



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



In the matter of:)
)
) ISCR Case No. 18-02582
)
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: John V. Berry, Esq.

11/26/2019

Decision

GLENDON, John Bayard, Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse). Applicant has used marijuana on three occasions since 2014, specifically in August 2014, July 2015, and October 2017. His last use was in a foreign country where marijuana is legally sold and used. He held an active security clearance in 2015 and 2017. Applicant’s evidence in mitigation was insufficient to mitigate security concerns raised by his conduct. Based upon the record evidence as a whole, Applicant’s eligibility for access to classified information is revoked.

Statement of the Case

On April 22, 2017, Applicant submitted a security clearance application (SCA) to renew his previously granted clearance. On January 2, 2019, 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* (Feb. 20, 1960); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review*

Program (Jan. 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (Dec. 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant responded to the SOR on February 2, 2019, admitting both of the SOR allegations with additional comments in mitigation. He requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On July 17, 2019, the case was assigned to me. DOHA issued a notice of hearing on September 6, 2019, scheduling the hearing on September 26, 2019.

I convened the hearing as scheduled. Department Counsel offered three documents, which I marked as Government Exhibits (GE) 1 through 3. Applicant's counsel offered eight documents, which were marked by Applicant's counsel as Applicant's Exhibits A through H. All exhibits were admitted into the record without objection. I marked the Government's Exhibit List as Hearing Exhibit 1 and Applicant's Exhibit List as Hearing Exhibit 2. I received the transcript of the hearing (Tr.) on October 11, 2019.

Findings of Fact

I have incorporated Applicant's admissions in my findings of fact. Applicant's personal information is extracted from GE 2, which is his most recent security clearance application, unless otherwise indicated by a parenthetical citation to the record. After a thorough and careful review of the pleadings, the hearing testimony, and the documentary evidence, I make the following findings of fact.

Applicant, 61, has worked as an engineer for defense contractors since at least 2001, except during the period January 2014 to April 2015 when he was laid off and then rehired. He has held a security clearance since 1983, with the exception of a short period without a clearance about 15 years ago. In 2006, he reapplied and was granted a clearance, when he began working in his current role. (Tr. 17-18; AE H.)

Applicant has a bachelor's degree in engineering. He was first married in 1985. That marriage ended in divorce in 2004. He remarried in 2016. He has one adult child from his first marriage and two adult stepchildren from his second marriage. (AE H.)

On three occasions since 2014, Applicant has smoked marijuana or consumed a THC product. He also used marijuana in 2003 on one occasion. In August 2014, Applicant was on vacation with his spouse in a state where the sale and use of marijuana and THC products are not illegal under state law. Applicant was given a THC candy and consumed it out of curiosity. He was unemployed at the time, and he understood that his clearance was deactivated. The next occasion occurred in July 2015. He and his spouse were camping with friends, and he smoked a marijuana cigarette along with the others. He was aware that his clearance had been reactivated at that time, following his rehiring in April 2015. The most recent incident occurred in October 2017 while Applicant was on vacation in a foreign country where the purchase and use of marijuana is legal. He and his spouse

purchased a marijuana cigarette in a so-called “coffee shop” and smoked it on two occasions while in the foreign country. (SOR response at 1-2; Tr. 21-30; GE 3 at 8.)

In April 2017, Applicant prepared the SCA and disclosed his drug use on the prior two occasions. He noted that the August 2014 usage occurred during a time he was unemployed and his clearance was not active. The July 2015 usage occurred just three months after he was rehired into a position that required a security clearance. Nevertheless, he denied in his April 2017 SCA that he had ever used illegal drugs while holding a security clearance, although he disclosed his use elsewhere in the illegal drug section of the SCA, as noted.

Applicant also checked a box in his SCA indicating that he did not intend to use the drug in the future. As an explanation in support of this stated intent, he wrote that he recognized that it was an illegal drug under federal law and that usage could have “deleterious health effects Regarding (sic) security clearance.” Notwithstanding that representation, he proceeded to use marijuana again in October 2017. At the hearing, he explained that his logic in using marijuana at the time was that he was on vacation in a foreign country where the drug was legal and his security clearance obligations “could somehow be set aside for an evening on vacation [in a foreign country.]” He conceded that his thinking was flawed and incorrect, and he regrets his mistake. He has learned that as a holder of a security clearance, he is obligated to take steps beyond avoiding the disclosure of national security matters. He has not used any illegal drugs in the last two years. (Tr. 27-31, 38-40.)

In the past, Applicant did not “fully understand the impact of [his] behavior” on his eligibility to hold a security clearance. He honestly disclosed his illegal drug use in his SCA and at his June 2018 background interview. He was surprised, though, to receive the SOR advising him that his clearance was in jeopardy, even though he has been involved in government contracting with a security clearance most of his life. He now has “a much greater understanding of the impact of breaking laws while holding a security clearance.” (Tr. 45-52.)

Applicant now rarely sees his friends who were involved in the 2015 camping trip. He last saw them over a year ago. He does not associate with people who use drugs frequently. Applicant’s spouse was with him on each of the three times Applicant used marijuana in recent years. His spouse holds a job subject to drug testing and is not a frequent drug user. His spouse is supportive of Applicant’s decision to abstain from any future illegal drug use. (Tr. 33, 52, 55, 67-68.)

