



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-00807

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

10/23/2017

Decision

CREAN, Thomas M.

Applicant failed to provide sufficient information to mitigate drug involvement security concerns. Personal conduct security concerns are found for Applicant. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on October 30, 2015, to retain a security clearance required for a position with a defense contractor. (Item 2) Applicant was interviewed by a security investigator from the Office of Personnel Management (OPM) on January 5, 2016. (Personal Subject Interview (PSI)) After reviewing the results of the background investigation, the Department of Defense (DOD) could not make the affirmative findings required to issue a security clearance. On October 20, 2016, DOD issued Applicant a Statement of Reasons (SOR) detailing security concerns for drug involvement under Guideline H and personal conduct security concerns under Guideline E. (Item 1) The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective in the Department of Defense on September 1, 2006.

Applicant answered the SOR on November 14, 2016, admitting the allegation of marijuana use from August 1987 until January 2015. He also admitted using marijuana after being granted eligibility for access to classified information in August 1987. Applicant elected to have the matter decided on the written record. (Item 1) Department Counsel submitted the Government's written case on October 19, 2016. (Item 4) Applicant received a complete file of relevant material (FORM) on December 22, 2016, and he was provided the opportunity to file objections and to submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant provided additional information in response to the FORM on January 11, 2017. (Item 5). I was assigned the case on October 1, 2017.

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing National Security Adjudicative Guidelines for *Determining Eligibility for access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs) which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the September 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's security clearance eligibility under the new AGs.

Procedural Issues

Applicant was advised in the FORM that the summary of the PSI (Item 3) was not authenticated and could not be considered over his objection. He was further advised that he could make any corrections, additions, or deletions to the summary to make it clear and accurate, and could object to the admission of the summary as not authenticated by a Government witness. He was additionally advised that if no objection was raised to the summary, the administrative judge could determine that he waived any objection to the admissibility of the PSI summary. Applicant responded to the FORM (Item 4), but he did not object to consideration of the PSI. Since Applicant did not object to consideration of the PSI, I will consider the information in the PSI in my decision.

Findings of Fact

After a thorough review of the case file, I make the following findings of fact. Applicant is 59 years old. He graduated in June 1976 from high school. He received a Bachelor of Science degree in electrical engineering in July 1981. He has worked for a defense contractor since May 2002 as a principal electrical engineer. He previously work for other defense contractors as an electrical engineer. Applicant noted on the e-QIP that he was granted access to classified information in July 1985 while working for a defense contractor. He never married and has no children. (Item 2, e-QIP, dated May 26, 2015; Item 3, PSI, dated January 5, 2016)

The SOR alleges, and Applicant admits that he used marijuana approximately three times a year from August 1987 until January 2015. (SOR 1.a) The same

marijuana use was also alleged as a personal conduct security concern (SOR 2.a). Applicant stated that he did not buy the marijuana, but used marijuana when it was available at friends' houses. He would take a hit from a bowl as it was being passed around. He used the drug to get high. He did not purchase the drug, but used the drug provided to him by friends.

Applicant told the security investigator that he is trying to make an effort to stop using marijuana. Now that he is older, he does not find marijuana to be as pleasant. He no longer associates with anyone who used illegal drugs to include marijuana. The use of marijuana never contributed to any problems with his home life, professional or personal relationships, finances, or his judgment and reliability. He said he had no intention to use illegal drugs in the future.

His last admitted use was in January 2015. However, it is not clear whether this was his last use of marijuana. In his October 2015 e-QIP, the January 2016 PSI, and his January 2017 response to the FORM, he did not state that he had stopped using marijuana. He admitted that he used the illegal drug for a long period of over 25 years. (Item 2, e-QIP, dated May 26, 2015; Item 3, PSI, dated January 5, 2016; Item 5, Response to FORM, dated January 11, 2017)

Applicant noted on his e-QIP that he was granted eligibility for access to classified information in July 1985. He admitted using marijuana as early as August 1987. He also admitted using marijuana while eligible for access to top secret information when he was working for another defense contractor from August 1987 until January 1989. He said that he revealed this misuse of a controlled substance on a previous e-QIP but he was still granted eligibility for access to classified information. He assumed he would again be granted eligibility for access to classified information since the present report of his misuse is similar to his previous report of misuse before he was granted eligibility for access to classified information. (Item 1, Response to SOR, dated November 14, 2016) In his response to the FORM, Applicant points out that he is considered a good and trustworthy person. His friends consider him to be honest, helpful, hardworking, and trustworthy. He stated that his use of marijuana was minor and not very serious. (Item 5, Response to FORM, dated January 8, 2017)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the Administrative Guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶

2(a), 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. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 applicant or proven by department counsel. . .” The applicant has the burden of persuasion to obtaining 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 grants access to classified information. 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.

