



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



In the matter of:

)
)
) ISCR Case No. 17-01110
)
)
)

Applicant for Security Clearance

Appearances

For Government: Andrew Henderson, Esquire, Department Counsel

For Applicant: *Pro se*

April 23, 2018

Decision

Jennifer I. Goldstein, Administrative Judge:

On March 3, 2016, Applicant submitted his most recent Electronic Questionnaire for Investigations Processing (e-QIP). On May 26, 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 and Substance Misuse; and E, Personal Conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines, effective September 1, 2006.

Applicant answered the SOR on July 5, 2017. He requested an administrative determination. However, on August 14, 2017, Department Counsel timely requested a hearing before an administrative judge in this matter. The case was assigned to me on August 16, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on September 12, 2017. I convened the hearing via video teleconference as scheduled on October 4, 2017. The Government offered Government Exhibits 1 through

3, which were admitted without objection. Applicant testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on October 12, 2017.

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* (December 10, 2016), implements new adjudicative guidelines, effective June 8, 2017. All national security eligibility decisions¹ 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 in Appendix A of SEAD 4. I considered the previous adjudicative guidelines, as well as the new AG, 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 promulgated in SEAD 4.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations concerning his drug involvement in subparagraphs 1.a and 1.b of the SOR. Subparagraphs 1.a and 1.b described his marijuana use from 1993 to present; and the fact that he used marijuana after receiving a security clearance in June 2006. He denied the allegations in subparagraphs 2.a and 2.b of the SOR, which alleged that he showed questionable judgment as identified in subparagraph 1.b, and the falsification of his March 3, 2016 e-QIP by denying his drug abuse.

Applicant is 42 years old. He works as a mechanic for a government contractor, where he has been employed since approximately February 2004. He received a security clearance in connection with his employment in June 2006. (GE 1; GE 2; Tr. 20-25.)

Marijuana use is prevalent in Applicant's family. Applicant first used it when he graduated from high school. He smoked it with his father. It is used at family reunions. His father grows and smokes it. Applicant likens its illegality to "jaywalking." (Tr. 15.-19, 22.) He does not recall specifically the last time he used marijuana, but estimated that he used it five to ten times per year prior to accepting employment with his current employer. Since then, he only uses marijuana when he visits his father. He estimated that he was last home in 2015, and thought he last used marijuana over the course of one week during that trip. (Tr. 22, 27-30.)

Applicant did not disclose his marijuana use on section 23 of his 2016 e-QIP, which asks: "In the last seven (7) years, have you illegally used any drugs or controlled substances?" and, "Have you ever illegally used or otherwise been involved with a drug

¹ SEAD 4 ¶ D.7 defines "National Security Eligibility" as, "Eligibility for access to classified information or eligibility to hold a sensitive position, to include access to sensitive compartmented information, restricted data, and controlled or special access program information."

or controlled substance while possessing a security clearance other than previously listed?" Applicant answered "No" to both of these questions. He also denied drug use on his 2005 e-QIP. (GE 2.) When asked why he answered these questions "No", he testified, "I kind of view my situation with it as more along the lines of something like jaywalking, I guess. I don't - - I take it too - - I take it lightly in my case because I feel very responsible about the choices that I make." (Tr. 30.) He was aware that marijuana use was in violation of Federal law. (Tr. 31.) He later admitted his marijuana use during his subject interview on November 9, 2016. (GE 3.)

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 useful 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 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence that establishes 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 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 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 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 and Substance Misuse

The security concern relating to the Drug Involvement and Substance Misuse guideline 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. Two conditions are established:

- (a) Any substance misuse;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Appellant used marijuana from 1993 to present. He has held a security clearance since 2006. Therefore, security concerns under AG ¶¶ 25(a), and 25(f) are established.

The guideline at AG ¶ 26 contains four conditions that could mitigate drug-related security concerns. Two conditions may be 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 failed to present any evidence to support the above mitigating conditions. There is no evidence that his drug involvement is unlikely to continue or that he has taken actions to overcome this problem.

Guideline E, Personal Conduct

¶ 15: The security concern relating to the Personal Conduct guideline is set out in AG

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. Two are potentially applicable in this case:

- (a) Deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and
- (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.

Applicant's long-term recurring use of marijuana was criminal conduct that could affect his personal, professional, or community standing. Further, he falsified his e-QIP concerning his drug use and drug use while holding a security clearance. The evidence is sufficient to raise concerns under these disqualifying conditions.

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17 including:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the above conditions have been shown to apply. While Applicant admitted his marijuana use in his November 2016 subject interview, this disclosure was

neither not prompt nor in good faith. Applicant has not presented evidence to support any of the above conditions.

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 an applicant's conduct and all the 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.

AG ¶ 2(b) requires each case must be judged on its own merits. 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 the facts and circumstances surrounding this case. Applicant has a 25-year history of illegal substance abuse. He also falsified his e-QIP. Applicant's current reliability, trustworthiness, and good judgment remain questionable under the alleged security concerns. My comments regarding each guideline are incorporated here also.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his drug involvement and substance abuse; and his personal conduct.

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 and 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	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.

Jennifer I. Goldstein
Administrative Judge