



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 18-02573

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

05/06/2019

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated drug involvement or criminal conduct concerns. Eligibility for access to classified information is denied.

Statement of the Case

On January 11, 2019, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons under the drug involvement and substance misuse guidelines why DoD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken 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); by the Security Executive Agent, Directive 4, *National Security Adjudicative Guidelines* (SEAD 4), effective June 8, 2017.

Applicant responded to the SOR on February 11, 2019, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on March 6, 2019. He supplemented the record in April 2019 with a memorandum and did not object to any of the Government's submissions. Applicant's supplemented memorandum was admitted without objection as Item 5.

Summary of Pleadings

Under Guideline H, Applicant allegedly (a) used, purchased, and sold marijuana with varying frequency from about August 2011 to at least May 2017; (b) used cocaine, with varying frequency, from about May 2012 to at least January 2018; and (c) was charged with possession of marijuana paraphernalia in about June 2012.

In his response to the SOR, Applicant admitted all of the allegations covering his drug activities and charges with explanations. He claimed he has not used, bought, or sold marijuana since May 2017. He further claimed that he no longer associates with individuals with whom he used marijuana. Applicant claimed he will attend any drug rehabilitation considered necessary and will abstain from all drug involvement. And, he claimed he is committed to living a healthy drug-free lifestyle and has a strong support system that is filled with individuals committed to helping Applicant maintain a healthy lifestyle and drug-free living.

Findings of Fact

Applicant is a 38-year-old systems engineer who seeks a security clearance for a defense contractor. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant has never married and has no children. (Items 3-4) He attended college classes between June 2012 and October 2017, but never earned a degree or diploma. Applicant reported no military service.

Since August 2016, Applicant has worked for his current employer. (Items 2-4) He reported unemployment between April 2013 and August 2016 while attending school, and December 2012. (Item 3)

Applicant's drug history

Applicant was introduced to marijuana as a teenager in August 2011. (Item 4) Typically, he would smoke marijuana joints recreationally with friends in small quantities at their homes and at parties. He generally purchased marijuana from third parties before transferring or reselling the marijuana to his high school friends. (Item 4) Marijuana produced psychedelic reactions by Applicant. Between 2011 and 2014, he used marijuana weekly. Over the course of the next three years, he reduced his frequency of use to monthly and less before ceasing his use of the substance altogether. (Item 3) He last used marijuana in May 2017 and no longer associates with the individuals who

supplied him marijuana. (Item 4) Applicant assured that he has no intention of resuming his use of illegal drugs in the foreseeable future and is willing to submit to randomized drug screening by his employer. (Items 2 and 5) His assurances cannot be fully accepted without more corroboration and substantiation. (Items 3-4)

Beginning in May 2012, Applicant used cocaine in varying frequencies. (Item 4) He last used the substance in January 2018. (Item 4) He was introduced to cocaine by an unknown individual at a local party while in college, (Item 4) He estimated that he had used cocaine approximately five to seven times before he last used the substance in January 2018 following his submission of his application for a security clearance. (Items 3-4)

In June 2012, Applicant was charged with possession of marijuana paraphernalia. (Item 4) He pled not-guilty to the offense and was cleared of the offense in court. (GEs 3-4)

Policies

The AGs list guidelines to be used by administrative judges in the decision making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise as security concern and may be disqualifying (disqualifying conditions), if any, and many of the conditions that could mitigate security concerns.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole-person in accordance with AG, ¶ 2©

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial into account the pertinent considerations for assessing extenuation and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk. When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. [s]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

Drug Involvement

The Concern: The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that causes 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 . . . AG

¶ 24.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States v. Gideon*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather,

the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And, because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Analysis

Applicant is a systems engineer who presents with a considerable history of drug involvement over an extended period of years. Principal security issues in this case center on Applicant's lengthy history of drug involvement that includes a still very recent January 2018 cocaine use.

Drug concerns

Over a considerable period of drug activity stretching from August 2011 to May 2017, Applicant used, purchased, and sold marijuana. His most recent involvement with marijuana (use, possession, purchases, and sales) occurred in May 2017. Besides his marijuana use and activity, Applicant used cocaine on multiple occasions with varying frequency between May 2012 and January 2018. Applicant's admissions to using and possessing illegal drugs over an extended number of years raises concerns about risks of recurrence as well as judgment issues. Applicant's admissions to using and possessing illegal drugs raises concerns about risks of recurrence as well as judgment issues. On the strength of the evidence presented, two disqualifying conditions of the AGs for drug abuse are applicable: DC ¶¶ 25(a), "any substance misuse," and 25(c) "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia."

While Applicant's material use and possession of illegal drugs has never been repeated since his acknowledged last use of marijuana in May 2017, and of cocaine in January 2018, in any proven way, his recurrent use and possession of marijuana and cocaine products is still too recent to enable safe predictions of continued avoidance of illegal drugs. It is too soon to fully apply any of the potentially mitigating conditions to Applicant's situation. While Applicant's assurances that his drug involvement is a thing of the past are encouraging, more time is needed to draw safe inferences that he is not a recurrence risk.

Considering the record as a whole, there is insufficient probative evidence of sustainable mitigation to make predictable judgments about his ability to avoid drugs, drug purchases, and drug sales in the foreseeable future. Taking into account all of the

facts and circumstances surrounding Applicant's past marijuana and cocaine activity, he does not mitigate security concerns with respect to the allegations covered by subparagraphs ¶¶ 1.a-1.b of the SOR. Based on the not-guilty conclusions associated with Applicant's 2012 possession of marijuana paraphernalia charges, allegations covered by SOR ¶ 1.c are unsubstantiated.

Whole-person assessment

In making a whole-person assessment of Applicant's trustworthiness, reliability, and good judgment, consideration is given to not only the drug involvement and substance misuse issues raised in the SOR, but the contributions he has and continues to make to his employer and the defense industry in general. Overall, though, Applicant has established insufficient probative evidence of his overall trustworthiness and understanding of DoD policy constraints on the use of illegal substances to facilitate safe predictions that he is at no risk of recurrence of illegal drug usage. Criteria for meeting security clearance requirements under the drug involvement and substance misuse guideline have not for the most part been met by Applicant. Unfavorable conclusions are warranted with respect to SOR ¶¶ 1.a-1.b. Favorable conclusions are warranted with respect to the allegations covered by SOR ¶ 1.c.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE H (DRUG INVOLVEMENT):	AGAINST APPLICANT
Subparagraphs 1.a-1.b	Against Applicant
Subparagraph 1.c:	For Applicant

: **Conclusions**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility to hold a security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