Section 7 of EO 10865 provides that decision shall be “in terms of eh 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 and sensitive information).

Analysis

Drug Involvement

The illegal use of a controlled substance to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose 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. Controlled substance means any “controlled substance” as defined in 21 U.S.C. § 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above. (AG ¶ 24)

Applicant admits that he used marijuana approximately three times a year from August 1987 until January 2015. He denied buying marijuana but he admits to using the drug when it was passed around by friends. Marijuana is a controlled substance. These facts raise the following Drug Involvement Disqualifying Conditions under AG ¶ 25:

- (a) any substance misuse;
- (f) any illegal drug use while granted access to classified information or hold a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

I considered the following Drug Involvement Mitigating Conditions under AG ¶ 26:

- (a) the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problems, 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 further involvement or misuse is grounds for revocation of national security eligibility.

While there is no "bright line" rule for determining when conduct is recent or sufficient time has passed since the incidents, a determination whether past conduct affects an individual's present reliability and trustworthiness 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 evidence of drug involvement, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation.

The mitigating conditions do not apply. Applicant admits to using marijuana three times yearly for over 27 years from 1987 until January 2015. He reports that he stopped

using marijuana in January 2015, just over 32 months ago. Applicant also admitted he used marijuana while eligible for access to highly classified information. His admission makes his use of marijuana frequent, recent, and deliberate. Other than his statement that he recently ceased using marijuana, there are no other indications that he stopped using illegal drugs. He did not present any evidence that would bolster or corroborate his statement that he no longer uses marijuana. There is no evidence of counseling, rehabilitation, or ongoing after care programs. Even if he has stopped, he could easily use marijuana again since he misused the illegal substance for over 27 years and only reported stopping 32 months ago. His misuse could start at any time. Based on the record evidence, I am not convinced that recurrence of similar security-significant conduct is unlikely.

Personal Conduct

Conduct involving questionable judgment, lack of candor, dishonesty, or willingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. (AG ¶ 15)

Applicant's admission that he used marijuana and that he used marijuana while being eligible for access to classified information raises the following disqualifying condition under AG ¶ 16

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any single guideline, but which, when considered as a whole, 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 individual may not properly safeguard classified or sensitive information.

As noted above, Applicant's use of marijuana over an extended period of time and his use while being eligible for access to highly classified information shows lack of judgment, untrustworthiness, and an unwillingness to comply with rules and regulations. It leads to the conclusions that his lack of candor shows that he may not properly safeguard classified or sensitive information. SOR ¶ 2.a cross-alleges under the personal conduct guideline, the same conduct alleged under the drug involvement guideline. All of Applicant's conduct causing a security concern under SOR ¶ 2.a is explicitly covered under Guideline H, and is sufficient to warrant revocation of his security clearance. Guideline E concerns constitute a duplication of the concerns under Guideline H, and accordingly, personal conduct security concerns in SOR ¶ 2. a are found for applicant

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(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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant has been eligible for access to classified information since 1985, over 27 years, with no reported security violations. However, Applicant admitted substance misuse from August 1987 until at least January 2015. He admitted he used marijuana while being eligible for access to classified information. He did not present evidence of counseling and rehabilitation or any other corroborating evidence for his statement that has stopped using marijuana. There is no credible evidence or reason to conclude that he has stopped no longer uses and will not use marijuana in the future. Overall, these facts leave me with questions and doubts about Applicant's judgment, reliability, trustworthiness, and eligibility and suitability for access to classified information. For all these reasons, I conclude that Applicant has not mitigated drug involvement and personal conduct security concerns. Eligibility for access to classified information is denied.

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

Paragraph 2, Guideline E

FOR APPLICANT

Subparagraph 2.a:

For 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.

THOMAS M. CREAN
Administrative Judge