



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 15-07107
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

10/05/2017

Decision

HESS, Stephanie C., Administrative Judge:

Applicant used marijuana between 2009 until at least 2015, after having been granted a security clearance. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on December 19, 2014. On March 25, 2016, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline F. The DOD acted under Executive Order (Ex. Or.) 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 DOD on September 1, 2006.

Applicant submitted his Answer to the SOR on April 23, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on June 30, 2016, and the case was assigned to me on September 26, 2016. On December 21, 2016, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for January 12, 2017. I convened the hearing as scheduled.

Government Exhibits (GX) 1 through 4 were admitted into evidence without objection. Applicant testified but did not submit any exhibits. I kept the record open until January 27, 2017, to enable Applicant to submit documentary evidence. He timely submitted Applicant's Exhibit (AX) A, without objection. DOHA received the transcript (Tr.) on January 24, 2017.

This case was adjudicated under the AG implemented by the DOD on September 1, 2006. The DOD implemented the amended AG on June 8, 2017, while this decision was pending. This decision will be decided based on the amended AG effective June 8, 2017. The outcome of this case would have been the same if decided based on the former AG.

Findings of Fact

Applicant is a 29-year-old software engineer currently employed by a defense contractor. He graduated from college in 2012 with a bachelor's degree in computer science, and was hired by his current employer. (GX 1; Tr. 29-33.)

Under Guideline H, the SOR alleges that Applicant used marijuana with varying frequency between 2009 and 2015, and that he intends to use marijuana in the future. The SOR further alleges that applicant was arrested in 2014 and charged with possession of marijuana and marijuana paraphernalia. Applicant admits each allegation in the SOR.

Applicant was first granted his first security clearance in 2008. He held clearances off and on throughout his college years for various summer internships. He received his current clearance in 2012. He began purchasing and using marijuana while in college in 2009, and continued to use marijuana until as recently as early 2016. Between 2009 and 2012, he "smoked fairly often in college, sometimes daily." After graduating from college and beginning work as a full-time defense contractor, Applicant continued to purchase and use marijuana, although less frequently, stating that he would sometimes go "a few months" without using any marijuana. (GX 1; GX 2; Tr. 18 - 19.)

On April 20, 2014, Applicant was pulled over by the local police. Applicant thinks that he was initially stopped due to a burned-out headlight, however, he was extremely nervous while speaking to the officer, and the officer requested permission from Applicant to search his vehicle. Applicant consented, and the officer found marijuana and marijuana paraphernalia, and placed applicant in handcuffs. Applicant was charged with possession of cannabis, possession of drug paraphernalia, and driving a vehicle in an unsafe condition. The officer issued Applicant a summons to appear in court and released him. Applicant hired an attorney, appeared in court, and was sentenced to 25 hours community service and six months of unsupervised probation. Upon successful completion of these requirements, the charges were dismissed. (GX 4; Tr. 35 - 37.) Applicant self-reported this arrest to his facility security officer. (Tr. 34.)

Following his arrest, Applicant continued to use marijuana. (GX 1; GX 2.) Applicant stated that "after getting arrested [he] had either slowed down, you know, quit for a while

and then... be over to somebody's house and some would get passed so I would accept." (Tr. 21.) While Applicant still associates with people who use marijuana, he avoids situations where people are actively using marijuana, stating that he tries, "to limit exposure to the substance." (Tr. 22 – 23.)

Applicant testified that he no longer uses marijuana. He thinks his last use of marijuana was in January 2016. (Tr. 21.) Applicant testified that after disclosing his arrest to his security officer, Applicant's security officer explained the potential negative ramifications of continued use of marijuana on Applicant's career, and that this discussion had a significant impact on his attitude and understanding of the pitfalls of continuing to use marijuana. (Tr. 18 -19.) However, Applicant continued to use marijuana for almost two more years. Applicant also stated that should policies change, or if he is on leave, or if he is no longer employed in the defense industry, he might use marijuana in the future. (Answer; Tr. 17-18; GX 2.) After the hearing, Applicant submitted a signed, notarized, statement of his intention not to use any illegal substances while holding a security clearance, and agreeing to the automatic revocation of his security clearance should he do so. (AX A.)

Policies

"[N]o 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 applicants 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.

Eligibility for a security clearance is predicated upon the applicant's meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and 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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

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." See Exec. Or.

10865 § 7. Thus, a decision to deny a security clearance 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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

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). “[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 and Substance Misuse

The concern under this guideline is set out in AG ¶ 24:

The illegal use of controlled substances . . . can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.

Applicant’s admissions, corroborated by the record evidence, establish the potentially disqualifying conditions under this guideline:

AG ¶ 25(a) any substance misuse;

AG ¶ 25(f) any illegal drug use while granted access to classified information or holding a sensitive position; and

AG ¶ 25(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The following mitigating conditions may also apply:

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) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used; and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant's use of marijuana is recent and casts doubt on his current judgment. Applicant started using marijuana after he had completed a security clearance application, undergone a background investigation, and worked as an intern for a defense contractor. He continued to use marijuana, sometimes daily, throughout college, despite regularly working in summer-intern positions which required a security clearance. After graduating from college in 2012, completing another security clearance application, undergoing another background investigation, and becoming a full-time federal contractor, he continued to use marijuana, albeit with less frequency than in college. Despite his arrest in 2014 for possession of marijuana and drug paraphernalia, and his completion of yet another security clearance application, as well as his interview with a background investigator, Applicant continued to use marijuana until late 2015 or early 2016.

The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006). The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006). This relatively short period of abstinence, compared to the eight years that Applicant used marijuana, combined with his use while holding a security clearance and after his arrest, is insufficient to mitigate the concern.

Applicant's signed statement of intent to abstain from all drug involvement in the future carries little weight. While Applicant credibly testified that he has not used marijuana since late 2015 or early 2016, he also testified that, under different circumstances, such as changes in policy, being on leave, or no longer working as a defense contractor, he might use marijuana in the future. Applicant actively avoids situations where people are using marijuana, however, he still associates with people who

use marijuana. Given that Applicant used marijuana while holding a security clearance, his continued use following his 2014 arrest, the recentness of his last use, and his stated willingness to consider future use, it is simply too soon to unequivocally conclude that Applicant has changed his pattern of behavior and will not use marijuana again while holding a security clearance.

Whole-Person Concept

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 applying the whole-person concept, an 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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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.

I have incorporated my comments under Guideline H in my whole-person analysis and have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his illegal drug use. Accordingly, I conclude he has failed to carry his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
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Subparagraphs 1.a – 1.c:	Against Applicant
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Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Stephanie C. Hess
Administrative Judge