



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



In the matter of:

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ISCR Case No. 15-04975

Applicant for Security Clearance

**Appearances**

For Government: Ray Blank, Esq., Department Counsel

For Applicant: *Pro se*

01/05/2017

**Decision**

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant did not mitigate the security concerns regarding his criminal conduct, personal conduct, and drug use. Clearance is denied.

**Statement of Case**

On February 8, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order 10865 (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 (AGs) implemented by DOD on September 1, 2006.

Applicant responded to the SOR on March 9, 2016 and requested a hearing. The case was assigned to me on October 21, 2016, and scheduled for hearing on October 27, 2016, in accordance with prior agreement with Applicant. At the hearing, the Government's case consisted of five exhibits (GEs 1-5). Applicant relied on one witness (himself) and no exhibits. The transcript (Tr.) was received on November 7, 2016.

**Procedural Issues**

Before the receipt of opening statements and the presentation of evidence. Department Counsel furnished an updated Joint Personnel Adjudication System (JPAS) record confirming Applicant's previous employer laid off Applicant in May 2016 after losing its defense contract. Because Applicant's new employer was not listed in JPAS records, Department Counsel made contact with Applicant's facility security officer (FSO) on the date of the scheduled hearing and obtained an updated JPAS record confirming Applicant's employment by his new employer. The updated JPAS record was admitted as HE 1.

Prior to the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with documentation of his deferred adjudication, completion of his court-ordered probation, and dismissal of his admitted criminal charges. (R.T., at 21)

For good cause shown, Applicant was granted seven days to supplement the record. Within the time permitted, Applicant supplemented the record with documentation of the court's deferred adjudication order, details of required 400 hours of community service, and satisfaction of probation conditions and dismissal of felony charges. Applicant's submissions were admitted as AEs A-C.

### **Summary of Pleadings**

Under Guideline J, Applicant allegedly was arrested on August 1, 2008 in another state and charged with possession of marijuana, less than 2000 pounds and more than 50 pounds, a felony - 2nd degree, found guilty on February 8, 2009, and sentenced to four years probation; fined \$4,000, and had court costs imposed in the amount \$313.

Under Guidelines E and H, Applicant allegedly was in possession of an illegal drug as set forth under Guideline J after he had been granted a security clearance on January 29, 2006.

In his response to the SOR, Applicant admitted all but two of the allegations, with one qualification. He claimed he was not convicted of the charge alleged in SOR 1.a. He denied the allegations covered by Guideline H but offered no explanations for his denials.

### **Findings of Fact**

Applicant is a 46-year-old aircraft mechanic of a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted are incorporated herein. Additional findings will follow.

#### **Background**

Applicant married in May 2004 and has no children from this marriage. (GEs 1-2) He earned a high school diploma in June 1986 and claimed some post-high school educational credits. (GEs 1-2) He took online flight school courses from an out-of-state college between August 2007 and January 2009 but claimed no diploma or certificate for

the online courses he completed. (GEs 1-2)

Applicant enlisted in the U.S. Air Force (USAF) in November 1986 and served four years of active duty in the USAF and four years of inactive reserve duty. (GEs 1-2; Tr. 33) He received an honorable discharge in May 1991. Applicant enlisted in the Air National Guard in June 1996 and served three years in the ANC's inactive reserves. (GE 1; Tr. 33) He received an honorable discharge in June 2002. (GE 1)

Applicant has worked for his current employer since October 2016 as an aircraft mechanic. (GE 1; Tr. 38) Between January 2015 and October 2016, he worked in the same capacity for another defense contractor. (GE 1) Records document that Applicant was granted a security clearance in July 2006 that was never activated during his employment. (Tr. 39)

Between late 2007 and January 2009 Applicant was unemployed while attending flight school at a state college for online courses. (GE 1; Tr. 43) Applicant believes he retained his security clearance following his layoff in late 2007, he is not entirely certain. (Tr. 41-42) Whether or not he retained his security clearance, he remained fully aware of the USAF's anti-drug policy while unemployed and without a security clearance in 2008. (GE 3; Tr. 35)

### **Applicant's drug-related criminal offense**

In August 2008, Applicant was arrested and charged with possession of marijuana, less than 2,000 pounds lbs and more than 50 pounds. (GEs 1 and 3-5) Applicant admitted knowingly transporting 230 pounds of marijuana for friends on the occasion he was charged for possession in 2008 when he was unemployed and did not have a security clearance. (Tr. 31-33) Although, he was fully aware at the time of USAF zero tolerance policy concerning the use and possession of illegal drugs. (Tr. 35)

Applicant pleaded guilty to the felony drug possession charges in February 2009 and was found guilty as charged. (GE 1 and 4-5) The presiding court entered a deferred adjudication order in February 2009 and sentenced Applicant to four years of probation (to include 400 hours of community service), imposed a \$4,000 fine, and added court costs of \$313. (GEs 1, 3-5 and AEs C-D; Tr. 36-37) The court deferred adjudication pending documentation of Applicant's satisfactory completion of his ordered probation and payment of all court-ordered fines and fees. (GEs 1-5; R.T., at 18)

Upon confirmation of Applicant's successful completion of his probation conditions and payment of all court-ordered fines and court costs, the presiding court dismissed the pending charges in January 2011. (AE B) Applicant retained his Constitutional rights to vote and own firearms. (Tr. 30-31) He has not engaged in any recurrent criminal conduct since his 2008 arrest on felony marijuana possession charges.

