



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



In the matter of:)
)
) ISCR Case No. 17-04386
)
Applicant for Security Clearance)

Appearances

For Government: Nicholas T. Temple, Esq., Department Counsel
For Applicant: *Pro se*

12/13/2018

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant failed to mitigate the drug involvement and substance abuse and personal conduct, and criminal conduct security concerns. National security eligibility for access to classified information is denied.

History of the Case

Applicant submitted a security clearance application (SCA) on June 30, 2016. On March 20, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H, Drug Involvement and Substance Abuse, Guideline E, Personal Conduct, and Guideline J, Criminal Conduct. Applicant answered the SOR on April 26, 2018 (Answer), and requested a decision on the record without a hearing.

On June 25, 2018, a complete copy of the File of Relevant Material (FORM), containing seven Items, was mailed to Applicant. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant did not respond to the FORM. Items 1 through 7 are admitted into evidence. The case was assigned to me on October 29, 2018.

Findings of Fact

Applicant is 27 years old, single, and has no children. He received a high school diploma in June 2010, and he has attended some college courses. He has worked for a defense contractor since June 2016, and this is his first security clearance application.

Applicant started using and purchasing marijuana in 2010, when he was approximately 18 years old. He has admitted to using and purchasing marijuana until at least May 2016.

In September 2012, Applicant was arrested and charged with possession of an illegal substance with the intent to distribute. He disclosed this arrest in his June 2016 SCA. The charges were ultimately dismissed. (Item 4 at 15-16)

The arresting officers noted that they saw a passenger in Applicant's car pass him a joint of marijuana, and Applicant admitted that he used marijuana while operating his vehicle. They detected a strong odor of marijuana when they approached Applicant's car. The officers found several discarded marijuana roaches, a burning marijuana joint, multiple baggies of marijuana, and other drug-related paraphernalia in Applicant's car. The two other individuals in the car were also arrested, and one admitted to the arresting officers that he had recently been arrested for selling marijuana. (Item 6)

In his PSI, Applicant claimed two individuals paid him to give them a ride in his car. When the police searched his car they found a bag of marijuana, it did not belong to him, but he was aware it was in his vehicle. The charges against Applicant were dropped after the presiding judge determined that the search and seizure during the arrest was illegal. (Item 4 at 15-16)

Applicant did not disclose his history of using and purchasing marijuana in his June 2016 SCA. (Item 3 at 35) During his September 2017 PSI, Applicant told the government investigator that he purchased and smoked three to five joints of marijuana a week from September 2010 until May 2016. He did not list this information on his SCA, because he was concerned he would lose his job. Additionally, he told the investigator that he does not intend to use marijuana in the future. (Item 4 at 16-17)

Policies

"[N]o one has a 'right' to a security clearance."¹ 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."² The President has authorized the Secretary of Defense or his designee to

¹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

² *Egan* at 527.

grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”³

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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.

Adverse 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.”⁴ Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Security Executive Agent have established for issuing national security eligibility.

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.⁵ “Substantial evidence” is “more than a scintilla but less than a preponderance.”⁶ The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability.⁷ Once the Government establishes a disqualifying condition, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.⁸ An applicant has the burden of proving a potential mitigating condition, and the burden of disproving it never shifts to the Government.⁹

³ Executive Order (EO) 10865 § 2.

⁴ EO 10865 § 7.

⁵ Directive ¶ E3.1.14.

⁶ *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

⁷ *See, e.g.* ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

⁸ Directive ¶ E3.1.15.

⁹ 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.”¹⁰ “[S]ecurity clearance determinations should err, if they must, on the side of denials.”¹¹

Analysis

Guideline H: Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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, but 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 describes conditions that could raise a security concern and be disqualifying in this case:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant admitted he purchased and used marijuana two to three times a week for almost six years. The record evidence raised both disqualifying conditions.

The burden shifted to Appellant to rebut or prove mitigation of the resulting security concerns. AG ¶ 26 provides conditions that could mitigate security concerns in this case:

- (a) the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

¹⁰ ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive ¶ E3.1.15.

¹¹ *Egan*, 484 U.S. at 531; see also AG ¶ 2(b).

(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 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.

Given Applicant's frequency of marijuana use, his period of abstinence is insufficient to mitigate his lengthy history of use. He told the government investigator that he no longer associates with the people with whom he used marijuana, but there is limited corroborating evidence that Applicant has changed his lifestyle and behavior. Mitigation was not established under AG ¶¶ 26(a) and 26(b).

Guideline E: Personal Conduct

The concern under this 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and
- (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and be disqualifying. The following is potentially applicable in this case:

(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.

In this case, Appellant admitted that he intentionally falsified his SCA. The evidence established the above disqualifying condition.

AG ¶ 17 describes conditions that could raise a security concern and be disqualifying. The following are potentially applicable in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(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.

Applicant failed to disclose derogatory information regarding use of marijuana in his SCA. Over a year later, he admitted during his PSI that he did not disclose his drug use because he was afraid his history would affect his ability to hold his job. The government relies upon applicants to be honest and forthright during the security application process. Applicant was not honest regarding his extensive period of marijuana use. There is no evidence that he made proactive efforts to disclose this derogatory information to his employer in the fifteen months between his completion of the SCA and his PSI. Mitigation was not established under AG ¶¶ 17(a) and 17(c).

Guideline J: Criminal Conduct

AG ¶ 30 expresses the security concerns pertaining to criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable in this case:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

Appellant's drug-related 2012 arrest establishes the above disqualifying condition.

AG ¶ 32 provides conditions that could mitigate security concerns raised in this case. The following two are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

It has been over six years since Applicant's 2012 arrest. However, he continued to use and purchase marijuana until May 2016. Mitigation under AG ¶¶ 32(a) and 32(d) was not established.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person. An 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.

I have incorporated my comments under the guidelines at issue in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under this guideline, and evaluating all the evidence in the context of the whole person, Applicant has not mitigated the drug involvement and personal conduct security concerns, but he did mitigate the criminal 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 Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a – 3.b:	Against Applicant

Conclusion

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

CAROLINE E. HEINTZELMAN
Administrative Judge