



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



In the matter of: REDACTED Applicant for Security Clearance))))))	ISCR Case No. 14-01565
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Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

03/16/2015

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant mitigated security concerns raised by his use of marijuana and minor offenses that he committed while in college. He has not used marijuana or been involved in other criminal activity in the past five years. Clearance is granted.

Statement of the Case

On June 10, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR), alleging that Applicant’s conduct and circumstances raised security concerns under the criminal conduct guideline (Guideline J).¹ On July 3, 2014, Applicant answered the SOR, affirmatively waived his right to a hearing, and requested a decision regarding his suitability for a clearance on the written record. Department Counsel did not move for a hearing.

¹ This action was taken under Executive Order (E.O.) 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 implemented by DOD on September 1, 2006.

On October 27, 2014, Department Counsel issued a file of relevant material (FORM) and sent it to Applicant. The FORM contains the Government's proposed findings of fact, argument, and five exhibits. Applicant elected not to submit a response or objections to the FORM. Therefore, Government Exhibits (Gx.) 1 – 5 are admitted into evidence without objection.² On January 30, 2015, I was assigned Applicant's case.

Motion to Amend SOR

Department Counsel moved to amend the SOR to withdraw allegation 1.a. (FORM, n. 5) The motion, without opposition, is granted.

Findings of Fact

After a thorough review of the pleadings and exhibits, I make the following findings of fact:³

Applicant bought and used marijuana while in high school and college. He graduated from high school in 2004. During his freshman year in college, Applicant's parents convinced him to go to counseling for his marijuana use. He continued to use marijuana until 2010. He was arrested and convicted of several minor offenses while in college, to include marijuana possession and public drunkenness. The record does not reflect any other arrests or involvement with illegal activity since 2010.

In 2011, Applicant earned his undergraduate degree and graduated from college. After graduation, Applicant was employed as an engineer until being laid off by his former employer in May 2013. He returned to school to pursue a graduate degree. He secured employment with his current employer in December 2013. He submitted a security clearance application (SCA) in connection with his current job. This is Applicant's first application for a security clearance. He disclosed his past drug use, police record, and other pertinent background information in response to questions in the SCA. He is now 28 years old, never married, and has no children.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are only eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry*, § 2 (Feb. 20, 1960), as amended.

² Gx. 5 is a summary of Applicant's security clearance background interview from February 6, 2014. Department Counsel conceded that the information reported in the summary "may not be entirely correct, or up to date." (FORM, n. 1) Accordingly, I have given this document less weight.

³ In reaching the above findings of fact, I have made only those reasonable inferences supported by the evidence and, where necessary, resolved any potential conflict raised by the evidence.

When evaluating an applicant's eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a common sense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.⁴ However, as the Appeal Board has unequivocally held, there is no *per se* rule in security clearance cases requiring disqualification. A judge must decide each case based on its own merits.⁵

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. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.⁶

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." E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

⁴ See *also*, ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) ("Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.").

⁵ ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014).

⁶ See, ISCR Case No. 11-13626 (App. Bd. Nov. 7, 2013) (security clearance determinations require administrative judges to make predictive judgments about an individual's ability and willingness to protect and safeguard classified information). See *also*, ISCR Case No. 11-12202 at 5 (The "Adjudicative Guidelines are designed to *predict*. The prediction in nonsecurity violation cases is made by identifying and then evaluating behaviors or circumstances that have an articulable nexus to the ability or willingness to safeguard classified information.") (emphasis in original).

Analysis

Guideline J, Criminal Conduct

The security concern regarding criminal conduct is explained at AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Applicant's past criminal conduct, to include his marijuana involvement, raises this security concern. It also triggers application of the following disqualifying conditions:

AG ¶ 31(a): a single serious crime or multiple lesser offenses; and

AG ¶ 31(c): allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

The guideline also sets forth a number of conditions that may mitigate the criminal conduct concern. The evidence raised the following mitigating conditions:

AG ¶ 31(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 31(d): there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's past criminal conduct was limited to his youth. He has not been involved in criminal activity, to include illegal drug involvement, since 2010. Although the counseling he received his freshman year in college had no immediate impact, five years have passed since he last used marijuana or was involved in criminal activity. In those five years, Applicant earned an undergraduate degree, graduated from college, and worked in his chosen profession. He has now returned to school to pursue a graduate degree while continuing to work as an engineer. AG ¶¶ 31(a) and (d) apply.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the

nine factors listed at AG ¶ 2(a).⁷ I hereby incorporate my comments under Guideline J and highlight some additional whole-person factors. Applicant voluntarily disclosed the adverse information that formed the basis of the SOR. His honesty and the maturity he has shown over the past five years demonstrate that he now possess the reliability, trustworthiness, and good judgment required of those granted a security clearance. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility for access to classified information.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraph 1.a:	Withdrawn
Subparagraphs 1.b – 1.g:	For Applicant

Conclusion

In light of the record evidence and for the foregoing reasons, it is clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is granted.

Francisco Mendez
Administrative Judge

⁷ The non-exhaustive list of adjudicative factors are: (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.