



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



In the matter of:)
)
) ISCR Case No. 16-02872
)
Applicant for Security Clearance)

Appearances

For Government: Benjamin Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

03/30/2018

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant failed to mitigate security concerns raised under Guideline H (Drug Involvement). He used marijuana while holding a security clearance. Eligibility for access to classified information is denied.

History of the Case

Applicant submitted a security clearance application (SCA) on March 9, 2015. On October 31, 2016, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DOD CAF acted 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 (2006 AG).

Applicant answered the SOR on December 7, 2016, and requested a hearing before an administrative judge. The hearing was held on February 28, 2018, I admitted Government's Exhibits (GE) 1 through 3 and Applicant's Exhibits (AE) A through F,

without objection. Applicant also testified. I received the completed transcript (TR) on March 19, 2018.¹

On June 8, 2017, the DOD implemented new AG (2017 AG).² Accordingly, I have applied the 2017 AG.³ However, I have also considered the 2006 AG, because they were in effect on the date the SOR was issued. I conclude that my decision would have been the same under either version.

Findings of Fact

Applicant admitted both allegations in the SOR. His admissions are incorporated into my findings of fact.

Applicant is a 30-year-old network engineer employed by a defense contractor since June 2013, and he requires a security clearance for this employment. He was previously granted a DOD clearance in approximately 2013. Applicant is single and has no children. He earned a bachelor's degree in May 2010.

In his March 9, 2015 SCA, Applicant admitted to using marijuana between January 2007 and July 2014 (GE 1 at 31). During an April 5, 2016 interview with a Government investigator, Applicant revealed additional marijuana use in July 2015 (GE 2 at 4). Applicant first used marijuana in 2007, while attending college. He continued to use marijuana after he graduated from college and started working at Company A. He testified he was unsure if this company had a policy regarding drug use. He used marijuana approximately two times while he was employed by Company A. After he started working for Company B in June 2013, he was granted a DOD security clearance. When he was hired, he was aware Company B had a policy regarding the use of drugs.

According to Applicant, his 2014 use occurred at a party where a friend of a friend shared marijuana with him. Applicant's use in July 2015, was at a concert, when he took approximately two hits from a stranger's marijuana joint.⁴ The use in 2014 and 2015, occurred while he held an active DOD security clearance, and he testified he knew drug use was inconsistent with both his company's policy and DOD policy.⁵

¹ March 19, 2018 Transcript (TR).

² On December 10, 2016, the Security Executive Agent issued Directive 4 (SEAD-4), establishing a "single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position." (SEAD-4 ¶ B, *Purpose*). The SEAD-4 became effective on June 8, 2017 (SEAD-4 ¶ F, *Effective Date*). The National Security Adjudicative Guidelines (AG), which are found at Appendix A to SEAD-4, apply to determine eligibility for initial or continued access to classified national security information. (SEAD-4 ¶ C, *Applicability*).

³ ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DOD policy and standards).

⁴ Applicant told the Government investigator that the 2015 use occurred at a party (GE 2 at 5).

⁵ TR at 22-27.

Applicant testified he used marijuana less than ten times in his life, and this use was always in social settings.⁶ On each occasion, he claims his judgment was impaired by alcohol consumption. Although he continues to consume alcohol, Applicant promises not to use illegal drugs in the future.⁷ He submitted a signed letter of intent to abstain from all drug use (AE A). He never purchased or sold marijuana, nor did he experiment with any other drugs. Applicant testified he has “never been a big fan of marijuana” and his use was just experimental.⁸ He claims he regrets his past drug use.

Applicant presented reference letters from his program manager at Company B and his program manager at the Government client. He testified he told both individuals his security clearance was in jeopardy, but he did not show either man the SOR. A week before the hearing, he told his manager at the Government client he used marijuana in recent years.⁹ Applicant also presented a certificate of excellence, a certificate of appreciation, and his most recent performance evaluation.

Policies

“[N]o one has a ‘right’ to a security clearance.”¹⁰ 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.”¹¹ 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.”¹²

Eligibility for a security clearance is predicated upon the applicant 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.

⁶ TR at 19-20 and GE 3-4.

⁷ TR at 28-30.

⁸ TR at 20.

⁹ TR at 33-35.

¹⁰ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹¹ *Egan* at 527.

¹² EO 10865 § 2.

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.”¹³ 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.¹⁴ “Substantial evidence” is “more than a scintilla but less than a preponderance.”¹⁵ The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability.¹⁶ Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.¹⁷ An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.¹⁸

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”¹⁹ “[S]ecurity clearance determinations should err, if they must, on the side of denials.”²⁰

¹³ EO 10865 § 7.

¹⁴ See *Egan*, 484 U.S. at 531.

¹⁵ See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

¹⁶ ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

¹⁷ Directive ¶ E3.1.15.

¹⁸ ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

¹⁹ ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

²⁰ *Egan*, 484 U.S. at 531; See also AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern pertaining to drug involvement:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, but 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 ¶ 25 describes two conditions that could raise a security concern and be disqualifying in this case:

- (a) any substance misuse (see above definition); and
- (f) any illegal use while granted access to classified information or holding a sensitive position.

Applicant admitted he used marijuana between 2007 and July 2015. He used marijuana two times after he was granted a DOD security clearance in 2013. The evidence raised both disqualifying conditions.

After the Government raised potentially disqualifying conditions, the burden shifted to Applicant to rebut or prove mitigation of the resulting security concerns. AG ¶ 26 provides two conditions that could mitigate security concerns in this case:

- (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; and
- (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 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;

AG ¶ 26(a) is not fully established. Applicant's illegal drug use is not infrequent in nature nor has there been a sufficient passage of time. Nor can his use, at least ten times between 2007 and 2015, be considered isolated incidents. Applicant's use of illegal drugs did not occur under unusual circumstances, each use occurred in a social setting.

AG ¶ 26(b) is not fully established. Applicant has expressed his intent not to use drugs in the future. However, his promises to abstain from illegal drug use are undercut by his testimony and the record evidence. Applicant continued to use drugs after he was granted a DOD clearance in 2013, and after he submitted a SCA in 2015.

Applicant chose to use illegal drugs, and his decision to do so continues to reflect negatively on his current security worthiness. Applicant's decision to use illegal drugs, especially after being granted a security clearance, cannot be considered a minor lapse in judgment, but a pattern of behavior that indicates an unwillingness to follow rules and regulations. Security clearance decisions are not limited to conduct during duty hours;²¹ off-duty conduct, especially where it reflects poor judgment, provides a rational basis for the government to question an applicant's security worthiness.²² Furthermore, Applicant's eventual self-reporting of his illegal drug use does not change the security significance of the underlying conduct. At this time his supervisors are still unaware he used marijuana while holding a security clearance. Applicant engaged in an activity he knew to be in direct contravention of federal law and his responsibilities as an individual holding a security clearance. His behavior showed a disregard for the law, regulations, and the fiduciary relationship he voluntarily entered into with the Government when he was granted access to classified information.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person. 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

²¹ See, e.g., ISCR Case No. 98-0620 at 3 (App. Bd. Jun. 22, 1999).

²² See, e.g., *Cole v. Young*, 351 U.S. 536, 550 n.13 (1956); *Croft v. Department of Air Force*, 40 M.S.P.R. 320, 321 n.1 (1989).

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 I 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 that Applicant has not mitigated the drug involvement concerns raised by his use of marijuana while holding a security clearance. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility 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, Drug Involvement:	Against Applicant
Subparagraphs 1.a – 1.b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is denied.

Caroline E. Heintzelman
Administrative Judge