



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 14-04002
)	
Applicant for Security Clearance)	

Appearances

For Government: Greg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

08/10/2015

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate security concerns raised by his illegal drug involvement. He used marijuana from 2001 to 2012, and failed to establish that he will not engage in similar conduct in the future. Clearance is denied.

Procedural History

On October 28, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR), alleging that Applicant's conduct and circumstances raised security concerns under the drug involvement guideline.¹ On November 24, 2014, Applicant answered the SOR, waived his right to a hearing, and requested a decision on the written record (Answer).

On April 20, 2015, Department Counsel prepared a file of relevant material (FORM) and sent it to Applicant. The FORM contains four exhibits that are admitted into

¹ This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines implemented by the Department of Defense on September 1, 2006.

evidence, without objection, as Government Exhibits (Gx.) 1 – 4. Applicant did not submit a response to the FORM within the allotted 30-day period. See Hearing Exhibit 1 (acknowledgment of receipt of FORM and cover letter advising Applicant of 30-day period to submit a response). On August 4, 2015, I was assigned Applicant's case.

SOR Amendment

The SOR is amended to conform to Applicant's Answer. Specifically, SOR 1.a is amended to reflect that Applicant used marijuana from 2001 to at least December 2012.

Findings of Fact

Applicant, a college graduate, is single with no children. He has been working for his current employer since late 2012. In April 2013, he submitted a security clearance application, disclosing his past drug involvement. He disclosed that he had been arrested in 2003, while in college, for possession of marijuana and drug paraphernalia. He received a suspended imposition of sentence and was ordered to complete community service. He also disclosed that he had used marijuana from 2001 to 2012. During the ensuing security clearance background interview, Applicant stated that his marijuana use was infrequent and sporadic, and usually occurred at social events with friends. He told the background investigator that if he did use marijuana in the future, he would do so infrequently and such use would not place anyone in "harm's way."²

Applicant stated the following in his Answer:

My infrequent, recreational use of marijuana has in no way impaired my reliability and trustworthiness. I do not believe that use of the drug has any more impact to an individual than recreational alcohol consumption. Frequent use of any drug, including alcohol, can certainly call into question one's motivation and reliability and should be addressed, whether that's on an individual's own or through a treatment program. That does not, however, in any way apply to me. Furthermore, as a resident of [State X], I live in a city where marijuana is a legal drug. While from a federal perspective, marijuana continues to be illegal, the United States government has not shown significant interest in reversing the state law or prosecuting anyone for marijuana consumption in [State X]. I have and will continue to be a hardworking, productive and well-respected member of society and do not believe that infrequent, recreational marijuana use has any impact on my ability to act in that manner.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to

² Gx. 4, Personal Subject Interview at 4.

classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865, § 2.

When evaluating an applicant’s eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, 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.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, recognizing the paramount importance of protecting national security in all suitability determinations, the Supreme Court has held that “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.³

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. 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 an 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

³ See also ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.”).

Analysis

Illegal Drug Involvement & Whole-Person Concept

The security concern regarding illegal drug involvement is set forth at AG ¶ 24:

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.

Applicant's past illegal drug involvement raises the above security concern. Applicant's 11-year history of illegal drug involvement and statements during the course of the security clearance process establish the following disqualifying conditions:

AG ¶ 25(a): any drug abuse;⁴

AG ¶ 25(c): illegal drug possession, . . . or possession of drug paraphernalia; and

AG ¶ 25(h): expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant continued to use marijuana for years following his drug-related arrest in 2003. He failed to demonstrate that he will not engage in similar security significant conduct in the future. I have considered all the applicable mitigating conditions, and find that none apply. After taking into account the favorable and extenuating factors raised by the evidence, to include Applicant's honesty and candor, as well as considering the whole-person factors listed at AG ¶ 2(a), I further find that Applicant failed to mitigate the security concerns raised by his illegal drug involvement. Overall, the record evidence leaves me with doubts about his eligibility for access to classified information.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement): AGAINST APPLICANT

Subparagraphs 1.a – 1.b: Against Applicant

⁴ The Directive defines "drugs" as "mood and behavior altering substances, and include . . . [d]rugs . . . identified and listed in the Controlled Substances Act . . . (e.g., marijuana . . .)," and "drug abuse" includes the "illegal use of a drug . . ." See AG ¶¶ 24(a), 24(b). See also, Memorandum from the Director of National Intelligence, dated October 25, 2014 (recent state law changes decriminalizing marijuana use does not alter federal law regarding marijuana, which remains a Schedule I controlled drug; nor do these recent changes alter the adjudicative guidelines, as an individual's disregard of federal law pertaining to the use of marijuana remains relevant in security clearance determinations)

Conclusion

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge