



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



In the matter of:)
)
) ISCR Case No. 16-03718
)
Applicant for Security Clearance)

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: *Pro se*

06/01/2018

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for access to classified information. He presented sufficient evidence to explain, extenuate, or mitigate the security concern stemming from his drug involvement and substance abuse. Accordingly, this case is decided for Applicant.

Statement of the Case

On September 28, 2014, Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format). On January 17, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised security concerns under the drug involvement and substance misuse guideline.¹ Applicant answered the SOR on April 4,

¹ This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on June 8, 2017, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2016). In this case, the SOR was issued under Adjudicative Guidelines effective within the Defense Department on September 1, 2006. My decision and formal findings under the revised Guideline H would not be different under the 2006 Guidelines.

2017, and requested a hearing to establish his eligibility for continued access to classified information.

A hearing was scheduled for May 16, 2018, a date mutually agreed to by the parties. Applicant testified at the hearing, and the exhibits offered by the Government at the hearing were admitted into the record without objection. (Government Exhibits (GE) 1 and 2.) The transcript (Tr.) was received on May 23, 2018.

Findings of Fact

Applicant is 35 years old and a college graduate holding bachelor's and master's degrees. He is unmarried but is in a serious relationship with his cohabitant. Since July 2006, he has worked for a defense contractor.²

Under Guideline H, the SOR alleged that Applicant used marijuana with varying frequency from about June 2004 until about August 2013 and that he used marijuana after being granted a security clearance in September 2008. The SOR also alleged that Applicant was arrested in March 2013 and charged with possession of marijuana. Finally, it alleged that Applicant intended to use marijuana in the future.³ Applicant admitted the allegations, but he denied that he intended to use marijuana in the future.⁴ Applicant disclosed his drug usage and his arrest in his 2014 security clearance application.⁵

Applicant testified that he began using marijuana during his undergraduate days. He graduated from undergraduate studies in 2004 and from graduate studies in 2006. He smoked marijuana cigarettes (joints) about once every three to four months between his undergraduate days and his graduation from graduate school. After graduating from graduate school, Applicant smoked about three times a year. He characterized his usage as "opportunistic" (he did not seek out places where it was being used) as opposed to habitual. He never felt he was addicted.⁶

Applicant occasionally purchased marijuana, when he was on personal or work travel and happened to be in a state where it was legalized. Applicant knew that the purchase and use of marijuana was illegal under federal law. And he knew that his employer had a policy against the use of illegal drugs. Applicant never reported his drug

² GE 1; Tr. 27-28.

³ SOR ¶¶ 1.a-d.

⁴ Answer ¶¶ 1.a-d. Specifically, Applicant answered SOR ¶ 1.d as follows: "I disagree. At the time that was true but things have shifted in my life in the 4 years since filling out the re-investigation paperwork and priorities have shifted." Answer ¶ 1.d.

⁵ GE 1. Applicant stated: "Laws in this region of the country are changing and the substance will be decriminalized (or legal) in some states. With that said, it is not a frequent habit and I don't plan on that changing with the change in legal standing of the substance." GE 1, p. 30.

⁶ Tr. 16-19, 32.

use to his employer, until he filled out his security clearance application. He has never used any other illegal drugs. Although his employer conducts random drug tests, he has never had one. Those tests are administered when the employee has shown job performance problems or indications of being under the influence. Applicant has never used marijuana on the job.⁷

Applicant testified about his March 2013 arrest for possession of marijuana. Applicant was on his way home from a party and had dozed off at a stoplight at about three o'clock in the morning. The police officer smelled marijuana. It was in the cup holder. It was left by an acquaintance. Applicant had not purchased the marijuana, nor had he smoked it. There was perhaps one inch left of a four to five inch joint. He has not seen that acquaintance since early 2014. Applicant was sentenced to attend a drug seminar and do community service, both of which he completed.⁸

Applicant last used marijuana in August 2013 while on a business trip to a state with legalized marijuana. He purchased a small amount from a dispensary, smoked some twice while in that state, and discarded the rest. Asked why he continued to use marijuana after his arrest, Applicant stated that it neither benefitted nor hindered him, and he was not using it frequently enough to impact his performance or endanger others.⁹

Applicant explained why he stopped using marijuana. He is in a serious relationship with his cohabitant, who does not use illegal drugs. He is four years older than when he filled out his security clearance application. Applicant said he is more mature now and is working with his cohabitant to conceive a child. He is more involved in doing things to be a positive role model for children and young adults.¹⁰

Applicant has disassociated himself from his former marijuana-using friends, who were mostly friends or acquaintances from college. He does not socialize or stay in contact with them. Since his last use of marijuana in 2013, Applicant has been in social settings where some are using marijuana, but he does not participate. Applicant does stay in contact with an individual with whom he went to college and has known since 2001. This person was arrested for trafficking in marijuana and served jail and house arrest time. After her arrest in 2014, she stopped trafficking and using marijuana. She then founded a company whose mission is to create educational content for children. Applicant is an investor in that company, so in that capacity he sees her about eight to ten times a year.¹¹

⁷ Tr. 17-20, 26-27, 30.

