



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 17-00734
)	
Applicant for Security Clearance)	

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

11/21/2017

Decision

HESS, Stephanie C., Administrative Judge:

Applicant used marijuana between April 1992 and May 2016. The recentness of his marijuana use, combined with his inconsistent statements regarding that use, cast doubt on his current reliability and trustworthiness. Applicant has not mitigated Guideline H (Drug Involvement and Substance Misuse) concern. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on August 26, 2016. On April 28, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline F. The DOD acted under Executive Order (Ex. Or.) 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 DOD on September 1, 2006.

Applicant submitted his Answer to the SOR on May 15, 2017, and requested a decision on the record without a hearing. Department Counsel submitted the

Government's written case on May 19, 2017. A complete copy of the file of relevant material (FORM), which included Government Exhibits (GX) 1 through 4, was sent to Applicant on that same day. He was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on May 25, 2017, and his Response was received by the Defense Office of Hearings and Appeals (DOHA) within the allotted 30 days and admitted without objection. The case was assigned to me on October 1, 2017.

The SOR was issued under the AG implemented on September 1, 2006. The DOD implemented the amended AG on June 8, 2017, while this decision was pending. This decision will be based on the amended AG effective June 8, 2017. The outcome of this case would have been the same if decided based on the former AG.

Findings of Fact

Applicant is a 52-year-old quality specialist employed by a defense contractor since July 2016. This is his first application for a security clearance. (GX 1.) Under Guideline H, the SOR alleges that Applicant used marijuana with varying frequency between April 1992 and May 2016. Applicant denies this allegation.

On his August 2016 e-QIP, Applicant listed his marijuana-use dates as April 1992 to May 2016, and his frequency of use as "not often." In his November 2016 personal subject interview (PSI), Applicant told the investigator that between April 1992 and May 2016, his marijuana use, "during this span was infrequent, once every two years." Applicant stated that he used marijuana exclusively with his brother, and never purchased it. However, in his Answer to the SOR, Applicant states that he was unemployed for two sustained periods, first in 1992 and again in 2016, and that it was only during these two periods of unemployment that he used marijuana. He further states that, "there was no partaking of the drug in between these dates." (GX 1; GX 2; Answer.)

Applicant states in his signed Response to the FORM, "that after reviewing the transcript from the interview . . . [he] absolutely agree[s] with the documented interview record." He emphasizes that he has not used marijuana since May 2016, and has no intention of any future use. He acknowledges that any future use of marijuana is grounds for revocation of a security clearance. He underwent a mandatory drug screening in June 2016 for his current employer, and the test results were negative. He further states that his brother knows Applicant cannot use marijuana, and does not offer it to him. He does not associate with any other people who have "offered" him marijuana.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." *Id.* at 527. 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.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant’s 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.

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.” See Exec. Or. 10865 § 7. 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. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement and Substance Misuse

The concern under this guideline is set out in AG ¶ 24:

The illegal use of controlled substances . . . 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.

Applicant's admissions, corroborated by the record evidence, establish the potentially disqualifying conditions under this guideline:

AG ¶ 25(a) any substance misuse.

The following mitigating condition may also apply:

AG ¶ 26(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

AG ¶ 26(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 is recent and casts doubt on his current reliability and trustworthiness. Applicant's use, while infrequent, spanned a period of over 24 years. Applicant passed his June 2016 drug screening, asserts that he has not used marijuana since May 2016, and will not do so in the future. However, Applicant continues to associate with his brother, the only person with whom Applicant used marijuana. Because Applicant has provided contradictory and inconsistent statements regarding his marijuana use, his credibility is at issue, and his signed statement of intent to abstain from marijuana involvement in the future carries little weight.

The Directive does not define “recent,” and there is no “bright-line” definition of what constitutes “recent” conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006). 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. ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006). Given Applicant’s relatively short period of abstinence, in light of his over 24 years of use, his inconsistent statements regarding his marijuana use, and his continued contact with his brother, Applicant has not mitigated the concern. AG ¶¶ 26(a) and 26(b) do not apply.

Whole-Person Concept

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. In applying the whole-person concept, an 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. 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 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 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 Applicant has not mitigated the security concerns raised by his illegal drug use. Accordingly, I conclude he has failed to carry his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Stephanie C. Hess
Administrative Judge