



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



In the matter of:)
)
) ISCR Case No. 17-01661
)
Applicant for Security Clearance)

Appearances

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

11/27/2018

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant failed to mitigate the drug involvement security concerns. National security eligibility for access to classified information is denied.

History of the Case

Applicant submitted a security clearance application (SCA) on December 14, 2015. On June 5, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H, (Drug Involvement). The DOD CAF acted under Executive Order (EO) 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 the DOD on September 1, 2006 (2006 AG).

Applicant answered (Answer) the SOR on July 12, 2017, and requested a decision on the record without a hearing. On November 2, 2017, a complete copy of the File of Relevant Material (FORM), containing four Items, was mailed to Applicant. He received the FORM on December 11, 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 did not respond to the FORM. Items

1 through 4 are admitted into evidence without objection. The case was assigned to me on May 7, 2018.

On June 8, 2017, the DOD implemented new AG (2017 AG).¹ Accordingly, I have applied the 2017 AG.² However, I have also considered the 2006 AG, because they were in effect on the date the SOR was issued. I conclude that my decision would have been the same under either version.

Findings of Fact

Applicant is 34 years old, unmarried, and has no children. He has attended some college. Applicant has worked as a junior systems administrator since March 2015. This is his first security clearance application.

In 2008, Applicant started using marijuana after he developed a knee condition. At the time, he did not have health insurance. He used marijuana because it was cheaper than prescription medication and helped with his insomnia. (Item 2; Item 3 at 26; GE 4 at 4)

Applicant started growing marijuana at home for his personal use in August 2010. "Since I was using marijuana for chronic knee pain and sleep, I took it upon myself to learn how to grow marijuana from August 2010 through February 2013." Additionally, he grew his own marijuana because he did not trust "anyone." (Item 2 at 2; Item 3 at 27; GE 4 at 4)

From February 2012 until June 2015, Applicant misused various prescription medications and illegal drugs³ for pain management associated with knee problems. He asserted that he stopped misusing drugs in 2015, because he "consulted with a health care professional . . . and [he] no longer needed to engage in controlled substances." (Item 2 at Item 3 at 26-28)

In his December 2015 SCA, Applicant admitted he used marijuana once a night until May 2015. At that time, he claimed that "[he did] not intend to use this drug as [he is] getting older and starting [his] career." (Item 3 at 26) However, during his January 2017

¹ On December 10, 2016, the Director of National Intelligence issued Security Executive Agent Directive 4 (SEAD-4), establishing a "single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position." (SEAD-4 ¶ B, *Purpose*). The SEAD-4 guidelines became effective on June 8, 2017 (SEAD-4 ¶ F, *Effective Date*). The National Security Adjudicative Guidelines (AG), which are found at Appendix A to SEAD-4, apply to determine eligibility for initial or continued access to classified national security information. (SEAD-4 ¶ C, *Applicability*).

² ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DOD policy and standards).

³ Applicant used "morphine, hydrocodone, oxycodone, Oxycontin, tramadol, suboxone, xanax, Ativan, amphetamines, Ritalin, soma." (Item 3 at 28)

personal subject interview (PSI), Applicant disclosed that despite his 2015 assertions, he used marijuana two times between August 2015 and January 2017.

Applicant's last admitted marijuana use was in January 2017, at his home with friends. He used marijuana at that time because it was there. During his January 2017 PSI, he stated that it was possible that he could use marijuana in the future. (Item 4 at 4)

In Applicant's July 2017 Answer to the SOR, he asserted that he no longer had contact with the people who provided him with marijuana and other drugs. He also stated, "If [he] would have known that [he] would be in this outstanding career right now in [his] life, [he] never would have used marijuana and other opiates that would have impacted this clearance decision." He provided a signed statement of intent to not use drugs in the future. (Item 2 at 2-3)

Policies

"[N]o one has a 'right' to a security clearance."⁴ 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."⁵ 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."⁶

Eligibility for a security clearance is predicated upon the applicant 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.

⁴ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

⁵ *Egan* at 527.

⁶ EO 10865 § 2.

Adverse 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.”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 Security Executive Agent have established for issuing national security eligibility.

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.⁸ “Substantial evidence” is “more than a scintilla but less than a preponderance.”⁹ The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability.¹⁰ Once the Government establishes a disqualifying condition, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.¹¹ An applicant has the burden of proving a potential mitigating condition, and the burden of disproving it never shifts to the Government.¹²

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”¹³ “[S]ecurity clearance determinations should err, if they must, on the side of denials.”¹⁴

Analysis

Guideline H: Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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, but because such behavior may

⁷ EO 10865 § 7.

⁸ Directive ¶ E3.1.14.

⁹ See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

¹⁰ ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

¹¹ Directive ¶ E3.1.15.

¹² ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

¹³ ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive ¶ E3.1.15.

¹⁴ *Egan*, 484 U.S. at 531; See also AG ¶ 2(b).

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. The following conditions are potentially 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; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant admitted he used marijuana from 2008 until at least January 2017. For several years, he misused prescription medication, illegal drugs, and grew marijuana for his own use. Additionally, he told a government investigator in January 2017 that he could use marijuana in the future. The evidence raised the above disqualifying conditions.

The burden shifted to Applicant to rebut or prove mitigation of the resulting security concerns. AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable in this case:

- (a) the behavior happened so long ago, was so infrequent, or happened under such unusual 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 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; and

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended.

Applicant used a variety of illegal drugs and misused prescription medications for a significant period of time. He also grew marijuana for his own use. Much of this drug use was for pain management related to a medical issue because of pain from his knees. However, this use was illegal and continued after he received medical treatment and applied for a security clearance.

Applicant disclosed and described drug use in his 2015 SCA, his January 2017 PSI, and his July 2017 Answer to the SOR. Specifically, in his December 2015 SCA he stated his last marijuana use was in May 2015, and in his January 2017 PSI he admitted he used marijuana in August 2015 and January 2017.

In his December 2015 SCA, Applicant claimed he intended to no longer use marijuana because it was inconsistent with his career goals. In January 2017, he said it was possible that he would use marijuana again. After he received the SOR, Applicant again claimed he would no longer use marijuana. These inconsistent and apparently self-serving statements are insufficient to alleviate concerns regarding his history of drug use and the potential for future use.

Applicant's decision to use illegal drugs, after he applied for a security clearance in 2015, cannot be considered a minor lapse in judgment, but rather a pattern of behavior that indicates his unwillingness to follow rules and regulations. Security clearance decisions are not limited to conduct during duty hours; off-duty conduct, especially where it reflects poor judgment, provides a rational basis for the government to question an appellant's security worthiness.¹⁵ Appellant's behavior showed a disregard for the law, regulations, and the fiduciary relationship he voluntarily entered into with the government when he applied for access to classified information.

Applicant did not establish mitigation under AG ¶¶ 26(a), 26(b), and 26(c).

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the applicable guidelines, each of which is to be evaluated in the context of the whole person. 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

¹⁵ See, e.g., *Cole v. Young*, 351 U.S. 536, 550 n.13 (1956); *Croft v. Department of Air Force*, 40 M.S.P.R. 320, 321 n.1 (1989).

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 the guideline at issue in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under these guidelines, and evaluating all the evidence in the context of the whole person, Applicant has not mitigated the drug involvement and substance misuse security concerns at issue. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the interests of national security of the United States 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 ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H: AGAINST APPLICANT

Subparagraphs 1.a – 1.d: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security of the United States to grant or continue Applicant's eligibility for access to classified information. National security eligibility for access to classified information is denied.

CAROLINE E. HEINTZELMAN
Administrative Judge