



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



In the matter of:)
)
) ISCR Case No. 18-00181
Applicant for Security Clearance)
)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

02/01/2019

Decision

GLENDON, John Bayard, 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

On March 21, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended (Exec. Or.); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016) (AG) for all adjudicative decisions on or after June 8, 2017.

Applicant provided an incomplete response to the SOR on June 20, 2018, and elected to have the case decided on the written record in lieu of a hearing. In an email from the DOD CAF, dated July 11, 2018, he was asked to supplement his response by

admitting or denying the SOR allegations. By email dated July 12, 2018, he admitted both allegations.

Department Counsel submitted the Government's written case on August 13, 2018. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on August 21, 2018. His response was undated. It was received by the Defense Office of Hearings and Appeals (DOHA) on September 17, 2018. Department Counsel did not object to Applicant's response to the FORM, and it is admitted into the record. In his response to the FORM, Applicant did not object to the Government's evidence, which was attached to Department Counsel's FORM as Items 1 through 6. In his September 2018 FORM response, Applicant updated his comments from his November 9, 2017 background interview with his current views on the use of illegal drugs. He also provided a signed statement in which he agreed to the revocation of his security clearance in the event he has any future involvement with illegal drugs. This document has been marked as Applicant Exhibit (AE) A. This evidence as well as the Government's six exhibits are admitted into the record. The Government's evidence is referred to herein using Department Counsel's numbering for each Item. The case was assigned to me on November 30, 2018.

Findings of Fact¹

In his SOR answer, Applicant admitted the two allegations made under Guideline H and set forth in SOR ¶¶ 1.a-1.b. His admissions are incorporated in my findings of fact.

Applicant is 25 years old and is unmarried. He graduated from college with a bachelor's degree in January 2016. He began his first full-time job in June 2016 working for a government contractor.

On August 30, 2016, he submitted a security clearance application (SCA). In the SCA, he disclosed that he used marijuana during the period 2012 to April 2016. He disclosed that he had used the drug infrequently, and that he had used it less than 50 times. He also disclosed that he had used cocaine twice, both times in the months after college and before he began his job. He reported that he had no intent to ever use cocaine again.

In his November 9, 2017 background interview, he confirmed his marijuana use while in college and admitted that his last use of the drug was in the preceding month, October 2017, over one year after he submitted his SCA. He acknowledged that he knew that the use of marijuana was illegal and stated that he plans to continue using the drug on weekends. After the investigator advised him that persons with security clearances

¹ Applicant's personal information is extracted from his security clearance application, dated August 30, 2016 (FORM Item 5), unless otherwise indicated by a parenthetical citation to the record.

are not permitted to use illegal drugs, Applicant told the investigator that he would stop using the drug if he was granted a security clearance. (Item 6 at 7.)

In September 2018, Applicant responded to Department Counsel's FORM by stating at length his changed view on his use of marijuana. He wrote that following his November 2017 background interview, he had reconsidered his priorities and decided to no longer use any marijuana. His last use was, as stated to the investigator, in October 2017. He elaborated that he had decided that his old views on using marijuana were immature and inconsistent with his career plans. He explained that he has cut ties with friends who he had smoked marijuana with and kept his distance from anyone using marijuana. He also emphasized that in September 2017 he had entered into a serious relationship with a woman who does not tolerate any drug use. She also has encouraged him to work hard to meet his goals, which includes abstaining from any drug use. As noted, he also signed a written statement that he has no future intent to use illegal drugs in the future. (FORM Response; AE A.)

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 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 and the documentary evidence in the FORM establish the potentially disqualifying condition in AG ¶ 25(a) (any substance misuse (see above definition)).

The following mitigating conditions under Guideline H 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 last illegal use of a controlled substance occurred after he submitted his SCA and less than one year before his response to Department Counsel's FORM. This period of abstinence suggests that the behavior may not recur, but is not long enough to establish that it is unlikely to recur. Applicant's choice to waive a hearing gave me no opportunity to assess his sincerity in committing to abstain from using marijuana in the future. Also, the recency of his last use of marijuana continues to cast doubt on his reliability and judgment. The fact that he first expressed his change in attitude about marijuana use after he received Department Counsel's FORM in August 2018 also supports this conclusion.

AG ¶ 26(b) is partially established. Applicant has established a pattern of abstinence, however, he continued to use marijuana after submitting his SCA and has only abstained after being advised by an investigator that he could not qualify for a clearance if he continued to use marijuana in the future. It is well established, however, that "drug involvement after having completed an SCA draws into serious question the applicant's judgment, reliability, and willingness to follow rules and regulations, insofar as [the SCA] placed the applicant on notice of the consequences of such misconduct." ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017) *citing* ISCR Case No. 14-03450 at 3 (App. Bd. Sep. 11, 2015). As noted, the period of his abstention is insufficient to constitute a pattern of abstention. Applicant has represented that he has taken steps referred to in the three subparagraphs of this mitigating condition. Without a longer period of abstinence, however, it is too early to conclude that these steps will be sufficient to ensure that Applicant will continue to abstain from illegal drug use.

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 and applied the adjudicative factors in AG ¶ 2(d). In particular, I have considered Applicant's young age at the time he smoked marijuana and the fact that he was in college for much of the period of his use of marijuana. I cannot conclude, however, that these factors provide sufficient mitigation under the facts of this case largely because insufficient time has passed since Applicant's last use of marijuana. Applicant has the burden of persuasion to establish mitigation, and his evidence, without appearing in person at a hearing, fell short of meeting that burden. 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 past actions.

Formal Findings

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

Paragraph 1. Guideline H: AGAINST APPLICANT

Subparagraphs 1.a and 1.b: 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.

John Bayard Glendon
Administrative Judge

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.