



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



In the matter of:)
)
) ISCR Case No. 18-01253
)
)
Applicant for Security Clearance)

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: Michael J. DeNiro, Esq., Attorney At Law

October 26, 2018

Decision

Lokey Anderson, Darlene D., Administrative Judge:

Statement of the Case

On April 12, 2017; March 3, 2015; and February 13, 2012, Applicant submitted security clearance applications (e-QIP's). (Government Exhibits 1, 2, and 3.) On May 15, 2018, 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, 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 after June 8, 2017.

Applicant answered the SOR on June 4, 2018, and requested a hearing before an administrative judge. The case was assigned to me on August 27, 2018. The Defense Office of Hearings and Appeals issued a notice of hearing that same day, and the hearing was convened as scheduled on September 25, 2018. The Government

offered six exhibits, referred to as Government Exhibits 1 through 6, which were admitted without objection. The Applicant offered twelve exhibits, referred to as Applicant's Exhibits 1 through 12, which were admitted without objection. Applicant testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on October 4, 2018.

Findings of Fact

Applicant is 40 years old. He has a high school diploma, an Associates of Arts degree in Liberal Arts, and a number of Technical Certificates. He is employed by a defense contractor as a Technician 3. He is seeking to obtain a security clearance in connection with his employment.

Guideline H - Drug Involvement and Substance Misuse

The Government alleges that the Applicant has used controlled substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose, which can raise questions about an individual's reliability and trustworthiness.

Applicant was granted a security clearance in 2001. For the past seventeen years, he has worked for a number of defense contractors and admits that "back in the day" he was made aware that each of them had no drug tolerance policies. Over the years, Applicant has also received security briefings and was made aware of DoD policy that prohibits the use of illegal drugs that includes marijuana use. From 2007 to at least 2017, Applicant has consistently used prescription marijuana while holding a security clearance.¹

Applicant began working for his current employer in October 2016. He testified that before he was hired by his current employer, he told his supervisor that he had a prescription for marijuana and wanted to know if it was going to be an issue or problem of any kind. Applicant received an e-mail from his supervisor and was told that there could be a problem, and that he would let him know what he found out. Applicant stated that he was willing to do whatever it takes to keep his security clearance. (Tr. p. 39-40.)

To provide some background, in his 20's Applicant was diagnosed with depression and anxiety, and his regular physician prescribed him Zoloft. Applicant did not like the side-effects, and his neighbor suggested that he try marijuana as an alternative. Applicant sought out a physician who could prescribe marijuana, and started using it. Applicant states that he also continued using his Zoloft. Applicant admits that he used prescription marijuana consistently from approximately 2007 to at least December 2017, while working for a defense contractor and while holding a security clearance. Until recently, Applicant never told any of his employers that he was

¹ Applicant's Exhibits 8 and 9 are NOT prescriptions, but allow cultivation and use of marijuana under state law. Federal Law prohibits the use of marijuana, which is still a controlled substance.

using marijuana. Applicant believes that because he had a prescription for medical marijuana to treat his depression and anxiety, that his use of marijuana was not illegal.

In April 2017, Applicant's security clearance was up for renewal. Applicant testified that during his security clearance background investigation, he learned for the first time, from the OPM investigator, that he needed to stop using marijuana if he wanted to keep his clearance. (Tr. p. 35.)

Applicant submitted a statement of intent dated September 5, 2018, signed under penalty of perjury, that he has no intent to use illegal drugs in the future, and in the event that he does, his security clearance will result in automatic revocation. (Tr. p. 35 - 36.) Applicant testified that to control his depression and anxiety in the future, he will take his pills, and follow up with his regular doctor.

Guideline E – Personal Conduct

Applicant completed an Electronic Questionnaire for Investigations Processing (e-OIP) dated March 3, 2015. (Government Exhibit 1.) In Section 23 concerning illegal drug use, Applicant was asked if "in the past seven years, has he illegally used any drugs or controlled substances? Use of a drug or controlled substance includes injecting, snorting, inhaling, swallowing, experiencing with or otherwise consuming any drug or controlled substance?" The Applicant answered, "NO." This was a false response. Under the circumstances, Applicant deliberately failed to disclose his use of marijuana from 2007 to at least March 2015. Applicant knew or should have known that his marijuana use, even with a physician's prescription, is illegal under Federal Law.

