



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



In the matter of:)
)
) ISCR Case: 16-03959
)
Applicant for Security Clearance)

Appearances

For Government: Tara K. Karoian, Department Counsel
For Applicant: *Pro se*

January 29, 2018

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Statement of Case

On November 20, 2015, Applicant submitted a security clearance application (e-QIP). On May 11, 2017, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guidelines H, Drug Involvement; F, Financial Considerations; and E, Personal Conduct. The action was taken under Executive Order 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 for Determining Eligibility for Access to Classified Information*, effective within the DoD after September 1, 2006.

Applicant answered the SOR on May 31, 2017. He requested that his case be decided by an administrative judge on the written record without a hearing. (Item 2.) On July 12, 2017, Department Counsel submitted the Government's written case. A complete copy of the File of Relevant Material (FORM), containing 6 Items, was mailed to Applicant on July 14, 2017, and received by him on July 21, 2017. The FORM notified

Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant responded to the FORM, and his response was admitted into evidence. Applicant did not object to Items 1 through 6, and they are also admitted into evidence. Hereinafter, they are referenced as Government Exhibits 1 through 6.

The SOR in this case was issued under the adjudicative guidelines that came into effect within the DoD on September 1, 2006. Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines*, implements new adjudicative guidelines, effective June 8, 2017. All national security eligibility decisions issued on or after June 8, 2017, are to be decided using the new *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), as implemented by SEAD 4. I considered the previous adjudicative guidelines, effective September 1, 2006, as well as the new AG, effective June 8, 2017, in adjudicating Applicant's national security eligibility. My decision would be the same under either set of guidelines, although this decision is issued pursuant to the new AG.

Findings of Fact

Applicant is 32 years old. He is employed by a defense contractor as an Aircraft Mechanic II. He is seeking to obtain a security clearance in connection with his employment.

Applicant served on active duty in the United States Air Force from April 2006 to June 2010, when he was honorably discharged. While in the Air Force, Applicant applied for, and was granted, a security clearance in 2006 that he has continued to hold until the present. Following his military service, Applicant used marijuana with varying frequency from 2010 until at least October 2015.

Applicant began working for his current employer in December 2013. Applicant admits that he used marijuana at various frequencies from 2010 until at least October 2015. During his most recent interview with OPM signed on April 7, 2017, Applicant stated that he used marijuana on two occasions with his former spouse in October 2010. (Government Exhibit 4.) She purchased it for him to use. They shared a marijuana joint both times at their house. Applicant explained that the effects of marijuana made him more personable. The next time he used marijuana was during his five day trip to Amsterdam, Holland, in October 2015. While in Holland, Applicant purchased marijuana from a coffee shop about three times, spending about \$10 per gram for his purchases and purchasing two grams. Applicant states that he smoked a marijuana joint every day with the thought that he did so legally as it was legal in Holland. At this time, Applicant worked for a defense contractor and held a security clearance. Applicant knew that his use of illegal drugs including marijuana was prohibited under Federal law and against his company policy. Applicant did not report

his drug use to his employer. He did not report his conduct to OPM because he states that he did not know that he had to do so. He also did not list his illegal purchase and use of marijuana on his security clearance questionnaire dated November 20, 2015. (Government Exhibit 3.) Applicant states that his use of marijuana was only recreational.

In October 2015, Applicant was charged with Possession of Marijuana, Mushrooms and recreational drugs at an airport. Applicant explained that while in Holland, he also purchased a small bag of mushrooms, because he had never tried them and wanted to. Applicant forgot that the drugs were packed in his items, when he was randomly selected for a search when he arrived at the Chicago Airport. Applicant was detained for two hours, required to write a statement explaining the event, and required to pay a \$500 fine. Applicant was then released. Applicant states that he did not tell anyone of this incident, as he was scared and concerned about his security clearance. (Government Exhibit 4.)

Applicant failed to file his Federal income tax return for tax years 2013, 2014 and 2015. Applicant stated that during each tax time for three years, he was deployed overseas. He was twice in Afghanistan and once in Turkey. Applicant stated that since he believed the Government owed him money, he took care of the tax matter with the help of a professional when he returned state-side in 2016. (Government Exhibit 2.) Applicant claims that he is in the best financial situation he has ever been in. During his separation and then divorce in 2013, he experienced some rough financial times, but since he has been working for a defense contractor, and deploying every four months, he has been in the best financial state since becoming an adult.

Applicant stated that in August 2009, he was with his best friend and his cousin from Puerto Rico. They were trying to enter a casino with Puerto Rican identification. An argument ensued, and Applicant was charged with trespassing.

In January 2010, Applicant was charged with Possession of a Dangerous Weapon, 1st Offense, Driving Under the Influence of Alcohol, Fail to Drive Marked Lines, and No Proof of Insurance. Applicant explained that he was leaving Las Vegas when his tire blew out on a merge lane, and ended up hitting the median. Applicant was pulled over by an officer who asked if he had been drinking. Applicant admitted that he had, and Applicant was subsequently charged with the above violations. Based upon this incident, although Applicant was given an honorable discharge from the Air Force, he was denied the opportunity to re-enlist.

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list

potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "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 applying for national security eligibility 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 national security eligibility. 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 or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline H: Drug Involvement and Substance Misuse

The security concern relating to the guideline Drug Involvement and Substance Misuse is set forth at AG ¶ 24:

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.

The guideline at AG ¶ 25 contains seven conditions that could raise a security concern and may be disqualifying.

(a) any substance misuse (see above definition); and

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

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

The guideline at AG ¶ 26 contains four conditions that could mitigate security concerns. None of the conditions are applicable.

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

Applicant's use of marijuana while possessing a security clearance from 2010 to 2015, is clearly prohibited by the DoD. Furthermore his criminal arrest in October 2015 for possession of illegal drugs shows the depth of his involvement. He states that he no longer intends to use illegal drugs including marijuana, and there is no other evidence of illegal drug use since 2015. However, given his history and pattern of misconduct over the years, it cannot be determined that he will not continue to use marijuana in the future. At this time he is not responsible enough to access sensitive or classified information.

Guideline F, Financial Considerations

The security concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

AG ¶ 19 describes three conditions that could raise security concerns and may be disqualifying in this case:

(g) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant has a history of failing to file his federal income tax returns for three years, 2013, 2014 and 2015. He claims that he has corrected this problem and filed these tax returns, but he has failed to provide any proof of filing them. Under these

particular circumstances, there is no acceptable excuse. These facts establish *prima facie* support for the foregoing disqualifying conditions, and shift the burden to Applicant to mitigate those concerns. Applicant is ineligible for a clearance because he made decisions that indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which raise questions about his reliability, trustworthiness, and ability to protect classified information.

None of the guidelines could mitigate the security concerns arising from Applicant's alleged failure to file his Federal income taxes. Even assuming that AG ¶ 20 applies:

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

Applicant has not acted responsibly under unforeseen difficult circumstances that were completely beyond his control, and there are no clear indications that his financial issues are under control. He simply ignored filing his tax returns for the three years he was deployed. The record establishes no mitigation of financial security concerns under the provisions of AG ¶¶ 20(a) through 20(g).

Guideline E - Personal Conduct

The security concern for the personal conduct guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-personal 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. This includes, but is not limited to, consideration of:

(3) a pattern of dishonesty or rule violation;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities, which, if known, could affect the person's personal, professional, or community standing;

(2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant's use of marijuana while in Holland may have been legal in that country but is not legal under Federal law. Furthermore, his past derogatory conduct involving his citation for trespassing; his arrest for Possession of a Dangerous Weapon; Driving Under the Influence of Alcohol; Failure to Drive In Marked Lines; and No proof of insurance shows poor judgment and unreliability. Applicant's failure to follow Federal tax laws also show an unwillingness to comply with rules and regulations. These serious errors in judgment show his level of immaturity and his inability to qualify to adequately protect classified information.

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.

According to 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 applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is a 32-year old adult, who does not seem to understand that by his age, he should be showing more responsibility and good judgment. From 2010 to 2015, he used marijuana while holding a security clearance. He was arrested in October 2015 for illegal possession of marijuana and mushrooms at the airport during a random search. He failed to file his Federal income tax returns for tax years 2013, 2014, and 2015. He was cited for Trespass in 2009, and arrested and charged with Possession of a Dangerous Weapon, DUI, failure to Driven in Marked lines, and No proof of insurance in 2010. He has not demonstrated sufficient responsibility on any level. Overall the record evidence leaves me with serious doubt as to Applicant's judgment, eligibility, and suitability for a security clearance. He has not met his burden to mitigate the security concerns arising under the guideline for financial considerations.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a	Against Applicant
Subparagraphs 1.b	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a	Against Applicant
Subparagraphs 3.b	Against Applicant
Subparagraphs 3.c	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 national security eligibility and a security clearance. National security eligibility is denied.

Darlene Lokey Anderson
Administrative Judge