



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 20-01778
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*
06/16/2021
Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for access to classified information. Applicant failed to mitigate the security concern raised by his use of marijuana and cocaine. Eligibility denied.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on May 4, 2019. This document is commonly known as a security clearance application. On October 16, 2020, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant his eligibility for access to classified information. The SOR detailed the factual reasons for the action under the security guideline known as Guideline H for drug involvement and substance misuse. Applicant answered the SOR on November 5, 2020, and requested a decision based on the written record without a hearing. Items 1 and 2.

On February 25, 2021, Department Counsel submitted a file of relevant material (FORM) containing the evidence supporting the SOR allegations. The FORM was mailed to Applicant on February 25, 2021. He was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government’s evidence. Applicant received

the FORM on March, 1, 2021. Applicant did not respond to the FORM. The case was assigned to me on May 12, 2021. Included in the FORM were three items of evidence, which are admitted into evidence without objection.

Findings of Fact

Applicant is 29 years old, a high school graduate, never married, with no children. He served on active duty in the United States Marine Corps from February 2012 until February 2017, when he was honorably discharged. Since April 2019, he has worked for a defense contractor. (FORM Items 2 and 3.)

The SOR alleged that Applicant (1) used cocaine with varying frequency from about June 2018 to February 2019 while having access to classified information; (2) used marijuana with varying frequency from about July 2015 to November 2018 while having access to classified information; (3) used marijuana with varying frequency from about November 2004 to November 2018. Applicant admitted those allegations. (FORM Items 1 through 3.)

Applicant used the cocaine and marijuana with two of his friends for experimental purposes. Applicant still maintains contact with those two friends. He never purchased or obtained the drugs. Applicant used the drugs at home. He did not like the effects the drugs had on him. He has no interest in or intent to use drugs in the future. Applicant's career is more important to him than illegal drug use. (FORM Item 3.)

Law and Policies

It is well-established law that no one has a right to a security clearance. As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *Department of Navy v. Egan*, 484 U.S. 518, 528,531 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance). Under *Egan*, E.O. 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information. An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information. ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004). The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted. An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven. In addition, an

applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence. *Egan*, 484 U.S. at 531. The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard. ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

Discussion

Guideline H – Drug Involvement and Substance Abuse

Under AG H for drug use, suitability of an applicant may be questioned or put into doubt because drug use can both impair judgment and raise questions about a person's ability or willingness to comply with laws, rules, and regulations. AG ¶¶ 24, 25 and 26 (setting forth the concern and the disqualifying and mitigating conditions).

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.

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions or factors:

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;

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

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.

Applicant admitted using marijuana and cocaine with varying frequency from November 2004 to February 2019 at times while holding a security clearance. Facts admitted by an applicant in an answer to a SOR or in an interview require no further proof from the Government. ISCR Case No. 94-1159 at 4 (App. Bd. Dec. 4, 1995) (“any admissions [applicant] made to the SOR allegations . . . relieve Department Counsel of its burden of proof”); ISCR Case No. 94-0569 at 4 and n.1 (App. Bd. Mar. 30, 1995) (“[a]n applicant’s admissions, whether testimonial or written, can provide a legal basis for an Administrative Judge’s findings”).

Marijuana and cocaine are Schedule I controlled substances, and possession of them is regulated by the federal government under the Controlled Substances Act. 21 U.S.C. § 811 *et seq.* The knowing or intentional possession and use of any controlled substance is unlawful and punishable by imprisonment and or a fine. 21 U.S.C. § 844. In an October 25, 2014 memorandum, the Director of National Intelligence reaffirmed that the use of marijuana is relevant to national security determinations, regardless of changes to state laws concerning marijuana use. James R. Clapper, Director of National Intelligence, Memorandum: *Adherence to Federal Laws Prohibiting Marijuana Use* (October 25, 2014). See also <http://www.dea.gov/druginfo/ds.shtml>. AG ¶¶ 25(a), (c), and (f) apply. The next inquiry is whether any mitigating factors apply.

I have considered mitigating factor AG ¶ 26(a). Applicant used illegal drugs with varying frequency from November 2004 to February 2019 at times while holding a security clearance. His behavior was neither infrequent, nor did it occur long ago, with his last use being in February 2019, just over two years ago. I find that AG ¶ 26(a) does not apply.

I have considered mitigating factor AG ¶ 26(b). There several elements to AG ¶ 26(b). First, the applicant needs to have acknowledged his drug involvement and substance misuse. Second, applicant needs to have signed a written statement of intent to abstain from all drug involvement in the future. Here, Applicant acknowledged his drug involvement and his intent to abstain from drug involvement in the future. Those acknowledgements were made in written statements by Applicant in his Answer to the SOR, his security clearance application, and during his Personal Subject Interview (PSI), all of which were verified. Third, Applicant needs to acknowledge that any future drug involvement is grounds for revocation of national security eligibility. Applicant has stated

that his career is more important to him than illegal drug use. I find that those three elements of AG ¶ 26(b) are satisfied.

There remains, however, two other elements of AG ¶ 26(b). Fourth, an applicant must disassociate himself from drug-using associates. During his PSI Applicant admitted that he remains in contact with the two friends who enabled his use of marijuana and cocaine. I find that this element is not satisfied. Fifth, an overarching element is that an applicant has shown a pattern of abstinence. Applicant has been abstinent for just over two years, after many years of illegal drug usage. I find that this is not a sufficient pattern of abstinence. AG ¶ 26(b) does not apply. Applicant is on the right track, and if he remains abstinent, he could be a worthy candidate for reapplication.

The record raises doubts about Applicant's reliability, trustworthiness, judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept. AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6). Accordingly, I conclude that Applicant did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the SOR allegations:

Paragraph 1, Guideline H:	Against Applicant
Subparagraphs 1.a-1.c:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant access to classified information.

Philip J. Katauskas
Administrative Judge