



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 15-05340
)	
Applicant for Security Clearance)	

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: Randall E. Wilbert, Esq.

02/23/2017

Decision

BORGSTROM, Eric H., Administrative Judge:

Applicant did not mitigate the security concerns about his drug involvement. Eligibility for access to classified information is denied.

Statement of the Case

On March 5, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement. The action was taken under Executive Order (EO) 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 (AG) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on April 2, 2016, and he elected to have the case decided on the written record in lieu of a hearing. On June 2, 2016, the Government submitted its file of relevant material (FORM) and provided a complete copy to Applicant. Applicant received the FORM on June 14, 2016. He was afforded an opportunity to respond to the FORM within 30 days of its receipt and to file objections

and submit material to refute, extenuate, or mitigate the security concerns. Applicant, through legal counsel, responded to the FORM on August 4, 2016. The case was assigned to me on January 25, 2017.

Procedural Issues

In the FORM, Department Counsel references FORM Items 1-4. FORM Item 4 is an unauthenticated summary of an April 20, 2015 interview with a government background investigator. In his response to the FORM, Applicant objected to the admission of FORM Item 4 into evidence. Pursuant to Directive ¶ E3.1.20, FORM Item 4 is not admitted into evidence because the summary of interview is unauthenticated. FORM Item 3 is admitted into evidence as Government Exhibit 3, without objection.¹

Applicant's response to the FORM included a cover letter, a memorandum, a copy of his response to the SOR, and July 2016 drug test results. These four documents are admitted into evidence as Applicant Exhibits (AE) A-D, without objection.

Findings of Fact

Applicant is 61 years old. He received a bachelor's degree in 1996 and a master's degree in 1999. Since 1999, he has been employed by a DOD contractor. He was first married from 1983 to 1989. He was then married from 1996 to 2007. He has an 18-year-old daughter.²

Between July 1973 to at least December 2014, Applicant used marijuana on several occasions. In 1973, he was arrested for possession of marijuana; however, he was released without formal charges. He also purchased marijuana on multiple occasions between 1973 and May 2014. Between 2007 and 2014, he estimated that he used marijuana approximately 15 to 20 times.³

Applicant participated in two drug tests – in March 2016 and July 2016 – and tested negative for marijuana, cocaine, phencyclidine (PCP), and opiates.⁴ There is no evidence that he has been evaluated by a substance abuse counselor or has attended substance abuse treatment.

On his March 2015 security clearance application (SCA) and in his response to the SOR, Applicant stated his intent to cease further illegal drug use. His motivations for ceasing his illegal drug use are his continued employment, his security clearance

¹ FORM Items 1 and 2 consist of the SOR and Applicant's response to the SOR. These documents are pleadings and are admitted into the record.

² GE 3.

³ GE 3. Although Applicant's FORM response states that the marijuana use was 15-20 times per year, I have concluded that this was a typographical error given the totality of the record evidence.

⁴ Response to SOR; AE C; AE D.

eligibility, and his desire to be a good example to his teenage daughter.⁵ He claimed to have no derogatory information in his personnel file; however, he has provided no corroborating documentation.⁶ Furthermore, there is no evidence his employer is aware of his illegal drug use. There is no evidence as to whether Applicant ceased all contacts with his drug-using associates or ceased attendance at social gatherings where he had used drugs in the past.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁷ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the 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." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

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 and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it

⁵ GE 3; Response to SOR; AE B.

⁶ AE B.

⁷ *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988). See *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

grants access to classified information. Decisions include, by necessity, consideration of the possible risk the 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.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement

The concern under this guideline is set out in AG ¶ 24: “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.” Drugs are defined in AG ¶ 24(a)(1) as “[d]rugs, 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).”

Disqualifying conditions under this guideline include:

AG ¶ 25(a): any drug abuse, defined in AG ¶ 24(b) as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction;” and

AG 25(c): illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.”

Between 1973 and December 2014, Applicant used marijuana on several occasions. More recently, he used marijuana approximately 15-20 times between 2007 and 2014. Between 1973 and May 2014, he purchased marijuana on several occasions, and he was arrested for illegal drug possession in 1973. AG ¶¶ 25(a) and 25(c) apply.

The Government established a case for disqualification. Accordingly, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts.⁸ The following mitigating conditions are potentially relevant:

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

⁸ Directive ¶ E3.1.15. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005) (An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.).

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.

The first prong of AG ¶ 26(a) (“happened so long ago”) focuses on whether the drug involvement was recent. 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 evidence. If the evidence shows “a significant period of time has passed without any evidence of 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.”⁹

In the present case, Applicant’s admitted drug involvement – 1973 to December 2014 – overlapped with his employment as a DOD contractor since 1999. His illegal drug use and purchases violated federal and state law and DOD policies prohibiting illegal drug use by its contractors. Applicant’s attestations in his SCA and in his response to the SOR that he is a “law-abiding citizen” and wants to be a good example for his daughter are undercut by his decades of illegal drug use and his use during most of his daughter’s childhood. He has not demonstrated that he ceased attending social gatherings at which he had previously used illegal drugs. He has not presented evidence of changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. Applicant’s conduct casts doubt on his reliability and judgment. AG ¶ 26(a) does not apply.

Applicant has not stated that he has ceased contact with his drug-using associates or avoided the circumstances in which he used illegal drugs in the past. Although his counsel argues that he no longer associates with drug users, Applicant himself made no such statements.

Applicant’s last use of marijuana was December 2014. As of his August 2016 response to the SOR, his period of abstinence from illegal drug use was approximately 20 months. He alluded to other periods of drug abstinence, though he failed to provide more specific information about the length and recency of such periods and why he resumed his marijuana use. The facts of this case mirror those in ISCR Case No. 12-06707:

The gravamen of the Judge’s decision is the fact that the period of abstinence established by the evidence is not compelling in terms of mitigation when considered in the context of Applicant’s 30-year history of marijuana use, especially when that use took place despite Applicant’s

⁹ ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

knowledge that it was illegal and contrary to the Government's and his subsequent employers' drug-free policies.¹⁰

Given Applicant's 40-year history of drug use compared to a 20-month period of abstinence, the evidence is insufficient to conclude that he has established an "appropriate period of abstinence."

Applicant's expressed intent to cease all illegal drug use – in his SCA and response to the SOR – is the functional equivalent of a signed, sworn statement with automatic revocation under AG ¶ 26(b)(4). AG ¶ 26(b) applies.¹¹ Nevertheless, Applicant's lengthy drug history, insufficient evidence of reform and rehabilitation, and the absence of evidence that he has disassociated himself from other drug users, cast doubt as to his judgment and reliability. I find that drug involvement concerns remain.

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.

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. In light of all the facts, I have considered the potentially disqualifying and mitigating conditions, and I have incorporated my comments under Guideline H and the factors in AG ¶ 2(c) in this whole-person analysis.

Applicant is a mature, educated individual, who has been employed by a DOD contractor for over 17 years. He voluntarily disclosed his drug arrest, use, and purchases on his SCA, and he expressed an intent to cease further drug use. Notwithstanding his maturity, education, and employment history, Applicant's marijuana use over a 40-year period showed an inability or unwillingness to comply with laws,

¹⁰ ISCR Case No. 12-06707 at 4 (App. Bd. Sep. 17, 2014).

¹¹ See ISCR Case No. 12-06885 at 6 (App. Bd. Sep. 12, 2013) ("The mere presence or absence of any given Adjudicative Guideline disqualifying or mitigating condition is not solely dispositive of a case"). See also ISCR Case No. 99-0109 at 5 (App. Bd. Mar. 1, 2000).

rules, and regulations. His assertions that he is a “law-abiding citizen” and seeks to be a good example to his teenage daughter are undercut by this decades of illegal drug use – including 15 years while employed as a DOD contractor – and his illegal drug use throughout his daughter’s childhood. Given his lengthy drug history and his failure to demonstrate that he has ceased contact with his drug-using associates, he has not established that such circumstances are unlikely to recur. As a result, the totality of the record evidence leaves me with questions and doubts as to Applicant’s eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the drug involvement security concerns.

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 of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Eric H. Borgstrom
Administrative Judge