



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 17-02099
)	
Applicant for Security Clearance)	

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: *Pro se*

03/23/2018

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns under Guidelines H (Drug Involvement), J (Criminal Conduct), and E (Personal Conduct), raised by Applicant's facilitation of his wife's marijuana use for six years. Security concerns are not mitigated. Eligibility for access to classified information is denied.

History of the Case

Applicant submitted a security clearance application on May 4, 2016. On June 26, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H, J, and E. The DOD acted under Executive Order (Exec. Or.) 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 (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on July 7, 2017, and requested a decision on the record without a hearing. Department Counsel submitted the Government's written case on October 16, 2017. On October 18, 2017, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on October 20, 2017, and did not respond.¹ The case was assigned to me on February 14, 2018.

Findings of Fact²

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a, 1.c, and 1.d. He denied the allegation in SOR ¶ 1.b. He did not expressly admit or deny the allegations in SOR ¶¶ 2.a and 3.a, which cross-allege the allegations in SOR ¶¶ 1.a-1.d. His admissions are incorporated in my findings of fact.

Applicant is a 56-year-old material technician employed by a defense contractor since May 1981. His security clearance application indicates that he has never been granted a security clearance. (GX 3 at 32.)

Applicant married in April 1986 and divorced in January 1996. He married his current spouse in December 2008. He has three adult children and one stepchild.

Applicant admitted SOR ¶ 1.a, alleging that he provided his current spouse \$100 per month for marijuana purchases from about December 2010 to December 2016. He denied SOR ¶ 1.b, alleging that he intended to continue providing his spouse with money for marijuana purchases. In his answer to the SOR, he stated that he has not provided drug money to his spouse "at all this year, nor will it happen in the future," because his spouse now has a job that requires random drug testing. He also commented that his wife is no longer using marijuana because her epilepsy is being controlled by prescribed medication. His comment suggests that she was using marijuana to control her epilepsy.

Applicant admitted that he was arrested for possession of marijuana in February 2012, as alleged in SOR ¶ 1.c. He did not admit or deny that he also was charged with obstruction without force, as alleged in the SOR. He explained that his wife was involved in a car accident, and he was looking for her glasses in the car when he found her marijuana and put it in his pocket. The court records reflect that he was convicted of marijuana possession (1st offense) and sentenced to 30 days in jail, suspended for 30 days. (Item 5.) The court records do not reflect that he was charged with obstruction.

¹ The FORM includes Item 4, a summary of an interview conducted by a security investigator on March 28, 2017, and two follow-up telephonic interviews in April 2017, which were included in the report of investigation by the Office of Personnel Management. Item 4 was not authenticated as required by Directive ¶ E3.1.20. Department Counsel failed to inform Applicant that he was entitled to comment on the accuracy of Item 4; make any corrections, additions, deletions or updates; or object to consideration of it on the ground that it was not authenticated. Item 4 is not admissible, and I have not considered it.

² Applicant's personal information is extracted from his security clearance application (GX 3) unless otherwise indicated by a parenthetical citation to the record.

Applicant admitted that he was arrested in 1981 for possession of marijuana and concealed weapons and pocket knives, as alleged in SOR ¶ 1.d. He explained that he did not know that putting a lock-blade Buck knife in his pocket or under his shirt was illegal.

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 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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.” 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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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.

Analysis

Guideline H, Drug Involvement

The concern under this guideline is set out in 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.

Applicant's admissions establish the disqualifying condition in AG ¶ 25(c): “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.” He admitted possession of marijuana in 1982 and 2012. His facilitation of his wife's drug abuse for six years included possession of her marijuana in the marital home and financing her purchases of marijuana, making him an accessory to her illegal conduct.

The following mitigating conditions are potentially applicable:

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;

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; and

AG ¶ 26(d): satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

AG ¶ 20(a) is not established. Applicant's drug involvement was recent, frequent, and did not occur under circumstances making recurrence unlikely.

AG ¶ 20(b) is not established. Applicant acknowledged his involvement in his wife's marijuana use, but he took no steps to prevent recurrence. He stopped facilitating her drug abuse solely because she stopped smoking marijuana.

AG ¶ 20(d) is not established. There is no evidence that Applicant completed a drug treatment program for his use of marijuana in 1981 or his drug involvement from 2010 to 2016.

Guideline J, Criminal Conduct

The concern under this guideline is set out in AG ¶ 30: "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations." The relevant disqualifying condition, established by Applicant's admissions of marijuana possession in 1981 and 2012, is AG ¶ 31(b): "evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted."

The following mitigating conditions are potentially relevant:

AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 32(d): there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity,

restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Neither mitigating condition is established. Applicant's criminal conduct was recent and frequent, and it stopped solely because his wife stopped using marijuana. I am not satisfied that he will not resume his complicity in her marijuana use if she decides to resume it.

Guideline E, Personal Conduct

The concern under this 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 or sensitive information. . . ." The following disqualifying conditions under this guideline are potentially applicable:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person 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;

AG ¶ 16(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-person 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: . . . a pattern of dishonesty or rule violations;

AG ¶ 16(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: . . . engaging in activities which, if known, could affect the person's personal, professional, or community standing; and

AG ¶ 16(g): association with persons involved in criminal activity.

All the above disqualifying conditions are established. Applicant knowingly and intentionally facilitated his wife's illegal drug involvement, raising questions about his judgment and willingness to comply with rules and regulations. He knew she was dealing

with illegal drug dealers. He risked damaging his professional reputation and made himself vulnerable to exploitation, manipulation, or duress.

The following mitigating conditions are potentially applicable;

AG ¶ 17(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; and

AG ¶ 17(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.

AG ¶ 17(c) is not established. Applicant's misconduct was serious, recent, frequent, and did not occur under unique circumstances making it unlikely to recur.

AG ¶ 17(g) is established. Applicant's spouse is no longer involved in criminal activity.

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 and applying the adjudicative factors in AG ¶ 2(d).³

I have incorporated my comments under Guidelines H, J, and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). After weighing the disqualifying and mitigating conditions under Guidelines H, J, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his drug involvement, criminal conduct, and personal conduct.

³ The factors are: (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.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement): AGAINST APPLICANT

 Subparagraphs 1.a-1.d: Against Applicant

Paragraph 2, Guideline J (Criminal Conduct): AGAINST APPLICANT

 Subparagraph 2.a: Against Applicant

Paragraph 3, Guideline E (Personal Conduct): AGAINST APPLICANT

 Subparagraph 3.a: Against Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge