



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



In the matter of:)
)
) ISCR Case No. 14-03522
)
Applicant for Security Clearance)

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: Andrew S. Wentworth, Esq.

11/15/2015

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, drug involvement, and Guideline E, personal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On November 7, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement, and Guideline E, personal conduct. DOD acted 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) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on December 15, 2014, and requested a hearing. The case was originally assigned to another judge on February 27, 2015, but was

continued to allow Applicant to retain counsel. He did so, and the case was reassigned to me on May 27, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 11, 2015, and the hearing was convened as scheduled on July 14, 2015. The Government offered exhibits (GE) 1 through 3, which were admitted into evidence without objection. The Government's exhibit index was marked as hearing exhibit (HE) I. Applicant testified and offered exhibits (AE) A through T, which were admitted into evidence without objection. Applicant's exhibit index was marked as HE II. DOHA received the hearing transcript (Tr.) on July 24, 2015.

Findings of Fact

In Applicant's answer, he admitted all the allegations in the SOR. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 62 years old. He is married and has three children. His youngest daughter lives with him along with her two children and one other grandchild. He has worked for a defense contractor for 32 years. He has a high school diploma and has technical training. He has held a security clearance for 32 years, including 10 years holding a top secret clearance.¹

Applicant's conduct raised in the SOR includes: (1) using marijuana from August to November 2011 after being granted a security clearance (SOR ¶ 1.a); and (2) in November 2011 being arrested for possession of a dangerous drug without a prescription and driving under the influence (DUI) of drugs. He pleaded guilty to the DUI and was sentenced in July 2013 (SOR ¶ 1.b). Both of these allegations were cross-alleged as personal conduct disqualifying conduct (SOR ¶ 2.a).

Applicant suffered a serious back injury in 2009. As a result of the back injury, he was prescribed various pain medicines including hydrocodone and morphine sulfur. He was also prescribed some muscle relaxers, but these tended to make his judgement "blurred." Applicant experienced smoking marijuana in the 1970s. He was arrested several times for using marijuana during that time. He remembered that marijuana helped him sleep. From August to November 2011, he resumed using marijuana to help him sleep. He held a security clearance at this time. He used marijuana two to three times per week before he went to bed. His child and grandchildren were living with him when he was using marijuana. He obtained the marijuana from an acquaintance he knew from the 1970s. He bought one ounce for \$40. He admitted knowing that using marijuana was against his company's drug policy and that it could cause him problems because of his security clearance, yet he used it anyway. He did not disclose his marijuana use to anyone at work.²

¹ Tr. 27, 48-49; GE 1.

² Tr. 28-29, 34-35, 37-39, 43-44, 46, 49; GE 3; AE S-T.

In November 2011, Applicant was driving to work when he had a flat tire. A state trooper pulled over to assist Applicant. Applicant had prescription drugs in an unmarked pill container and could not produce a valid prescription for the trooper. The trooper asked Applicant to perform some field sobriety tests, which he failed. He was arrested and taken to a location where a blood test was performed and which showed a positive result for the presence of marijuana (THC) in his system. He was charged with DUI as a result of the blood test. He was not prosecuted for the prescription drug issue, but pleaded guilty to the DUI charge. He was sentenced in July 2013 and completed all requirements of his sentence. He claims that he has not used marijuana since the day he was arrested and does not intend to in the future.³

Applicant still suffers from his back condition and remains in constant pain. He does not intend to undergo surgery for the condition. He remains on prescription pain medicine.⁴

Applicant offered documents showing job-related awards he received over the years. He also included his job performance evaluations from 2009 to 2014, which show his overall performance ranges between “exceeds expectations” to “exceptional.”⁵

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 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 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 access to classified information will be resolved in favor of national security.” In reaching this

³ Tr. 29-31, 39-40; GE 2-3.

⁴ Tr. 49-50, 53; AE T-S.

⁵ AE A-K.

decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under 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 applicant or proven by Department Counsel, and 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 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.

Section 7 of Executive Order 10865 provides that 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

AG ¶ 24 expresses the drug involvement security concern:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.

I have considered all of the evidence in this case and the disqualifying conditions under drug involvement AG ¶ 25 and found the following relevant:

(a) any drug abuse; and

(g) any illegal drug use after being granted a security clearance.

Between August and November 2011, Applicant illegally used marijuana on multiple occasions. In November 2011, he was arrested and convicted of DUI involving marijuana. His uses during these times occurred while he was holding a security clearance. I find that both the above disqualifying conditions apply.

I have considered all of the evidence in this case and the drug involvement mitigating conditions under AG ¶ 26 and found the following relevant:

(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) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant used marijuana on a regular basis between August and November 2011. His period of abstinence since 2011 is insufficient to demonstrate his intent not to use marijuana in the future, particularly since he started using again after an abstinence of some 35 years. Additionally, he is still experiencing the back pain that led to his use of marijuana in 2011. Even though four years have passed since his last marijuana use in 2011, his use while holding a security clearance and knowing his actions were illegal are cause for significant concern about his judgment. He did not establish that recurrence is unlikely. While he apparently has abstained from marijuana use for several years and stated in does not intend to use in the future, his past actions, particularly his conscious decision to use marijuana while holding a security clearance, cast doubt on his current reliability, trustworthiness, and good judgment. It is too soon to tell whether his use will recur. Although he claims he no longer uses marijuana, given his history of use while holding a security clearance and his willingness to use marijuana when his grandchildren resided with him, this is not enough to show a demonstrated intent not to use drugs in the future. AG ¶¶ 26(a) and 26(b) partially apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security concern:

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 in this case. The following disqualifying condition is potentially applicable:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant use of marijuana created a vulnerability to exploitation, manipulation, or duress. AG ¶ 16(e) applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

(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

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

I considered all of the facts and circumstances surrounding marijuana use and his future intentions. Applicant failed to present sufficient evidence to demonstrate his conduct is unlikely to recur. He started using marijuana again after a 36-year abstinence and he still experiences the back pain-issues which led him to resume using marijuana in 2011. The evidence is insufficient to support that he has taken positive steps to reduce or eliminate his vulnerabilities. AG ¶¶ 17(c) and 17(e) 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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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 considered Applicant's awards, job appraisals, and his years of government contractor service. However, I also considered that he used marijuana on multiple occasions while holding a security clearance and while living in the same household as his grandchildren. Additionally, he was 58 years old at the time of his last use. Despite the presence of some mitigation, Applicant failed to provide sufficient evidence to fully mitigate the security concerns.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement, and Guideline E, personal conduct.

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:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge