



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



In the matter of:)
)
) ISCR Case No. 15-03601
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Ronald C. Sykstus, Esq.

07/25/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Guideline H (drug involvement). Clearance is granted.

Statement of the Case

On October 1, 2014, Applicant submitted a Questionnaire for National Security Positions (SF 86). On November 13, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline H. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to continue 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 continued or revoked.

On November 24, 2015, Applicant responded to the SOR. On February 29, 2016, Department Counsel was ready to proceed. On March 9, 2016, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me. On April 1, 2016, DOHA issued a hearing notice, setting the hearing for April 19, 2016. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through GE 3, which were received into evidence without objection. Applicant called eight witnesses, testified, and offered Applicant Exhibits (AE) A through AE N, which were received into evidence without objection. On June 5, 2015, DOHA received the hearing transcript (Tr.).

Findings of Fact

Applicant admitted all of the allegations with explanations. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 31-year-old lead software architect employed by a defense contractor since October 2014. He seeks to retain his secret security clearance, which is a requirement of his continued employment. Applicant was initially granted a clearance in 2009 and has successfully held an active clearance since then except for the time period from 2012 to 2014 when he did not work for a defense contractor. (GE 1; Tr. 14-15)

Applicant graduated from high school in May 2004. He was awarded a bachelor of science degree in engineering in May 2009, and was awarded a master of science degree in software engineering in August 2011. (GE1; AE H, AE K; Tr. 16-21) He has never married and has no dependents. Applicant has not served in the U.S. armed forces. (GE 1, Tr. 17-18)

Drug Involvement

The underlying basis of Applicant's past drug involvement is derived from his self-disclosure. His past drug use consists of having used marijuana with varying frequency from about March 2006 through May 2008 and on one occasion on January 1, 2013. Although he was granted a security clearance in August 2009 with a previous employer, that clearance was not active in January 2013, as inferred in the SOR. (SOR ¶¶ 1.a - 1.b; SOR answer; Tr. 28-30)

Applicant initially reported his past marijuana use when completing his October 2014 SF-86, and discussed in detail the circumstances of such use during his November 3, 2014 Office of Personnel Management Personal Subject Interview (OPM PSI). He further discussed his past marijuana use in detail during his hearing. He

estimates that his total use of marijuana occurred “seven to 10 times . . . usually at party settings.” His former roommate introduced him to marijuana, a roommate with whom he no longer communicates. He used marijuana “six to nine times” before graduating from college and one time on January 1, 2013. (GE 1, GE 2; Tr. 21-24, 26-28)

Applicant’s one-time post-college marijuana use on January 1, 2013, occurred at a New Year’s Eve party when a friend “took a joint out and passed it around. I took one hit and then I stopped immediately after that.” (Tr. 29) Applicant has never used marijuana since that date. (Tr. 30, 32-34)

Applicant submitted a signed statement of intent dated April 7, 2016, with automatic revocation of clearance for any drug violation. (AE A; Tr. 30-31) He stated, “I know I made a mistake and I know it was stupid. And we all learn from mistakes and I hope this doesn’t affect my life. And I will be true to what I say, so . . . I do understand that it was a mistake and it was really dumb.” (Tr. 31)

Character Evidence

Eight witnesses testified on Applicant’s behalf. Those eight witnesses were work-related and included the director of software programs, his software engineering manager, computer engineers, and software engineers. The majority of those who testified have security clearances. They know Applicant well and work with him or have worked with him on a daily basis. All of the witnesses are aware that Applicant self-reported his marijuana use and have no reservations about recommending him for a security clearance. Applicant is clearly a trusted, well-liked, and productive employee. (Tr. 35-67)

Applicant’s 2009 through 2015 work performance evaluations document above average performance and that he is an employee who is making a significant contribution to his company and the national defense. (AE C – AE F) Applicant also submitted a 2015 certificate of appreciation from a computer society for a presentation he made on a work-related topic, a 2010 certificate of completion for server essentials, and a 2009 order of the engineer certificate. (AE G, AE I, AE L) Applicant’s undergraduate and graduate transcripts document superior academic achievement. (AE M) Applicant also developed a software metric-related utility patent while he was working on his master’s degree. (Tr. 23-26’ AE N)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 Applicant's 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 and modified.

Eligibility for a security clearance is predicated upon the applicant 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 over-arching adjudicative goal is a fair, impartial and common sense 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. Clearance decisions must be "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), 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 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 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 security concern concerning 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.

The Government established its case under Guideline H for SOR ¶ 1.a, that Applicant used marijuana with varying frequency from about March 2006 to January 2013, through his admissions. However, the evidence did not support its case under Guideline H for SOR ¶ 1.b, that Applicant used marijuana after being granted a security clearance in August 2009. The evidence conforms to Applicant’s assertion that he did not have an active security clearance during his last marijuana use in January 2013. Applicant fully and candidly discussed his marijuana use at his hearing.

A review of the evidence supports application of two drug involvement disqualifying conditions. AG ¶ 25(a): “any drug abuse (see above definition);”¹ and AG ¶ 25(c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia.”

Considering the totality of the circumstances in this case, I find application of drug involvement mitigating conditions 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): “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.”

Concerning AG ¶ 26(a), there are no “bright line” rules for determining when 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). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant’s last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows “a significant period of time has passed without any evidence of

¹ 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 medication direction.

misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.”²

AG ¶ 26(a) applies. Applicant’s last drug use was a one-time use at a New Year’s Eve party in January 2013, about 39 months before his hearing. His illegal drug use ended at that time and is unlikely to be repeated. This process clearly has had an impact on Applicant as demonstrated by his remorse and candid testimony. The absence of evidence of more recent or extensive drug use, and his promise not to use illegal drugs in the future eliminates doubts about his current reliability, trustworthiness, or good judgment with respect to abstaining from illegal drug use.³

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. With maturity, he has broken or reduced the prevalence of his patterns of drug abuse, and he has changed his life with respect to illegal drug use. He has abstained from drug abuse for about 39 months and has had no problem in doing so. AG ¶ 26(b) applies.

The testimony from senior company representatives show Applicant’s work behavior has not been indicative of his having a drug problem. He is viewed as a

² ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge’s decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle change and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant’s last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant’s efforts at alcohol rehabilitation.”) (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

³In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

valuable employee, who is reliable, dependable, and professional. His value to the defense industry is supported by senior company officials, who know him personally and professionally, and by his own credible testimony and evidence presented. At his hearing, He expressed a steadfast commitment to continue lifestyle changes consistent with total abstinence of marijuana or any other drugs. I find for Applicant under this concern.

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.

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). The discussion in the Analysis section under Guideline H is incorporated in this whole-person section. However, additional comments are warranted.

Applicant has been and is willing to maintain conduct expected of one entrusted with a security clearance. His employer, family, and friends support him. His employment history to date is indicative of stability and a strong work ethic. This support and self-introspection should ensure his continued success. Applicant demonstrated the correct attitude and commitment to remaining drug free. Considering his demeanor and testimony, I believe Applicant has learned from his mistakes, and his questionable behavior is unlikely to recur. I find Applicant has presented sufficient evidence of rehabilitation.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole-person factors"⁴ and supporting evidence, my application of the pertinent

⁴See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is eligible for access to classified information.

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

Subparagraphs 1.a – 1.b: For Applicant

Decision

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

ROBERT J. TUIDER
Administrative Judge