⁸ Tr. 20-23.

⁹ Tr. 26-27.

¹⁰ Tr. 25-28.

¹¹ Tr. 28-30.

Law and Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individuals are eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2; SEAD-4, ¶ E.4.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. SEAD-4, Appendix A, ¶¶ 2(c), 2(d).

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). In resolving the ultimate question regarding an applicant’s eligibility, “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” SEAD-4, Appendix A, ¶ 2(b). See also SEAD-4, ¶ E.4. Moreover, the Supreme Court has held that officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an 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.

Discussion

Guideline H, Drug Involvement and Substance Abuse

Under AG H for drug use,¹² suitability of an applicant may be questioned or put into doubt because drug use can both impair judgment and raise questions about a person's ability or willingness to comply with laws, rules and regulations:

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 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 ¶ 25 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including. . . purchase. . .; and
- (f) any illegal drug use while granted access to classified information.

I have also considered all of the mitigating conditions for alcohol consumption under AG ¶ 26 and found the following relevant:

- (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
- (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

¹² AG ¶¶ 24, 25 and 26 (setting forth the concern and the disqualifying and mitigating conditions).

involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant denied in his April 2017 Answer the SOR allegation that he intended to use marijuana in the future. Therefore, the burden is on the Government to prove this controverted fact.¹³ On the one hand, the Government may point out correctly that Applicant continued to use marijuana after his March 2013 arrest for possession until August 2013. And, Applicant's disclosure of his past drug usage and future intent in his September 2014 security clearance application was less than unambiguous and implied that he might use marijuana in the future. On the other hand, almost four years have elapsed since Applicant filled out that application. In addition, almost five years have elapsed since he last used marijuana. Applicant's more recent statements of his intent in his April 2017 Answer and his reaffirmation of that intent during the hearing, which I find credible, carry the day. The Government has not met its burden of proof on this issue. I find in favor of Applicant on SOR ¶ 1.d.

Applicant admitted his use of marijuana from June 2004 until August 2013, and that his use occurred while he held a security clearance. He also admitted his 2013 arrest for marijuana possession. Facts admitted by an applicant in an answer to a Statement of Reasons require no further proof by the Government.¹⁴ Marijuana is a Schedule I controlled substance, and its possession is regulated by the federal government under the Controlled Substances Act.¹⁵ In an October 25, 2014, memorandum, the Director of National Intelligence reaffirmed that the use of marijuana is relevant to national security determinations, regardless of changes to state laws concerning marijuana use.¹⁶ AG ¶¶ 25(a), (c), and (f) apply. The next inquiry is whether any mitigating conditions apply.

As noted above, Applicant's last use of marijuana was in August 2013. That lapse of almost five years works in his favor. In addition, his life has changed fairly dramatically. He is in a serious relationship with his cohabitant, and they are trying to conceive a child. And the putative mother has not used illegal drugs. Applicant feels he has matured since his last use of illegal drugs. He also is engaged in positive activities, instead of using illegal drugs. Except for one friend, Applicant has disassociated himself from his former marijuana-using friends and acquaintances. Even if he attends a social event where others present are using marijuana, he does not do so. The one friend he stays in contact with is someone he has known since 2001, when they were in college together. She was

¹³ Directive ¶ E3.1.14.

¹⁴ ISCR Case No. 94-1159 at 4 (App. Bd. Dec. 4, 1995) ("any admissions [applicant] made to the SOR allegations . . . relieve Department Counsel of its burden of proof"); ISCR Case No. 94-0569 at 4 and n.1 (App. Bd. Mar. 30, 1995) ("[a]n applicant's admissions, whether testimonial or written, can provide a legal basis for an Administrative Judge's findings").

¹⁵ 21 U.S.C. § 811 *et seq.*

¹⁶ James R. Clapper, Director of National Intelligence, Memorandum: *Adherence to Federal Laws Prohibiting Marijuana Use* (October 25, 2014), available at <http://www.dea.gov/druginfo/ds.shtml>.

a former trafficker and user of marijuana and was convicted as such. She did, however, stop using and trafficking in 2014. Applicant stays in touch with her, because he is an investor in her children's educational venture. AG ¶¶ 26(a) and (b) apply.

The record does not raise doubts about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.¹⁷ Accordingly, I conclude that Applicant met his ultimate burden of persuasion to show that it is clearly consistent with the national interest 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, Guideline H: For Applicant

Subparagraphs 1.a-1.d: For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant access to classified information.

Philip J. Katauskas
Administrative Judge

¹⁷ AG ¶ 2(a)(1)-(9).