on April 24, 2018. The record remained open until May 14, 2018, to give Applicant an opportunity to provide documents. He timely submitted performance evaluations for years 2014, 2015, 2016, and 2017, which I marked as Applicant Exhibits (AE) A, B, C, and D. Department Counsel did not object to the documents, and they are admitted.

Findings of Fact

Applicant is 41 years old and has been married for 20 years. He and his wife have two children, ages 12 and 19 years old. In 1998, he earned a degree in engineering and began working for his current employer, a federal contractor. His wife also works as an engineer for a different employer. He coaches middle and high school sports. (Tr. 14-18) In November 2015, he submitted a security clearance application for re-investigation. He was initially granted a security clearance in 2005. (Tr. 8, 24; GE 1)

Applicant first used marijuana in 1995 with friends while in college. He used it approximately a dozen times from then until he graduated in 1998. Prior to starting employment in 1998, he underwent drug testing in accordance with his company's no-drug use policy. He has not been drug tested since starting his job. (Tr. 19-21)

In April 2005, Applicant submitted his first security clearance application (SCA-1). In Section 27, inquiring about illegal drug use, he disclosed that within the past seven years, he used marijuana one time in about July or August 2000. He stated he was on a weekend reunion with former college friends with whom he previously used marijuana at the time. He has not seen any of those friends for the past ten or more years. (Tr. 21-24; GE 2)

In November 2015, Applicant submitted a second security clearance application (SCA-2) for re-investigation. In Section 23, inquiring about illegal drug use within the past seven years, he disclosed that he used marijuana two or three times during one week, in either 2012 or 2013. (GE 1) He said he was on an annual week-long vacation with a group of friends and their family members when he used it. He acknowledged he had a security clearance at the time. He has not used marijuana since that week. (Tr. 24-29, 31)

Applicant admitted that he did not disclose his 2012 or 2013 usage in another question in Section 23 of SCA-2 that inquired: "Have you ever illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed." (GE 2) He interpreted this question as inquiring whether he had used an illegal drug while holding a clearance at any time other than he previously disclosed in the SCA-2. (Tr. 25-26) In his response to the SOR, he denied that he deliberately withheld requested information from the government. (Answer)

In response to another question in Section 23 of SCA-2, which inquired into Applicant's intention to use illegal substances in the future, he wrote: "Possibly will smoke or be exposed to marijuana in the future, especially now that it is legal in [state]. Use would be occasional as noted above [less than] 1 time per year." (GE 1) At the time he wrote that he did not understand that while using marijuana was not a state crime, it remained a federal crime, which prohibited him from using it while working for a federal contractor. He does not intend to use marijuana again while holding a clearance and would sign a statement regarding his intention. He no longer has friends that use marijuana and has not been present in situations where it is being smoked. It is not part of his lifestyle. (Tr. 29-33)

Applicant submitted performance evaluations for 2014, 2015, 2016, and 2017. His 2014 and 2015 summary evaluations document that he "exceeds expectations." (AE A, B) His 2016 and 2017 summary evaluations note some new responsibilities and rate him as "met expectations." (AE C, D)

Policies

When evaluating an applicant's suitability for 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 to be used in evaluating an applicant's national security eligibility.

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. The entire process is a conscientious scrutiny of applicable guidelines in the context 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 says that 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 applying 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 national security eligibility. 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 or sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, “[a]ny 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* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline H: Drug Involvement and Substance Misuse

AG ¶ 24 describes the security concern involving drug involvement and substance misuse as follows:

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 sets out conditions that could raise a security concern. Two may be disqualifying in this case:

(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 admitted that he used marijuana in 2000 with college friends, and during a vacation in either 2012 or 2013. He worked for a federal contractor and held a security clearance in 2012 and 2013. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate drug involvement and substance misuse security concerns are provided in AG ¶ 26. 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.

The last time Applicant used marijuana was during a week-long vacation in either 2012 or 2013, five or six years ago. That previous usage does not cast doubt on his current trustworthiness. The evidence establishes some mitigation under AG ¶ 26(a). He acknowledged his mistake. He no longer associates with people who use marijuana and is not in situations where it is present. Although he did not sign a statement that he intends to abstain from all illegal drugs in the future, he clearly emphasized that he has no intention to use marijuana while holding a security clearance or working for a federal contractor regardless of state laws. The evidence established mitigation under AG ¶¶ 26(b)(1), (2), and (3).

Guideline E: Personal Conduct

AG ¶ 15 explains the security concerns relating to personal conduct:

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. The following disqualifying conditions are potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications,

award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing; and

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Under this guideline, the SOR alleged in ¶ 2.a that Applicant deliberately failed to disclose in his SCA-2 that he used marijuana while holding a security clearance. Applicant denied that he intentionally falsified his SCA-2 when he answered, "No," to that question. He explained he misunderstood the question and believed he had disclosed the requested information in a previous question in the same section. After listening to his testimony and reviewing the pertinent language in Section 23 regarding illegal drug use while possessing a security clearance, I find Applicant's explanation is credible. This allegation is found in his favor.

Applicant illegally used marijuana while holding a position with a federal contractor and a security clearance. That conduct creates a potential vulnerability to exploitation as it is the type of conduct, which, if known, in certain communities could affect his professional standing. The evidence established the disqualifying condition under AG ¶ 16(e)(1). Applicant was aware of his employer's policy regarding the illegal use of drugs while working, having participated in a drug screening at the time of his employment. AG ¶ 16(f) applies.

AG ¶ 17 provides conditions that could mitigate security concerns. Two may potentially apply:

(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

(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.

The evidence establishes mitigation under AG ¶ 17(c) for the reasons articulated concerning AG ¶ 26(a) above. Although Applicant has not participated in structured counseling for drug issues, he acknowledged his mistake when he used marijuana while holding a security clearance and exhibited sincere remorse over his use of marijuana while working for a federal contractor. He fully understands the adverse ramifications future drug use would have on his employment. He no longer associates with others who use marijuana, and he is committed to not using it again, regardless of its availability and the circumstances within his state. He is aware that similar conduct could adversely affect his employment, such that it is unlikely to recur. AG ¶ 17(d) applies.

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; (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 have incorporated my comments under Guideline F and Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

After observing Applicant's demeanor and listening to his testimony, I found him to be candid and honest. He displayed remorse over his misconduct and the ramifications it has had in his life. Given those facts and the positive performance evaluations from his employer, I do not believe that he will engage in similar conduct in the future. Overall, the evidence no longer raises doubt as to Applicant's present eligibility and suitability for a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	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 continue Applicant's access to classified information. National security eligibility is granted.

SHARI DAM
Administrative Judge