



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



In the matter of:)
)
) ISCR Case No. 16-03883
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Esq., Department Counsel
For Applicant: *Pro se*

05/31/2018

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense's (DOD) intent to revoke his eligibility for a security clearance to work in the defense industry. The security concerns raised by Applicant's two instances of marijuana use are mitigated by the passage of time. It is unlikely that he will engage in similar conduct again and has signed a statement of intent to that effect. Clearance is granted.

Statement of the Case

On February 8, 2017, the DOD issued a Statement of Reasons (SOR)¹ detailing security concerns under the drug involvement and substance misuse guideline.² DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant's security clearance and recommended that the case be submitted to an administrative judge for a determination whether to revoke his security clearance.

¹ The DOD CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive), and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on September 1, 2006.

² This title change is effective as of the implementation of the 2017 adjudicative guidelines.

Applicant answered the SOR and requested a decision without a hearing.³ The Government submitted its written case on March 31, 2017. A complete copy of the file of relevant material (FORM) and the Directive were provided to Applicant. He received the FORM on April 6, 2017 and did not respond. The items appended to the FORM are admitted as Government's Exhibits (GE) 1 through 6, without objection.

Procedural Matters

While the case was pending decision, the Director of National Intelligence (DNI) issued the Security Executive Agent Directive 4, establishing the National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The 2017 AG superseded the AG implemented in September 2006, and they are effective for any adjudication made on or after June 8, 2017. Accordingly, I have applied them in this case.

Findings of Fact

Applicant, 59, has worked for his current employer, a federal contractor, since November 2009. He was granted access to classified information in March 2011. Applicant completed his most recent security clearance application in February 2016 in conjunction with a periodic reinvestigation and disclosed two occasions of marijuana use.⁴

In February 2013, Applicant used marijuana with a friend after learning of a mutual friend's death. Applicant said he did so without thinking. He used again in May 2014 in an attempt to bond with his estranged son whom he had not seen in many years. In his September 2016 background interview, Applicant expressed regret for his conduct, calling it "stupid." He has no intention to use the drug in the future, and in his SOR answer provided a signed statement to that effect with revocation of national security eligibility for any future violations.⁵

In addition to disclosing the drug use on his 2016 security clearance application, Applicant also reported the use to his supervisor. Applicant does not believe the incidents can be used as a source of exploitation in the future.⁶

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief

³ GE 2.

⁴ GE 4-5.

⁵ GE 2, 4, 6.

⁶ GE 4, 6.

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 the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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 the 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." The applicant has the ultimate burden of persuasion to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of 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

The illegal use of controlled substances can raise questions about an individual's reliability and trustworthiness, 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.⁷ Applicant's admissions establishes a *prima facie* case he used illegal drugs, and did so after being granted access to classified information.⁸ Applicant's use of marijuana while holding a security clearance places a heavy burden on Applicant to establish mitigation. After considering the record as a whole, specifically, the circumstances surrounding Applicant's limited use of marijuana, the length of time that has since that limited use, and Applicant's remorse for his actions, I conclude that applicant has met his heavy burden of proof and persuasion.

Applicant's last use of marijuana occurred in May 2014. The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct.⁹ 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.¹⁰ Applicant's misconduct is mitigated by the passage of time and does not reflect negatively on his current security worthiness.¹¹ He voluntarily disclosed his misconduct to his supervisor and during his security clearance adjudication. It cannot be used as a source of vulnerability or exploitation. Furthermore, Applicant has acknowledged the seriousness of his misconduct and has repeatedly expressed remorse. He also signed a statement of intent to abstain from illegal drug use in the future with automatic revocation of his security clearance for any violation.¹²

Based on the record, I have no reservations about Applicant's current security worthiness. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(d). A finding that Applicant has mitigated the security concerns raised by his conduct in no way diminishes the seriousness of his illegal conduct. However, it is not the purpose of a security clearance case to punish or sanction a person for their past actions. Rather, it is a predictive risk assessment based on the past conduct. Applicant has taken responsibility for his misconduct. Most important, Applicant self-reported his misconduct to his supervisor and on his 2016 security clearance application. He also spoke candidly about the instances of illegal drug use during his background investigation. Applicant's self reporting and candid disclosures without regard for its consequences also lends credibility to his statement of intent that he will abstain from illegal drug use in the future.

⁷ See, AG ¶ 24.

⁸ AG ¶ 25 (a) and (f).

⁹ ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006).

¹⁰ ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006).

¹¹ AG ¶ 26 (a).

¹² AG ¶ 26 (b).

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 and Substance Misuse: FOR APPLICANT

Subparagraphs 1.a – 1.b: For Applicant

Conclusion

In light of all of the circumstances presented, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for continued access to classified information is granted

Nichole L. Noel
Administrative Judge