Applicant presented at the hearing a written statement of his intent to never use illegal drugs again. In his statement, he also committed to avoiding locations where illegal drugs were being used. A second exhibit offered at the hearing is a letter, dated September 23, 2019, from a licensed clinical social worker with substantial experience treating drug and alcohol dependency. As of the date of the letter, the social worker had treated Applicant for a period of six months. Applicant continues to be treated by the

counselor. The social worker concluded that Applicant has no “ongoing urges or desires to use marijuana” and is not addicted or dependent on marijuana. (AE A, G; Tr. 34-44.)

The social worker also concluded that Applicant has “no clinical signs of depression, anxiety, or behavioral concerns.” With respect to a diagnosis, the social worker wrote:

I would NOT diagnose or classify [Applicant] as having a Cannabis/marijuana dependence or addiction. In fact, my official diagnosis is: “F43.20, Adjustment to life stressors, Unspecified” (“Unspecified” meaning there are no clinical signs of depression, anxiety, or behavioral concerns.) (Emphasis in original.)

(AE G.) Applicant believe that he has now taken responsibility for his actions and has taken “some positive actions.” (Tr. 45.)

In three character letters submitted by Applicant at the hearing, his professional and personal references attested to Applicant’s honesty, trustworthiness, and good judgment. Applicant also submitted two recent performance appraisals from his current employment. His performance was highly rated in both years. He has received cash bonus awards, a promotion, and a merit pay increase by his employer in recognition of his excellent work. (Tr. 40-42; AE B through F.)

Two character references also testified in support of Applicant’s case. One was a former supervisor who has known Applicant for many years. He testified that Applicant is very straightforward and transparent. The witness is “very comfortable” having Applicant work at their defense contractor with a security clearance. He admires Applicant’s honesty and willingness to take responsibility for his actions. This witness also wrote AE B in support of Applicant. (Tr. 71-86.)

A second character witness testified and provided a reference letter. She has known Applicant for about 15 years through their work together and has become a social friend. She is a peer of Applicant. When he was laid off, she urged her employer to ultimately rehire him when the opportunity arose. She describes Applicant as honest, hardworking, knowledgeable, and dedicated. She also testified that Applicant is very reliable and trustworthy. (Tr. 85-92; AE C.)

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 security concern under this guideline is set out in AG ¶ 24 as follows:

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 in his SOR response and the record evidence at the hearing establish the following potentially disqualifying conditions under Guideline H, except his use of marijuana in October 2017, which was a legal use of a drug in a foreign country:

AG ¶ 25(a): any substance misuse (see above definition [in AG ¶ 24]);

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

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position.

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; and

AG ¶ 26(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.

AG ¶ 26(a) is not established. Applicant's use of marijuana was infrequent, but his use over a 14-year period was opportunistic, occurring when the drug happened to be offered to him or was readily available. The fact that he twice used marijuana while granted access to classified information casts doubt on his current reliability, trustworthiness, and judgment. Applicant's judgment is also called into question by his use of marijuana in October 2017 after he had prepared his most recent SCA in which he noted his intent not to use marijuana in the future. The fact that Applicant's use of marijuana in October 2017 was not illegal under foreign law does not materially change this conclusion in light of his comment in the SCA. That mistake of judgment casts doubt on his reliability and trustworthiness.

AG ¶ 26(b) is established. Applicant sincerely acknowledges his drug involvement and has provided evidence of actions taken to overcome this problem. He has established a pattern of abstinence over the past two years. He has provided a written statement pursuant to AG ¶ 26(b)(3) and he has a six-month track record of engaging in counseling related to his past drug use. He does not associate with drug abusers, and he rarely sees his friends with whom he used marijuana in July 2015, which addresses AG ¶ 26(b)(1).

AG ¶ 26(d) is partially established. Applicant has received counseling from a licensed clinical social worker for six months. This is not quite the same as a "prescribed drug treatment program," but his counseling is for the same purpose. The social worker's letter in the record (AE G) does not contain a formal prognosis, but it fair to characterize the letter as viewing the likelihood of Applicant's continued abstinence favorably.

Whole-Person Analysis

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), specifically:

- (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 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. I have considered the important fact that Applicant disclosed his past use of marijuana. I have also considered Applicant's age and maturity. He is a mature professional who should know that using marijuana is inconsistent with his work responsibilities and his obligations with a security clearance. His judgment failed him on three occasions since 2014, when he used marijuana opportunistically because it was readily available. This raises concerns about his judgment and his control over his behavior. He should have known better than to use marijuana after being granted eligibility to access classified information. He works on a defense contract that is important to our national security, yet he did not appreciate that his work responsibilities on behalf of the Federal Government require that he obey federal law outside of work. He has provided impressive whole-person evidence from two work colleagues, as well as other evidence. This evidence, though, is somewhat contradicted by his actions on three recent occasions.

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

Formal Findings

Guideline H, Drug Involvement and Substance Misuse:

AGAINST APPLICANT

Subparagraph 1.a-1.b:

Against Applicant, except as noted with respect to the October 2017 allegation

Conclusion

I conclude that it is not clearly consistent with the national interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is revoked.

John Bayard Glendon
Administrative Judge