Section 23, of the same questionnaire dated March 3, 2015, asked Applicant if "he has ever illegally used a controlled substance while possessing a security clearance other than previously listed?" The Applicant answered, "NO." This was a false response. Under the circumstances, Applicant deliberately failed to disclose his use of marijuana from 2007 to at least March 2015. Applicant knew or should have known that his marijuana use, even with a physician's prescription, while holding a security clearance, is illegal and against Federal law.

Applicant completed an Electronic Questionnaire for Investigations Processing (e-OIP) dated February 3, 2012. (Government Exhibit 2.) In response to Section 23 concerning his illegal drug use, Applicant was asked if "in the past seven years, have you illegally used any drugs or controlled substances? Use of a drug or controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with other otherwise consuming any drug or controlled substance?" The Applicant answered, "NO." This was a false response. Under the circumstances, Applicant deliberately failed to disclose his use of marijuana from 2007 to at least February 2012. Applicant knew or should have known that his marijuana use, even with a physician's prescription, is illegal under Federal Law.

Section 23 of the same questionnaire dated February 3, 2012, asked the Applicant if "he has ever illegally used or otherwise been involved with a drugs or

controlled substance while possessing a security clearance other than previously listed?" The Applicant answered, "NO." This was a false response. Under the circumstances, Applicant deliberately failed to disclose that he used marijuana after being granted a security clearance in April 2007. Applicant knew or should have known that his marijuana use, even with a physician's prescription, while holding a security clearance is illegal and against Federal law.

Letters of recommendation from Applicant's regional manager and various coworkers are favorable and attest to Applicant's great work ethic, attention to detail, job performance, and dedication to his co-workers. Applicant's regional manager adds the fact that Applicant has been under a doctor's prescription for medical marijuana, which has had no effect on his job performance. In their opinion Applicant is trustworthy and honest, and they recommend him for a security clearance. (Applicant's Exhibits 2 through 12.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). 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.

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 AG ¶ 2 describing 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 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.

Directive ¶ E3.1.14, requires the Government to present evidence that establishes 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person who applies for access to classified information 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 access to classified information. 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 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 three conditions that could raise a security concern and may be disqualifying:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia, and
- (f) any illegal drug use while granted access to classified information or holding sensitive position.

The guideline at AG ¶ 26 contains conditions that could mitigate security concerns. None of the conditions are 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.

None of the mitigating factors demonstrate full mitigation. Applicant is not young and immature, with little or no experience in the defense industry. He is a 40-year-old man, who has worked in the defense industry for the past seventeen years, and has held a security clearance most of that time. He has also used marijuana for most of that time. Interesting in this case, is that he has never told his employers in the past that he has been using marijuana. Applicant contends that because he had a prescription for marijuana use, he did not use it illegally. Applicant is wrong. Applicant was entrusted with the privilege of holding a security clearance and is expected to know and understand the rules and regulations that apply to him. While holding a security clearance, an individual is held to a higher standard. Applicant admits that he knew and has known since “back in the day” that illegal drug use, including the use of marijuana, is prohibited in the defense industry. Applicant also admits that he was been told about his company’s policies and DoD policy that prohibit marijuana use. Over the years, he has been privy to numerous security briefings that consistently review the drug use policy information. Given his long history with the defense industry, he knew or should have known that his use of marijuana, even with a “prescription” is prohibited while holding a security clearance. If nothing more, he should have clarified the matter years ago, when he started using marijuana, which would have avoided this situation.

Guideline E - Personal Conduct

The security concern for the personal conduct guideline is set out in AG ¶ 15:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant deliberately failed to disclose his marijuana use on two of his security clearance applications. This raises serious questions about his credibility, and indicates behavior that shows questionable judgment, unreliability, and untrustworthiness.

None of the mitigating conditions apply under AG¶ 17 are applicable. (a) the individual did not make a prompt or good-faith effort to correct the falsifications; (b) the concealment was not caused or contributed by advice of legal counsel or a person with professional responsibilities for advising or instructing the individual concerning security processes; (c) the offense was not minor, and the behavior was not infrequent . . . ; (d), (e), (f), and (g) 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 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 facts and circumstances surrounding this case. I have incorporated my comments under Guideline H and Guideline E in my whole-person analysis. Applicant has failed to provide sufficient evidence to demonstrate that he meets the qualifications for a security clearance.

Overall, the record evidence leaves me with many 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 Drug Involvement and Substance Misuse, and Personal Conduct security concerns.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	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 national security eligibility for a security clearance. Eligibility for access to classified information is denied.

Darlene Lokey Anderson
Administrative Judge