



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



In the matter of:)	
)	
)	ISCR Case No. 19-01474
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: *Pro se*

12/02/2019

Decision

CERVI, Gregg A., 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 April 3, 2017. On June 25, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. 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 adjudicative guidelines (AG) effective on June 8, 2017.

Applicant answered the SOR on July 17, 2019 (Ans.), and requested a decision based on the administrative record, without a hearing. The Government’s written brief with supporting documents, known as the File of Relevant Material (FORM), was submitted by Department Counsel on August 19, 2019. The case was assigned to me on

November 21, 2019. A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, rebut, or mitigate the security concerns. Applicant received the FORM on August 28, 2019, but he did not submit a reply nor did he object to any matters contained in the record. Government Exhibits (GE) 1 through 3 are admitted into evidence without objection.

Findings of Fact

Applicant is a 30-year-old circuit design engineer, employed by a government contractor since March 2017. He previously worked for the same company from May 2013 to June 2015, but resigned to avoid being reassigned to another facility in another state. He graduated from high school in 2008, and earned two bachelor's degrees in 2012. He is unmarried and does not have any children. Applicant has never held a DOD security clearance.

The SOR alleges under Guideline H (Drug Involvement and Substance Misuse) that Applicant used marijuana from approximately 2005 to present, including after completing a DOD security clearance application (SCA); and that he intends to continue using marijuana in the future. In his Answer to the SOR, Applicant admitted the allegations, and explained that he intends to continue to use marijuana on a recreational basis, outside of working hours, in accordance with state regulations.

Applicant submitted an SCA in April 2017. In it, he disclosed a history of using marijuana (THC) since January 2005. He also disclosed past use of 3,4-methylenedioxy-methamphetamine (MDMA) (also known as ecstasy or molly), three times from October 2008 to February 2015. He stopped using MDMA because he was no longer interested in it, and because it was illegal.

Applicant was first caught using marijuana while in high school. He completed a drug awareness program in lieu of a suspension. More recently, he typically used marijuana with his girlfriend, friend, and roommate, usually with a smoking device (bong) or by consuming edibles. He purchased marijuana and MDMA illegally from friends until December 2012, when recreational use of marijuana became legal in his state, and it could be legally purchased under state law, at state-approved dispensaries.

Applicant was twice drug tested by his current employer; including when he was first hired in 2013, and again when he was rehired in March 2017. He passed both tests. Applicant stopped using marijuana prior to applying for jobs because he was concerned that he would test positive. Despite his employer's pre-employment drug tests, Applicant claimed that he is unaware of his company's illegal drug-use policy, and would stop if his company asks, but he understands use of marijuana is illegal under federal law. After Applicant was rehired and subsequently completed his SCA, he resumed using marijuana.

Applicant stated that he does not believe marijuana use is a problem as long as he does not use it on company time. He compared it to drinking beer. He stated he intends to continue to use marijuana with his friends, who have used it with him in the past. He enjoys the effects he gets from THC, and he believes it has not created any problems for him. He stated that he will continue to use marijuana under state law, despite his knowledge that it is illegal under federal law. He asserted that he has no ties to the U.S. government, so he sees no reason to stop using marijuana.

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.

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 conditions potentially applicable in this case include:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including . . . purchase, . . . 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 admitted to purchasing and using marijuana from 2005 to present, including after completing a government SCA in 2017. He also expressed his intent to

continue to use marijuana as long as it remains legal under state law. Disqualifying conditions AG ¶¶ 25 (a), (c), and (g) apply.

AG ¶ 26 provides conditions that could mitigate security concerns, and I have considered them all. No mitigating condition applies to this case. Applicant has a history of regular marijuana use since 2005. He also clearly and unambiguously stated his intent to continue to use marijuana in the future, including with friends with whom he used marijuana in the past. Marijuana use remains illegal under federal law and government security regulations. Applicant's history of regular marijuana use and expressed intent to continue using it in the future is inconsistent with federal law and regulations governing defense industry employees entrusted with the nation's secrets. Applicant's drug use history and future intent raise serious questions about his judgment, willingness to follow laws, rules, and regulations, and overall trustworthiness.

Whole-Person Concept

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. AG ¶¶ 2(a), 2(c), and 2(d). The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d).

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. I also considered Applicant's voluntary disclosures in his SCA and PSA, as well as his illegal use of MDMA on three occasions until 2015, and regular use of marijuana since 2005.

Additionally, I considered Applicant's expressed intent to continue to use marijuana, despite all that he knows about the security clearance and defense industry employment process, and drug-use prohibitions under federal law. Applicant has clearly expressed his intent to use marijuana, now and in the future, regardless of federal law or regulation. 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:
Subparagraphs 1.a and 1.b:

AGAINST APPLICANT
Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interest of the United States to grant Applicant's eligibility for access to classified information. Applicant's security clearance is denied.

Gregg A. Cervi
Administrative Judge