



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



In the matter of:)
)
) ISCR Case No. 10-05742
)
Applicant for Security Clearance)

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

April 29, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant, 28, has an eight-year history of illegal use of marijuana. His most recent use of marijuana was in January 2010. He is commended for disclosing his marijuana use in his security clearance application (SCA). Notwithstanding, the sparse record evidence is not sufficient to mitigate the drug involvement concerns. His use is recent. He has not participated in substance abuse counseling or treatment. He presented no evidence of a recent diagnosis with a favorable prognosis. In light of his age, his many years of using marijuana, and the sparse corroborating evidence about a permanent lifestyle change and disassociation from his drug-using friends, Applicant's behavior continues to cast doubt about his reliability, judgment, and ability and willingness to comply with the law. Clearance is denied.

Statement of the Case

Applicant submitted a SCA on March 25, 2010. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and

Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

On October 28, 2010, DOHA issued Applicant a statement of reasons (SOR), which specified the basis for its decision – security concerns under Guideline H (Drug Involvement) of the adjudicative guidelines (AG).²

Applicant responded to the SOR allegations on November 15, 2010, and elected to have his case decided without a hearing. A complete copy of the file of relevant material (FORM), dated January 6, 2011, was mailed to him by cover letter dated January 28, 2011. Applicant acknowledged receipt of his copy of the FORM on an unspecified date. He was given 30 days from the date he received the FORM to submit any objections and information in mitigation or extenuation. He did not respond, and the case was assigned to me on April 4, 2011, to determine whether a clearance should be granted or denied.

Findings of Fact

Applicant denied the factual allegation under SOR ¶ 1.a. In his answer to the SOR, he explained that he denied the SOR allegation because it suggests that he illegally used marijuana beyond January 2010. He reiterated that, as disclosed on his SCA, and as stated in his April 2010 interview with a government background investigator, he only used marijuana from January 2003 until January 2010.

His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, including Applicant's SCA, his answers to the SOR and DOHA interrogatories, and his statement to a government investigator, I make the following additional findings of fact.

Applicant is a 28-year-old project analyst working for a government contractor. He graduated from high school in May 2001. He attended college from August 2001 until December 2009, when he received his bachelor's degree. He is not married and he has no children. He has been working for his employer since June 2009. This is his first security clearance application.

Applicant started using marijuana illegally at age 20, while in college, in about January 2003. He estimated using marijuana approximately 75 times between January 2003 and January 2010. He used marijuana mostly at social settings. He explained that most of his marijuana use occurred from 2003 until 2006, specifically from the summer of 2005 to the summer of 2006. Applicant clarified that he did not use marijuana from

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

² Adjudication of this case is controlled by the AGs, implemented by the DoD on September 1, 2006.

the fall of 2006 until January 2010. He categorized his use of marijuana in January 2010, as an isolated incident and a huge mistake. He used marijuana in January 2010 while vacationing in Spain with a friend.

Applicant claimed he has been abstinent from marijuana since January 2010, and that he has no intention of using marijuana ever again. He averred he has never used any other illegal drugs, and that he never purchased, cultivated, or sold marijuana.

Applicant has not participated in drug counseling or rehabilitation, and has not been diagnosed with substance abuse. He presented no evidence of a recent diagnosis or prognosis concerning his use of illegal drugs. Applicant reiterated his intention never to use illegal drugs again. He explained that he understands that the illegal use of drugs would be detrimental to his career and his health. He claimed that he no longer associates with his drug-using friends. Applicant stated that his mother and friends are aware he used marijuana, and that he cannot be blackmailed based on that information.

Applicant stated that he assumes full responsibility for his lack of judgment. He is willing to participate in any type of drug testing to show that he has been abstinent. He believes that he being candid and forthcoming in his SCA and during his background interview demonstrates his honesty, reliability, and trustworthiness.

Policies

The President of the United States 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.” *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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 to reach his decision.

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 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. 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. See also Executive Order 12968 (Aug. 2, 1995), Section 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 that 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

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern about drug involvement:

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.

Applicant has an extensive history of illegal use of marijuana. He started using marijuana at age 20, and he used marijuana with varying frequency, from January 2003 until January 2010. Applicant claimed he stopped using marijuana because he wants to pursue a career and is concerned about his health. He knows that his use of marijuana

was illegal, and his continued use of marijuana would affect his ability to pursue a career. He promised to never use marijuana again. Notwithstanding, the sparse record evidence is not sufficient to show he has implemented permanent lifestyle changes to prevent his future use of marijuana.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Two drug involvement disqualifying conditions raise a security concern and are disqualifying in this particular case: AG ¶ 25(a) “any drug abuse”³ and AG ¶ 25(c) “illegal drug possession.”

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.

I find that none of the Guideline H mitigating conditions fully apply. Applicant’s abuse of drugs spans a lengthy period. Not enough time has passed for me to conclude

³ AG ¶ 24(b) defines “drug abuse” as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

AG ¶ 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.

that his questionable behavior is unlikely to recur. His behavior still cast doubts on Applicant's reliability and judgment. AG ¶ 26(a) does not apply.

Applicant consumed illegal drugs from 2003 until January 2010. He has not participated in any counseling or aftercare treatment program. He presented no evidence of a recent diagnosis or prognosis concerning his illegal drug use. In light of Applicant's age, his history of illegal marijuana use, and the recency of his questionable behavior, Applicant's promise not to use illegal drugs without corroboration (e.g., clear evidence of lifestyle changes, statements from those who know him about his disassociation from his drug-using friends, or a competent medical diagnosis and prognosis) is not sufficient to show his questionable behavior is unlikely to recur.

The sparse record evidence is not sufficient to demonstrate his intent not to use drugs in the future. I find there has not been a sufficient period of abstinence. His past questionable behavior still casts doubts on Applicant's reliability, judgment, and willingness and ability to comply with the law. Applicant's favorable evidence, at this time, is not sufficient to fully mitigate the Guideline H security concerns.

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(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.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant worked while attending college. Most of his questionable behavior occurred while he was in college. He stopped using illegal drugs in January 2010, because he wants to develop a career and is concerned about his health. These factors show responsibility, good judgment, and some mitigation.

In light of Applicant's age and lengthy period using marijuana, his promise to not use marijuana without corroboration is not sufficient to show it is unlikely his questionable behavior will recur. On balance, the record evidence fails to convince me of Applicant's eligibility and suitability for a security clearance.

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

Subparagraph 1.a: Against Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge