



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



In the matter of:)	
)	
)	ISCR Case No. 18-00681
)	
Applicant for Security Clearance)	

Appearances

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

01/15/2019

Decision

Gregg A. Cervi, 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 July 27, 2017. On March 14, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H.¹

Applicant answered the SOR on June 8, 2018, and elected to have the case decided on the written record in lieu of a hearing. The Government's written brief with

¹ 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 revised adjudicative guidelines (AG) effective on June 8, 2017.

supporting documents, known as the File of Relevant Material (FORM), was submitted by Department Counsel on July 13, 2018. A complete copy of the 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 July 31, 2018, but did not submit a response within the time provided. The Government's exhibits included in the FORM (Items 1 through 5) are admitted into evidence. The case was assigned to me on January 9, 2019.

Findings of Fact

Applicant is a 36-year-old computer programmer for a defense contractor, employed since 2017. He was fired from a previous position in 2016 due to "drug issues," although Applicant denied using drugs while with that employer, and denied that he departed for that reason. He received a general education degree (GED) in lieu of a high school diploma. He is unmarried, but has lived with his fiancée since 2012. He has never held a DOD security clearance.

The SOR alleges under Guideline H that Applicant used marijuana with varying frequency from October 2001 to at least February 2017. The SOR also alleged an arrest in 2002 for possession of marijuana and driving under the influence of drugs; a 2003 arrest for possession of narcotic equipment and possession of marijuana with intent to sell; a 2007 arrest for unlawful distribution of a controlled substance and possession of one ounce of marijuana; a 2015 arrest for interference with the arresting officer, use or possession of drug paraphernalia, and possession of a controlled substance (marijuana/spice); and a 2017 arrest for speeding, possession of controlled substance (marijuana/spice) and two counts of use or possession of drug paraphernalia.

Applicant admitted the allegations, but denied using marijuana after about October 2015. He noted some charges from the 2003 arrest were dismissed, and all of the charges from the 2015 and 2017 arrests were dismissed. Applicant provided a document from the relevant court with his Answer to the SOR, showing that he entered guilty pleas to the 2017 charges of possession of controlled substance, and use or possession of drug paraphernalia.

Applicant discussed his history of marijuana purchases, possession, and use during his personal subject interview (PSI) by a Government investigator. He stated that he began experimenting with marijuana in about 2001, and continued to purchase and use it about 150 times between 2001 and 2015. He noted that while using marijuana, it would affect his ability to hold confidences and that it caused him to often call in sick to work. He has never received drug treatment and his fiancée is aware of his drug-use history.

In 2002, Applicant was arrested and charged with possession of marijuana, which was dismissed while the driving under the influence of drugs charge resulted in a conviction. He was unable to recall the circumstances because of the time elapsed since the incident. In 2003, Applicant's car was searched incident to a traffic stop after the officer smelled marijuana. Applicant and the driver were arrested for possession of marijuana with intent to sell and possession of drug paraphernalia. He was convicted and sentenced to serve

365 days in jail (all but 60 days suspended), fined, and three years' probation.

In 2007, Applicant was charged with possession of drug paraphernalia and unlawful distribution of a controlled substance. He was convicted of possession of marijuana and unlawful distribution. He was sentenced to 180 days confinement and fined. In 2015, Applicant was again involved in a traffic stop when the officer searched his vehicle and found marijuana. Applicant claimed it was for his personal use. The charges of obstruction of justice and possession of marijuana were dismissed because the officer failed to obtain a search warrant. In 2017, an officer smelled marijuana incident to a traffic stop, and discovered marijuana in a backpack in Applicant's car. Applicant claimed that someone, whom he refused to name, used his car and left the backpack in it. Despite his claim, Applicant pleaded guilty to charges of possession of a controlled substance and use or possession of drug paraphernalia; however, the plea was held in abeyance for six months and dismissed if Applicant refrained from similar offenses and paid a fine. Applicant asked the court to terminate his "plea in abeyance" early because of his pending security clearance investigation.

Applicant noted that his career, fiancée, and intent to start a family were more important than using marijuana. He thought the medical aspects of marijuana would help him with anxiety, but it had the opposite effect of making him paranoid and more anxious. Since Applicant elected to have this case decided on the written record in lieu of a hearing, I was unable to further inquire into these allegations or evaluate his demeanor or credibility in response to questions. He did not submit documentary evidence of drug abuse counseling, changes in lifestyle, or a signed statement of intent to abstain from further drug involvement.

Law and Policies

The Director of National Intelligence (DNI) issued revised adjudicative guidelines (AG) in a Security Executive Agent Directive, effective on June 8, 2017. These AGs are applicable to this decision.

"[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.

National security eligibility 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 a person's stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

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. *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, e.g.*, ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015).

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, e.g.*, 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; *see*, AG ¶ 1(d).

Analysis

Guideline H: Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse 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.

The guideline notes conditions that could raise security concerns under AG ¶ 25. The disqualifying condition potentially applicable in this case includes:

- (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; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant has a long history of illegal drug purchase, use, and possession, including intent to sell, particularly from 2001 to 2017. Although he claims to have stopped using marijuana in 2015, his 2017 guilty plea for possession of marijuana and drug paraphernalia shows continued illegal drug involvement and casts doubt on the veracity of his claims of recent abstinence. The record is devoid of a clear and convincing commitment to discontinue marijuana use and illegal drug involvement. Disqualifying conditions under AG ¶¶ 25 (a), (c), and (g) are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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;
- (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; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant is a mature adult. He began “experimenting” with marijuana in 2001, and continued use for at least 14 to 16 years. By his own estimate, he used marijuana about 150 times. His claim to have refrained from drug use since 2015 is not supported by credible evidence and is unconvincing given his 2017 guilty pleas for possession of marijuana and drug paraphernalia. He has not shown a clear and convincing commitment to discontinue further drug use or illegal drug involvement, or to change the environment where illegal drugs are being used or disassociation from drug-using associates. He has not attended a drug treatment program or submitted a signed statement of intent to abstain from all drug involvement and substance misuse. Applicant’s stated history of drug use, and recurring arrests for drug-related crimes raises questions about his truthfulness, reliability, and ability to follow rules and regulations. Applicant’s failure to show rehabilitation and a change in behavior toward drug involvement continues to cast doubt on his reliability, trustworthiness, and good judgment. No mitigation is warranted.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the 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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d). Although adverse information concerning a single criterion may not be sufficient for an unfavorable eligibility determination, the individual may be found ineligible if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or unstable behavior. AG ¶ 2(e).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guideline H in my whole-person analysis. Applicant is a mature adult whose history of recurring illegal drug involvement leaves me with serious questions about his future intent and his willingness to follow rules and regulations. I am not convinced that he fully appreciates the legal and policy implications of his actions, and he has not clearly and convincingly established a commitment to discontinue further illegal drug use.

Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility for access to classified information.

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
Subparagraph 1.a – 1.f:	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.

Gregg A. Cervi
Administrative Judge