



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



In the matter of:)
)
 [REDACTED]) ISCR Case No. 18-03018
)
 Applicant for Security Clearance)

Appearances

For Government: Allison Marie, Esq., Department Counsel
For Applicant: *Pro se*
08/07/2019

Decision

MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 13, 2017. On January 9, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The DOD CAF acted under Executive Order (EO) 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 adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on February 15, 2019, and requested a decision on the record without a hearing. On April 8, 2019, the Government sent a complete copy of its written case, a file of relevant material (FORM) including documents identified as Items 1 through 6, to Applicant. He was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government’s evidence. He received the FORM on April 29, 2019, and did not respond.

Items 1 through 3 are the pleadings in the case. Items 4 through 5 are admitted into evidence. The case was assigned to me on July 17, 2019.

Procedural Matter

I extracted the below findings of facts from Applicant's SOR answer (Item 3), his SCA (Item 5), and a summary of his security clearance interview with a DOD authorized investigator (SI) (Item 6). Item 6 was not authenticated as required by Directive ¶ E3.1.20. However, I conclude that Applicant waived any objection to Item 6. The Government included a separate footnote entitled "**NOTICE TO APPLICANT**" in the FORM to notify Applicant of his right to object to the admissibility of Item 6 on the ground that it was not authenticated. In that paragraph, Applicant was also notified that if he did not raise any objection to Item 6 in his response to the FORM, or if he did not respond to the FORM, he could be considered to have waived any such objection, and that Item 6 could be considered as evidence in his case. Applicant received the FORM, which included a copy of Item 6. He did not respond to the FORM or otherwise object to Item 6.

Findings of Fact

Applicant, age 27, has been married since 2016. He has one minor child and an adult stepson. He received a bachelor's degree in 2014. He has been employed as an engineer by the same federal contractor since 2011, initially as an intern and then full-time status in 2015. He was granted a DOD security clearance in 2014.

The SOR alleged, under Guidelines H and E, Applicant's use and purchase of marijuana from about November 2016 through May 2017, which occurred while he held a security clearance. It also alleged his May 2017 arrest for possession of marijuana and paraphernalia. Under Guideline E, it alleged that Applicant failed to immediately report his May 2017 arrest, as required. In his SOR answer, Applicant admitted to each of the Guideline H and E allegations, without explanation.

In his September 2017 SCA, Applicant disclosed that he had been arrested in May 2017 and charged with two misdemeanors, "possession of marijuana" and "possession of paraphernalia." At that time, he was awaiting a trial, scheduled for November 2018. He also disclosed the following facts concerning his marijuana use: (1) First use: approximately November 2016; (2) Most recent use: May 2017; (3) Frequency: "I would smoke mainly on weekends and during stressful times;" (4) Use occurred while possessing a security clearance; and (5) No intent to use in the future, with the following explanation: "Doing this has messed up my life, family and is affecting my job. This was not worth losing any of these. I regret ever doing this." He disclosed the following facts concerning how he obtained marijuana: (1) "I would get marijuana from someone I knew to smoke;" and (2) Frequency: "Once a month." He disclosed the following facts about the reasons he used and purchased marijuana: (1) "This time period was *[sic]* low period of my life and *[sic]* was stressed out. During this time period I got married, had a baby, and was moving to a new house;" (2) "I was stressed out dealing with my family and my life changed drastically when I got married, had a baby and got a new house." (Item 5 at 28-29, 30-31).

In his SCA, Applicant disclosed that he “voluntarily sought counseling or treatment as a result” of his marijuana use. He explained that he was “Going to a counselor to talk about what has happened and dealing with my stress.” At the time he completed the SCA, he had scheduled his first appointment, but had not yet begun the counseling. (Item 5 at 32-33). He also disclosed that his DOD security clearance had been “denied, suspended, or revoked” in August 2017 because “I did not report an arrest immediately and I waited approximately 40 days to self report.” (Item 5 at 35).

During his February 2018 SI, Applicant expounded on the facts and circumstances underlying his marijuana use, purchase, and arrest; and his reporting of the arrest to his employer. He reiterated that he was motivated to use marijuana due to various contemporaneous stressors, including a new marriage, home, and baby; and issues concerning his troubled stepson, who then resided with him and his wife. He also expressed his intent never to use marijuana again, citing his job and family as motivation. He admitted that he lied when he told the investigator that he obtained marijuana from a friend because he did not want to disclose the name of his drug dealer. He purchased approximately 1/4 to 1/8 ounces of marijuana per month from the dealer. (Item 6 at 2-6).

Applicant’s May 2017 arrest occurred on a Monday between approximately 12:00 pm and 1:00 pm while he was driving from home to work. The officer initially pulled him over for speeding, but asked to search his vehicle because he smelled marijuana. He consented to the search, during which the officer found a container filled with one to two grams of marijuana and a pipe. He was arrested and brought to the police station, where he spent approximately 20 minutes before he was released. Approximately three hours from the time he was pulled over, he retrieved his car, which had been towed upon his arrest, and then drove straight to work. When he arrived at his work location, he acted as if nothing had happened and did not immediately report his arrest. Applicant’s criminal charges were initially adjudicated in July 2017. His case was diverted to a pre-trial program for first time offenders. Because he successfully completed the tasks required of the program, including an eight hour course that specifically targeted marijuana use, his case was dismissed in July 2018. (Item 4; Item 6 at 2-3 and 5-6).

