



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



In the matter of:)
)
) ISCR Case No. 14-02870
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Cory Goldensohn, Esq.

09/14/2015

Decision

DAM, Shari, Administrative Judge:

Applicant used marijuana twice in 2012, while holding a security clearance. He disclosed the illegal drug use in his security clearance application. He provided evidence that he no longer uses marijuana or associates with people using illegal drugs. His employer is aware of the 2012 incidents, and continues to support Applicant's request for a security clearance. He mitigated the drug involvement security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On January 22, 2009, Applicant submitted a Questionnaires for Investigations Processing (e-QIP). (Item 6.) On September 15, 2014, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline H, Drug Involvement. The SOR detailed reasons why the DoD was unable to find that it is clearly consistent with the national interest to grant a security clearance for Applicant, and it recommended

that his case be submitted to an administrative judge for a determination whether his clearance should be denied, granted, continued, or revoked.

On September 21, 2014, Applicant answered the SOR and requested a hearing (Answer). On December 2, 2014, Applicant's attorney filed his appearance. (Item 4.) On December 9, 2014, Applicant through his attorney requested that his case be decided on the written record rather than a hearing. (Item 5.) On May 14, 2015, Department Counsel prepared a File of Relevant Material (FORM) containing eight Items, and mailed Applicant a complete copy of it on June 1, 2015. He received the copy on June 4, 2015, and had 30 days from its receipt to file objections and submit additional information. Applicant timely filed a Response to the FORM, and submitted eight documents, which I marked as Applicant Exhibits (AE) 1 through 8 and admitted into the record without objection from Department Counsel.¹ On July 23, 2015, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me.

Findings of Fact

Applicant admitted the sole allegation in the SOR. His admission is accepted as a factual finding.

Applicant is a 29-year-old employee of a defense contractor. He attended college from 2004 to 2008, and graduated with a bachelor's degree. He is married since 2014. He and his wife were expecting their first child in July 2015. (Item 8; Response.)

In January 2009 Applicant began a position with his current employer, at the age of 22. When Applicant completed his January 2009 e-QIP, he disclosed that between February 2004 and June 2004, he used marijuana six to eight times while in his senior year of high school.² (Item 6.) He was subsequently granted a security clearance. (Item 7.)

When Applicant completed his February 2014 e-QIP, he disclosed that he used marijuana twice in March 2012. (Item 6.) He explained that while traveling for a vacation to another state he spent the night with a friend of a friend. That evening the friend offered Applicant marijuana which he accepted. On his way home from his vacation, Applicant spent another night with that friend, and again used marijuana when the friend offered it to him. He stated that he told his family and employer about his usage. He expressed regret and shame over his misconduct. (Item 2.)

Applicant stated that he has not used marijuana since March 2012. He has had no contact with the individuals with whom he used marijuana, as they live in another state. He has matured since March 2012. He is now in management at his place of

¹ Applicant's Counsel labeled his exhibits as Items in his Response to the FORM. For purposes, of clarification, those Items will be referred to as Applicant Exhibits (AE) in this Decision.

² The SOR did not allege Applicant's 2009 marijuana use as a security concern. Hence, it will not be considered in the analysis of disqualifying conditions. However, it may be considered in the analysis of mitigating conditions and whole-person concept.

employment and has become a leader of his team. His family and job are of primary importance to him. (Item 2.) He submitted a statement of his intent to agree to an automatic revocation of his security clearance for any future violations. (AE 5.) Applicant has never been arrested, charged, or convicted of a drug-related offense or any other offense. (Item 2.)

Applicant submitted three letters of recommendation. A senior manager, who has supervised Applicant for five and a half years, is aware of the pending security clearance investigation. He stated that Applicant is an exemplary employee, excelling at a “high level of technical competence, leadership, teamwork, and responsibility.” (AE 2.) He said that Applicant “is genuinely remorseful and wishes he could change history. [Applicant] is guilty of a lapse of judgment-something that he has clearly learned from and I believe won’t repeat again.” (AE 2.) Another supervisor is aware of Applicant’s marijuana use. He said that Applicant explained to him what happened in March 2012, and that “[Applicant] did not take the easy way, he told the truth and took ownership of his actions.” (AE 3.) A colleague for six years is aware of Applicant’s marijuana use. He believes that “the very admission of the marijuana usage is testament to the open and honest, trustworthiness that defines [Applicant] as an individual.” (AE 4.) Applicant’s security officer stated that Applicant “has not been written up for any security violations or infractions.” (AE 6.)

Applicant submitted four annual performance evaluations. In 2011 he received an overall “High Contributor” rating. In 2012 he received an overall “Exceptional Performer” rating. In 2013 he received an overall “High Performer” rating. In 2014 he earned an overall rating of “Exceptional Performer.” All evaluations document his success as an employee who demonstrates high potential and commitment to his job and team. (AE 7.)

Policies

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 the applicant may deliberately or inadvertently fail to protect or 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. Adverse clearance decisions are made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned.” See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995) § 3. 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 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. See *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 ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Drug Involvement

AG ¶ 24 articulates the drug involvement security concern:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 25 describes two conditions that could raise a security concern and may be disqualifying:

- (a) any drug abuse (see above definition); and
- (g) any illegal drug use after being granted a security clearance.

Those two disqualifying conditions apply because Applicant admitted that he illegally used marijuana twice in March 2012, at which time he held a security clearance.³

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

- (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) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence; and
 - (4) a signed statement of intent with automatic revocation of clearance for any violation.
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no "bright line" rules for determining when such conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004.) In 2009 Applicant disclosed to the Government that he illegally used marijuana several times in 2008 during the final months of his senior year in high school. In 2014 Applicant disclosed that he illegally used marijuana twice in March 2012 when he was on vacation in another state. He has not used marijuana since March 2012, over three

³AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

- (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

years ago. Based on his honest disclosures, remorse, the circumstances surrounding those usages, and his employer's observations and recommendations, similar conduct is unlikely to recur. AG ¶ 26(a) provides mitigation.

Applicant no longer associates with people with whom he used illegal drugs and he avoids environments where drugs are present. He provided a signed statement of his intent not to use illegal drugs in the future. AG ¶ 26(b) also has application.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse drugs after being issued a prescription that is lawful under federal law. The marijuana he used was never lawfully prescribed for him under federal law. He did not provide proof of satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, or a favorable prognosis by a duly qualified medical professional.

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 AG ¶ 2(a):

- (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 AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

The factors in favor of granting Applicant access to classified information are persuasive. Applicant honestly disclosed using marijuana in 2004 while in high school, and eight years later in 2012 while on a vacation. While his use in 2012 raised an additional concern because he held a security clearance at the time, his statements of remorse and guilt over his misconduct, along with strong work performances and impressive recommendations from supervisors, lead me to believe that he has sufficiently matured in the past three and a half years, and he will no longer use marijuana. He should realize at this time that similar conduct in the future, in all probability, will result in the loss of his security clearance and employment. Overall, the record evidence leaves me without concerns as to Applicant's present eligibility and

suitability for a security clearance. He met his burden to mitigate the security concerns arising from his drug involvement.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Shari Dam
Administrative Judge