



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



In the matter of:

ISCR Case No. 16-02976

Applicant for Security Clearance

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel

For Applicant: *Pro se*

November 1, 2017

Decision

MOGUL, Martin H., Administrative Judge:

Statement of the Case

On November 4, 2016, in accordance with Department of Defense (DoD) Directive 5220.6, as amended (Directive), the DoD issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines H and J.¹ (Item 1.) The SOR further informed Applicant that, based on information available to the government, DoD adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

On November 21, 2016, Applicant submitted a written reply to the SOR (RSOR), and he requested that his case be decided on the written record in lieu of a hearing. (Item 1.) On December 19, 2016, Department Counsel issued the Department's written

¹ I considered the previous Adjudicative Guidelines, effective September 1, 2006, as well as the new Adjudicative Guidelines, effective June 8, 2017. My decision would be the same if the case was considered under the previous Adjudicative Guidelines, effective September 1, 2006.

case. A complete copy of the file of relevant material (FORM) was provided to Applicant. In the FORM, Department Counsel offered five documentary exhibits. (Items 1-5.) Applicant was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. A response was due on February 10, 2017. Applicant submitted no additional documents into evidence. The case was assigned to this Administrative Judge on October 1, 2017. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Findings of Fact

After a thorough and careful review of the pleadings, and exhibits, I make the following findings of fact:

Applicant is 56 years old. He has never been married, and he has no children. He is a high school graduate. Applicant is employed by a defense contractor as a Material Technical Aide, and he seeks a DoD security clearance in connection with his employment in the defense sector. (Item 3.)

Paragraph 1 (Guideline H - Drug Involvement)

The SOR lists three allegations (1.a. through 1.c.) under Adjudicative Guideline H.

1.a. The SOR alleges that Applicant was arrested in September 2001 and charged with possession of marijuana. Applicant admitted this allegation in his RSOR. (Item 1.)

1.b. The SOR alleges that Applicant used marijuana from January 2008 to at least March 2016, after he had been granted a DoD security clearance. Applicant admitted this allegation in his RSOR. (Item 1.)

1.c. The SOR alleges that Applicant stated during his last security clearance investigation that he intended to continue to use marijuana in the future. Applicant admitted this allegation in his RSOR. (Item 1.)

Guideline J, Criminal Conduct

The SOR alleges that Applicant has engaged in criminal acts, which create doubt about his judgement, reliability, and trustworthiness. The SOR lists one allegations (2.a.) regarding criminal conduct, under Adjudicative Guideline J.

2.a. It is alleged in the SOR that Applicant's conduct as set forth in subparagraphs 1.a. and 1.b., above, is a concern under Guideline J. (Item 1.) Applicant admitted this allegation in his RSOR. (Item 1.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense 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 national security eligibility 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.

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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person who applies for access to classified information seeks to enter 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 Executive Order (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

AG ¶ 24 expresses the security concern pertaining to Drug Involvement:

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.

I have considered all of the evidence in this case and the disqualifying conditions under Drug Involvement AG ¶ 25, and the following are potentially applicable:

(a) any substance misuse;

(c) Illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

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

The Government presented sufficient information to support the factual allegations under SOR ¶ 25.(a), (b), and (g). Applicant used marijuana and was involved with illegal drug conduct, for many years. More significantly for many of those years he held a DoD security clearance. And what is most troubling and is an absolute bar to holding a security clearance, Applicant has indicated that he intends to continue using marijuana in the future.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement AG ¶ 26. Because of all the reasons cited in the paragraph above, I find that none of the mitigating factors can be considered in this case. I find Guideline H against Applicant.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(b) evidence . . . of criminal conduct, regardless of whether the individual was formally charged, prosecuted or convicted.

While Applicant was only arrested for possession of marijuana in 2001, his drug usage continued, while holding a security clearance, from 2008 to as recently as at least March 2016. This conduct gives rise to concerns about Applicant's judgment and reliability because of the nature of the continuing criminal offenses. The aforementioned disqualifying condition has been established.

Because Applicant's criminal conduct of using marijuana occurred continually and as recently as 2016, and because Applicant has indicated that he intends to continue committing the criminal conduct in the future, I do not find that any Criminal Conduct mitigating conditions are applicable under AG ¶ 32. Applicant's criminal past continues to cast doubt on his trustworthiness and judgment. I, therefore, find Guideline J against 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 relevant 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 facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and J in my whole-person analysis.

Overall, the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the Drug Involvement and Criminal Conduct security concerns under the whole-person concept.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a.-1.c.:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.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.

Martin H. Mogul
Administrative Judge