### **Character references and community contributions**

Applicant provided no character references or performance evaluations. Nor did he provide any evidence of community or civic contributions.

## **Policies**

The AGs list guidelines to be used by administrative judges in the decision-making process covering security clearance cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and any of the "[c]onditions that could mitigate security concerns."

These AGs must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person.

The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk. The following AG ¶ 2(a) factors are pertinent: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

### **Criminal Conduct**

*The Concern.* 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. AG ¶ 15

### **Personal Conduct**

*The Concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with

the security clearance process. AG ¶ 15.

### **Drug Involvement**

*The 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 ¶ 24.

### **Burden of Proof**

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of E. O. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

### **Analysis**

Security concerns are raised over Applicant's guilty plea to felony charges of transporting more than 50 pounds of marijuana (actual transport figure was 230 lbs) for friends in 2008. The presiding court accepted Applicant's guilty plea and entered an order of deferred adjudication, conditioned on his completion of four years of supervised probation (including 400 hours of community service) and payment of a court-ordered \$4,000 fine and \$313 in court costs. (GE 1 and AE B) In accordance with the court's sentencing terms. Applicant completed two years of probation that included his performing

400 hours of community service and paid the court-ordered \$4,000 fine and court costs. (AE B)

Based on the developed record to date, one disqualifying condition (DC) of the criminal conduct guideline (Guideline J) warrants application: DC ¶ 31(a), “a single serious crime or multiple lesser offenses.” On the strength of the evidence presented, one several disqualifying conditions of the Adjudicative Guidelines for drug abuse are also applicable: DC ¶ 25(c), “illegal possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” While the term “use” in DC ¶ 25(a), “any drug abuse,” is expansive enough under Webster’s definition of the term (i.e., employ, utilize, manipulate) to cover drug possession it is not necessary to apply to these narrow circumstances covering Applicant’s one-time delivery of marijuana in 2008 to friends.

Independent judgment concerns exist over Applicant’s commission of a felony in his transporting of over 200 lbs of illegal drugs in 2008 (a major felony). Based on the findings and conclusions in the record, DC ¶ 16(d), “credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information . . .” applies to Applicant’s situation. DC ¶ 16(d) includes, but is not limited to consideration of (2) “a pattern of dishonesty or rule violations . . .”

Applicant is entitled to credit for his completion of his probation conditions, payment of his court fine and court costs, and avoidance of any drug-related conduct since his 2011 release from probation. More time is needed, though, to dispel all reasonable doubts about his ability to avoid illegal drug possession in the future. Other mitigating conditions covered by Guidelines J, H, and E are not available to Applicant.

Historically, the Appeal Board has emphasized the importance of a strong rehabilitation program and a seasoned track record in mitigating serious criminal offenses. See ISCR Case No. 95-0622 at 4-5 (App. Bd. April 18, 1997). Holding a security clearance requires a high degree of trust and confidence in the person entrusted with classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980)

Serious drug-related conduct weighs heavily against reposing in an applicant the trust and confidence required of persons granted access to classified information. Because of the gravity of Applicant’s drug-possession offense and his ensuing two years of supervised probation, satisfaction of Appeal Board requirements of public confidence and trust requires a much stronger showing of reform and rehabilitation over a significant period of time before safe conclusions can be made that it is clearly consistent with the national interest to grant Applicant a security clearance.

From a whole-person perspective, Applicant has shown limited verifiable growth and maturity in the two years since the dismissal of his drug-related charges in 2011. He provided no character references, performance evaluations, or probative evidence of

community and civic contributions since completing his probation conditions. At this point, positive impressions that he has forged with his supervisors and community remain unknown.

Taking into account the seriousness of Applicant's felony guilty plea, the limited amount of evidence of his continuing mitigation efforts since completing his probation requirements in 2011, and a whole-person assessment of his avoidance of recurrent use and possession of illegal drugs, conclusions are warranted that it is still too soon to conclude that Applicant is absolved of any risks of recurrent drug-related offenses. Concerns over his felony drug-related offense in 2008 are not mitigated.

### **Formal Findings**

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE J (CRIMINAL  
CONDUCT)

AGAINST  
APPLICANT

Subparagraph: 1.a:

Against Applicant

GUIDELINE E (PERSONAL CONDUCT)  
Subparagraph: 2.a:

AGAINST APPLICANT

GUIDELINE E  
(DRUGS) Against  
Applicant AGAINST  
APPLICANT

Subparagraph: 3.a:

Against Applicant

Subparagraph: 3.b:

Against Applicant

### **Conclusions**

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 Applicant's security clearance. Clearance is denied.

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Roger C. Wesley  
Administrative Judge