Applicant admitted to the investigator during the SI, albeit after initially providing a more benign reason, that he knew that he should have immediately reported his arrest to his employer and failed to do so because he felt really bad about it and was fearful that he was going to lose his job. He reported it approximately 40 days after his arrest, after he was advised by his employer that he would be required to complete a security questionnaire for a new job assignment. Before completing the questionnaire, which he knew would require him to list his arrest, Applicant submitted an adverse report disclosing the arrest to his security office. After receiving the adverse report, his employer revoked his security clearance, relocated him, and disciplined him for the following reasons: (1) failure to notify them about his arrest; (2) drug use; and (3) mischarging his time on the day of his arrest. The discipline included a one-week unpaid suspension, one year of therapy, and a two-year probation which required “heightened drug tests.” At the time of the SI, Applicant had not yet been subjected to any drug tests by his employer. (Item 6 at 3-4).

Applicant engaged the services of a therapist through an employer-sponsored program. He began therapy in late September or October 2017, initially weekly and then once every other week. As of March 2018, he had not missed any sessions, which primarily involved helping him cope with his life stressors with specific emphasis on issues related to his stepson. He described his stepson's issues, which included mental health, drug use, and police involvement, as "very stressful." He did not provide any information about sessions, if any, after March 2018. Without providing any records from his therapist about his diagnosis or prognosis, he averred that he has not been diagnosed with any substance use disorder. Through therapy, he learned alternative coping mechanisms to deal with his stress. (Item 6 at 2, 4 and 5).

Applicant began using marijuana approximately six to nine months before his arrest. He never previously used any illegal drug. He knew that he was prohibited from using marijuana due to his employer's drug-free workplace policy, and because he held a security clearance. Thus, he intentionally separated his marijuana use from work, using it only on Saturdays and Sundays. He consumed marijuana by smoking it either in his car or in a closet in his home on each day of the weekend, which relaxed him and helped him calm down. He has not used marijuana since the day before his May 2017 arrest. He used marijuana with his wife, who has smoked marijuana daily since he met her in 2014, purportedly for back pain. She does not have a prescription for medical marijuana, and has no plans to discontinue her use, which has been a source of tension between them. (Item 6 at 4-5).

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." (*Egan* 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." (EO 10865 § 2).

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.

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.” (EO 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. (ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993)). 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. (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; AG ¶ 2(b)).

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.

The facts and circumstances surrounding Applicant’s marijuana use establish the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse (see above definition);

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.

Neither of the following potentially applicable mitigating conditions under this guideline are established:

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; and

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.

Given that Applicant did not respond to the FORM or otherwise specifically endorse the SI, while I admitted it into the record, I considered any facts contained in the SI that were not otherwise corroborated in the record for the sole purpose of evaluating mitigation and whole person. The facts and admissions contained in the SCA and the SOR Answer alone support the disqualification conditions of this guideline. However, the facts and circumstances discussed during the SI, including other unalleged misconduct, not only cuts against mitigation, but suggest that Applicant may have been minimizing not only his behavior, but also the severity of the stressors in his life and overestimating his ability to manage them.

As a married adult with a new baby, Applicant chose to smoke marijuana every weekend for six months, knowing that he was prohibited from doing so while he worked for a federal contractor in a drug-free workplace and held a security clearance. He purchased his marijuana from a drug dealer, a fact that he was less than candid about in his SCA and during his SI. I applaud his efforts to seek out alternative mechanisms to cope with stress through his employer-mandated therapy. However, Applicant has not established a sufficient pattern of abstinence, particularly given the persisting stressors of his wife's continued daily marijuana use and stepson's ongoing issues, and the lack of any prognosis from his therapist. I am unable to conclude that his marijuana use is unlikely to recur and have doubts about his current reliability, trustworthiness, and good judgment.

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.

Applicant's admissions, together with the facts and circumstances surrounding his marijuana use, including while holding a security clearance, and his failure to timely report his arrest to his employer, as required, establish the general concerns involving questionable judgment and unwillingness to comply with rules and regulations, and the following specific disqualifying condition:

AG ¶ 16(b): deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

Applicant has not established any of the following potentially applicable mitigating conditions under this guideline:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

AG ¶ 17(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; and

AG ¶ 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Incorporating my comments under Guideline F, I conclude that Applicant's marijuana use and his deliberate failure to timely report his arrest to his employer continues to cast doubt on his good judgment and willingness to comply with rules and regulations.

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 adjudicative guidelines, each of which is to be evaluated in the context of the whole person. In evaluating the relevance of an individual's conduct, 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 Guidelines H and E in my whole-person analysis, and I have considered the factors AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated security concerns raised by his marijuana use while holding a security clearance, his arrest for possession of marijuana and paraphernalia, and his failure to timely report his arrest to his employer. His lack of candor during the security clearance investigations process and other uncharged misconduct revealed during his SI further underscores these concerns. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

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

| | |
|---------------------------|-------------------|
| Paragraph 1, Guideline H: | AGAINST APPLICANT |
| Subparagraphs 1.a – 1.d: | Against Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |
| Subparagraphs 2.a – 2.b: | Against Applicant |

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge