



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 ---) ISCR Case No. 19-01539
)
 Applicant for Security Clearance)

Appearances

For Government: Liam M. Apostol, Esquire, Department Counsel
For Applicant: *Pro se*

10/04/2019

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding drug involvement and substance misuse. Eligibility for a security clearance is denied.

Statement of the Case

On December 12, 2017, Applicant applied for a security clearance and submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a Security Clearance Application. On June 7, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (AG) (December 10, 2016) for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position, effective June 8, 2017.

The SOR alleged security concerns under Guideline H (Drug Involvement and Substance Misuse), and detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a notarized statement dated June 26, 2019, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by the Defense Office of Hearings and Appeals (DOHA) on July 16, 2019, and he was afforded an opportunity, within a period of 30 days, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on July 25, 2019. His response was due on August 24, 2019. Applicant timely submitted two documents in response to the FORM, and they were admitted without objection. The case was assigned to me on September 6, 2019.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with comments, both of the factual allegations pertaining to drug involvement and substance misuse (SOR ¶¶ 1.a. and 1.b.). Applicant's admissions and accompanying comments are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 35-year-old employee of a defense contractor. He has been serving as a project manager with his current employer since March 2011. A 2002 high school graduate, Applicant received a bachelor's degree in 2013. He enlisted in the U.S. Navy in July 2002, and served on active duty until February 2008, when he was medically discharged under honorable conditions, with no reserve obligation. He was granted a secret clearance in 2008, and that clearance has remained active. Applicant was married in 2007, and he has two children, born in 2011 and 2013.

Drug Involvement and Substance Misuse

Applicant was a recreational substance abuser whose substance of choice was marijuana. He commenced what he called a "minor level of participation" as well as "limited and infrequent" use of marijuana during the Christmas holiday in about December 2010, when he was 26 years old, and he continued his use until at least May 2016, when he was 32 years old, at a bachelor party of a close friend. In each instance, his marijuana use occurred during a vacation, or while attending a social gathering. Applicant never purchased the marijuana or carried it anywhere, for it was always provided by someone else during those gatherings. He denied ever using marijuana while carrying out his professional responsibilities; that he ever failed a random drug screening; or that his marijuana use ever resulted in any disciplinary action or criminal charges. (Item 1 (Answer to the SOR), at 2; Item 2, at 33; Item 3, at 2)

Marijuana made Applicant feel relaxed. Nevertheless, at some point, Applicant claimed that he decided that he no longer had the time or the desire to continue using marijuana, and continued use did not align with his career or developmental goals. (Item 2, at 34; Item 3, at 2; Item 1, at 2) Applicant voluntarily reported his marijuana use to his facility security officer (FSO) when he was completing his 2017 e-QIP. (Item 3, at 2) When Applicant completed his 2017 e-QIP, he acknowledged his past drug involvement and substance misuse. (Item 2, at 33-34)

Applicant denied knowing the significance of using any illegal drug while granted access to classified information, and he contends that his marijuana use while holding his security clearance was done “in ignorance.” (Response to the FORM) Now that he is aware of that information, Applicant submitted a signed statement of intent to abstain from all drug involvement and substance misuse, and he has acknowledged that any future involvement or misuse will result in the automatic revocation of his security clearance eligibility. (Statement of Intent, attached to his Response to the FORM) Applicant claims that he has been drug free since May 2016, and that he has ended his relationships with his drug-using friends and relatives. There is no evidence to indicate that Applicant has ever received counseling or treatment as a result of his illegal use of drugs or controlled substances.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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. The President has authorized the Secretary of Defense or his designee to grant an applicant 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.)

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.” “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)). “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 Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).)

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Furthermore, “security clearance determinations should err, if they must, on the side of denials.” (*Egan*, 484 U.S. at 531)

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” (See Exec. Or. 10865 § 7) Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Abuse 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.

Furthermore, on October 25, 2014, the Director of National Intelligence (DNI) issued Memorandum ES 2014-00674, *Adherence to Federal Laws Prohibiting Marijuana Use*, which states:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines (Reference H and I). An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

The guideline notes two conditions under AG ¶ 25 that could raise security concerns in this case:

- (a) any substance misuse (see above definition); and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant admittedly used marijuana between December 2010 and May 2016, describing the frequency of such use as "minor level of participation" as well as "limited and infrequent" use. He held a security clearance from 2008 until the present day. Applicant's argument that he was ignorant of the significance of using illegal drugs while holding a security clearance cannot be given much weight. AG ¶¶ 25(a), and 25(f) have been established.

The guideline also includes examples of conditions under AG ¶ 26 that could mitigate security concerns arising from Drug Involvement and Substance Misuse:

- (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

(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.

AG ¶¶ 26(a) and 26(b) minimally apply. Applicant's professed "minor level of participation" as well as "limited and infrequent" marijuana use, nevertheless, constitute drug involvement. Vacations and social events are not a valid excuse to use illegal drugs, and there is no evidence to indicate that it happened under such circumstances that it will be unlikely to recur. It is highly significant that the use of marijuana occurred and continued occurring after Applicant was granted a security clearance in 2008. While Applicant now finally acknowledges his drug involvement and substance misuse, he has only stated that he has been drug free since May 2016, and that he has ended his relationships with his drug-using friends and relatives. There is no documentation, including character statements that might support his positions. He has submitted a formal statement of intent acknowledging that any future drug involvement or misuse is grounds for revocation of national security eligibility.

A person should not be held forever accountable for misconduct from the past, but in this instance, Applicant started using marijuana in December 2010, and his most recent drug involvement and substance misuse was in May 2016, while Applicant was in possession of a security clearance. With a cavalier attitude towards laws, rules, and regulations spanning over five years, Applicant periodically used marijuana while holding a security clearance. Despite knowing that such use was prohibited by both the Government and his employer, he claimed ignorance of the significance of doing so while holding a security clearance.

I have considered the entire record, including Applicant's admission of the SOR allegations. Applicant did finally come forward and admit his drug involvement, and for doing so, I have given him some credit. However, Applicant's purported abstinence from marijuana has only been for little over three years, or two years before the SOR was issued, while his use of marijuana occurred over a period of nearly six years. Applicant's abstinence should be encouraged, but his repeated marijuana use continued until at least May 2016. Despite his claimed new maturity and intentions, Applicant's actions under the circumstances continue to cast doubt on his current reliability, trustworthiness, and good judgment.

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at SEAD 4, App. A, ¶ 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.

Under SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis. (See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006))

There is some evidence mitigating Applicant's conduct. Applicant is a 35-year-old employee of a defense contractor. He has been serving as a project manager with his current employer since March 2011. A 2002 high school graduate, Applicant received a bachelor's degree in 2013. He served honorably in the U.S. Navy from July 2002 until he was medically discharged with no reserve obligation. He was granted a security clearance in 2008, and that clearance has remained active. He has reportedly abstained from any drug involvement and substance misuse since May 2016. Applicant finally voluntarily disclosed his history of drug involvement and substance misuse when he completed his e-QIP in 2017.

The disqualifying evidence under the whole-person concept is more substantial. Applicant admittedly was a marijuana user between December 2010 and May 2016, describing the frequency of such use as "minor level of participation" as well as "limited and infrequent" use. Nevertheless, regardless of the frequency of such drug use, the use of marijuana was prohibited by both the Government and his employer, a defense contractor, and it was illegal. The use of, or involvement with, marijuana raises questions about an individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws. In this instance, Applicant's attitude towards laws, rules, and regulations, is unacceptable, and his use of marijuana while holding a security clearance, even though he claimed ignorance of the significance of doing so while holding a security clearance, continues to cast doubt on his current reliability, trustworthiness, and good judgment.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his drug involvement and substance abuse; and personal conduct. See SEAD 4, App. A, ¶¶ 2(d)(1) through AG 2(d)(9).

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

Subparagraphs 1.a. and 1.b.: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ROBERT ROBINSON GALES
Administrative Judge