



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 20-02895 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

07/22/2022

Decision

CERVI, Gregg A., Administrative Judge

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Abuse) 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 May 29, 2019. On April 19, 2021, the Defense Counterintelligence and Security Agency, Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The DCSA 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Applicant responded to the SOR on July 29, 2021 and requested a decision based on the administrative (written) record, without a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The Government's written brief with supporting documents, known as the file of relevant material (FORM), was submitted by Department Counsel on November 17, 2021. 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 January 14, 2022. He did not respond to the FORM, object to the Government's exhibits, or submit additional documentary evidence for my consideration. The case was assigned to me on March 30, 2022. Government Exhibits (GE) 2 through 4 are admitted into evidence without objection. GE 1 is the SOR and Applicant's Answer, which are already part of the record.

Findings of Fact

Applicant is a 29-year-old process mechanic and aircraft painter, employed by a defense contractor since April 2019. He graduated from high school in 2012. He is unmarried and has no children. This is his first security clearance application.

The SOR alleges under Guideline H (Drug Involvement and Substance Misuse) that Applicant used marijuana on various occasions between at least June 2009 and January 2019 (SOR ¶ 1.a); and that in August 2016, he was charged with DWI – drug intoxication, resisting arrest by flight, and felony property damage. He was convicted of DWI and placed on probation for two years. (SOR ¶ 1.b)

Under Guideline E (Personal Conduct), the SOR cross-alleged in ¶ 2.a, the allegations in SOR ¶¶ 1.a and 1.b. Also, the SOR alleged that Applicant falsified his May 2019 SCA by failing to disclose his criminal charges and DWI conviction as alleged in SOR ¶ 1.b, and past drug use as alleged in SOR ¶ 1.a. (SOR ¶¶ 2.b and 2.c) Finally, the SOR alleges that Applicant falsified material facts in the answers provided in his August 2019 personal subject interview (PSI), wherein he failed to disclose his felony charge and alcohol-related offense as alleged in SOR ¶ 1.b. (SOR ¶ 2.d)

In his 2019 SCA, Applicant noted that he had no history of illegal drug use, alcohol-related charges, arrests, convictions, or other criminal/police activity. When he was first interviewed by an investigator in August 2019, he twice denied ever being charged with a felony or any offense involving alcohol. When the investigator confronted him with information about his charges and conviction in August 2016, he asserted that it was not supposed to be part of his record so he did not think it needed to be listed on his SCA. He described the incident, changed parts of his story, and then stated that he purposely omitted the arrest, assuming it would not be on his record or raised in the investigation and that he wanted to keep his business private. He stated that he was happy to have his job and did not want or think he needed a security clearance.

In his response to Government interrogatories and in his PSI, Applicant admitted to daily marijuana use from June 2009 to January 2019. He stated in his PSI that he was

an “habitual daily user” but never believed it to be problematic because it never affected his personal or professional life. He used marijuana alone or whenever given the chance. He purposely omitted the information from his SCA as he did not think it would ever come up or be included in the police report. He claimed to have no immediate intention to use marijuana again, but left open the possibility of using it after he retired if it was legal. He also admitted his August 2016 arrest for driving under the influence of alcohol. He stated in his response to interrogatories that he pleaded guilty and “a deal was made if I go two years under probation with no re-occurring incidents, then the DUI would be removed from [his] record, case is currently closed with everything complete.” His Federal Bureau of Investigation (FBI) criminal history shows Applicant was charged in August 2016 for DWI-drug intoxication, resisting arrest, property damage, and felony property damage 1st degree.

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 several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

(a) any substance misuse (see above definition).

Applicant used marijuana daily between June 2009 and January 2019, and was also charged with DWI – drug involvement. AG ¶ 25(a) applies.

AG ¶ 26 provides conditions that could mitigate security concerns. I have

considered all of the mitigating conditions, and find the following conditions as potentially applicable:

(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;

(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 has a long history of marijuana use, terminating in January 2019. He claims to have stopped before he began his current employment. Although he told the investigator in his PSI that he had no intention of continuing illegal drug use, he did not provide a signed statement as contemplated by AG ¶ 26(b), nor did he convince me of a sufficient pattern of abstinence, a change in circumstances, efforts to acknowledge a habitual drug use problem or efforts to overcome it, disassociating from drug-using associates, or a change to the environment where drugs were used in the past.

Insufficient time has passed since he stopped using illegal drugs, and I do not find that the circumstances in which he used drugs in the past are unlikely to recur. Of further concern is that Applicant falsely denied drug use in his SCA. Applicant's history of drug use continues to cast doubt on his current reliability, trustworthiness, and good judgment. No mitigating condition fully applies.

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.

The relevant disqualifying conditions under AG ¶16 are:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

(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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing;

(2) while in another country, engaging in any activity that is illegal in that country; and

(3) while in another country, engaging in any activity that, while legal there, is illegal in the United States.

Applicant's use of marijuana, the 2016 charges including a felony and an alcohol/drug-related offense, and falsifications of his 2019 SCA and PSI are all disqualifying conduct under Guideline E. Applicant admitted to the SOR allegations in his Answer, and the documentary evidence supports the SOR. AG ¶¶ 16(a), (b), and (e) apply.

AG ¶ 17 provides conditions that could mitigate security concerns in this case:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

None of the mitigating conditions fully apply to Applicant's falsifications of his SCA and PSI, or his use of marijuana and criminal conduct. I am not satisfied that sufficient time has passed or that Applicant has shown that this conduct is behind him and will not recur. He noted his omissions were intentional and stemmed from his belief that a security clearance was not necessary for his employment, and his desire to keep his business private. His behavior continues to cast doubt on his reliability, trustworthiness, and good judgment. Nothing has submitted to persuade me that these personal conduct concerns will not persist. Personal conduct security concerns are not mitigated.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), 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. 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 Guidelines H and E in my whole-person analysis. I considered Applicant's admissions, PSI, and interrogatory responses. Based on Applicant's lack of response to the FORM, I am not convinced that Applicant is willing or able to permanently put his past misconduct aside and show good judgment in all areas of his life, especially those that are relevant to security eligibility.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude he 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 amended, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

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