



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 17-03874
)	
Applicant for Security Clearance)	

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

02/27/2019

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on February 25, 2016. On March 22, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DOD CAF acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on May 10, 2018, and requested a decision on the written record without a hearing. Department Counsel submitted the Government’s written case in an undated document, which was sent to Applicant on October 17, 2018, and he

was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on October 30, 2018, and did not respond. The case was assigned to me on February 12, 2019.

The FORM included Item 5, a summary of a personal subject interview (PSI) conducted on June 20, 2017. The PSI summary was not authenticated as required by Directive ¶ E3.1.20. Department Counsel informed Applicant that he was entitled to comment on the accuracy of the PSI summary; make any corrections, additions, deletions or updates; or object to consideration of the PSI summary on the ground that it was not authenticated. I conclude that he waived any objections to the PSI summary by failing to respond to the FORM. "Although *pro se* applicants are not expected to act like lawyers, they are expected to take timely and reasonable steps to protect their rights under the Directive." ISCR Case No. 12-10810 at 2 (App. Bd. Jul. 12, 2016).

Findings of Fact¹

In Applicant's answer to the SOR, he admitted the allegations. His admissions in are incorporated in my findings of fact.

Applicant is a 30-year-old information technology specialist employed by a federal contractor since February 2016. He graduated from college with a bachelor's degree in May 2011. He was unemployed after graduation until he was hired in March 2012 as an administrative assistant at a small marketing company. He moved to another area in September 2012 and worked for six months as an administrative assistant at a small software company. He moved again and worked as a day laborer at his father's roofing company. He was unemployed from January to April 2013, and then worked as a landscaper from April 2013 to January 2014. He was unemployed from January 2014 until he was hired by a medical marijuana propagator in January 2015, for whom he worked until he was hired for his current job.

Applicant is unmarried, lives with a cohabitant, and has no children. (FORM Item 5 at 4.) He has never held a security clearance.

Applicant started using marijuana in May 2007 and used it every week or two with friends while he was in college. After he graduated from college, he continued to use marijuana every month or two with friends. He stopped using it in October 2012 because it gave him anxiety. He resumed his marijuana use in October 2013, using it every month or two with friends. He purchased it from various local drug dealers until January 2013, when he moved to a state where marijuana was legal and obtained a marijuana card. He told a security investigator that he obtained a prescription for marijuana to relieve depression, and he obtained a marijuana card that allowed him to grow a limited number of marijuana plants and to purchase marijuana from a legal marijuana dispensary. He

¹ Applicant's personal information is extracted from his security clearance application (FORM Item 4) unless otherwise indicated by a parenthetical citation to the record.

stopped growing, purchasing, and using it in October 2015. His marijuana card expired in October 2016. (FORM Item 5 at 6.)

Applicant told a security investigator that he stopped using marijuana because he was bored with using it, that he no longer associates with marijuana users, and that he does not intend to grow or use marijuana in the future. He does not consider himself addicted to marijuana. (FORM Item 5 at 7.) In his SCA, he stated that he used it infrequently for nine years, “around once every month to two months on average,” but that he would “sometimes go a year without using.” (FORM Item 4 at 40.)

When Applicant answered the SOR, he submitted a statement of intent to abstain from all illegal drug involvement and substance abuse. He acknowledged that any future drug involvement or substance misuse would constitute grounds for revocation of a security clearance. (FORM Item 3.)

Applicant did not submit any character references or job-performance evaluations. Although he told a security investigator that he obtained medical marijuana to treat his depression, he provided no evidence indicating whether he continues to suffer from depression and, if so, whether he found a legal substitute to treat it.

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The SOR alleges that Applicant used marijuana with varying frequency from about May 2007 to at least October 2015 (SOR ¶ 1.a). It also alleges that he possessed a medical marijuana card from about January 2015 to October 2016 (SOR ¶ 1.b), and that he worked for a medical marijuana propagator from about January 2015 to February 2016 (SOR ¶ 1.c).

The concern under this guideline is 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.

Applicant's admissions establish the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse (see above definition); and

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The following mitigating conditions are potentially applicable:

AG ¶ 26(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;

AG ¶ 26(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) is not established. Applicant's marijuana use was frequent and did not occur under unusual circumstances. The first prong of AG ¶ 26(a) ("happened so long ago") focuses on whether the drug involvement was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. 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).

Applicant's abstinence from marijuana from October 2015 to the present is a "significant period of time," but it must be considered in the context of eight years of purchasing, growing, and using marijuana (May 2007 to October 2015, with one year of abstinence), including six years (May 2007 to January 2013) when he illegally purchased it from local drug dealers and used it, knowing that it was illegal. He now lives in a state where it is legal and readily available but still illegal under federal law. Since February 2016, he has been under pressure to obtain a clearance and keep his job. I am not satisfied that sufficient time has passed to show that he will not revert to his previous drug involvement when the pressure of qualifying for a clearance and keeping his job is lifted.

AG ¶ 26(b) is partially established. Applicant has abstained from marijuana for more than three years. He no longer associates with drug users or illegal drug dealers. He has changed his environment from a job selling marijuana to a job for a federal contractor who requires abstinence from illegal drugs. He has signed the requisite statement of intent. However, he still lives and works in a state where marijuana use is legal and it is readily available. He has submitted no "evidence of actions to overcome this problem," such as treatment or counseling. He told a security investigator that he used marijuana to control his depression, but he submitted no evidence regarding his current steps to control depression without using marijuana.

Whole-Person Concept

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. In applying the whole-person concept, an 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 and applying the adjudicative factors in AG ¶ 2(d).²

I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment. Applicant has drifted through several jobs since his graduation from college, and his current job is the first that offers a meaningful career. He submitted no evidence about his job performance or other evidence of a pattern of responsible conduct. He does not yet have a track record of jobs demonstrating reliability, trustworthiness, and the ability to follow rules and regulations.

Applicant's credibility is a key element in this case, and he bears the burden of showing that he will not return to his drug-using lifestyle. Because he requested a

² The factors are: (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.

determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003).

“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.” ISCR Case No. 09-01652 at 3 (App. Bd. Aug 8, 2011), *citing Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). I have considered Applicant’s abstinence from using marijuana and his statement of intent to continue his abstinence, However, the presence of some mitigating evidence does not alone compel a favorable security clearance decision. ISCR Case No. 11-14684 (App. Bd. Jan. 17, 2014). Based on the sparse record in this case, I cannot conclude that Applicant has overcome this presumption.

After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his drug involvement.

Formal Findings

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

Paragraph 1, Guideline H (Drug Involvement and Substance Misuse):	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge