



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-02347

Appearances

For Government: Nicholas Temple, Esq., Department Counsel

For Applicant: *Pro se*

04/25/2018

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant failed to mitigate security concerns raised under Guideline H (Drug Involvement). He used drugs until less than a year ago. Eligibility for access to classified information is denied.

History of the Case

Applicant submitted a security clearance application (SCA) on July 24, 2016. On August 23, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H (Drug Involvement). The DOD acted under Executive Order (EO) 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 decisions on or after June 8, 2017.

Applicant answered the SOR on September 11, 2017, and requested a decision on the record without a hearing. On October 11, 2017, a complete copy of the File of Relevant Material (FORM), containing four Items, was mailed to Applicant and received

by him on October 23, 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 respond to the FORM. Hence, Items 1 through 4 are admitted into evidence without objection. The case was assigned to me on March 1, 2018.

Findings of Fact

Applicant admitted all six allegations in the SOR. His admissions are incorporated into my findings of fact.

Applicant is almost 25 years old. He has worked as an engineer for a defense contractor since July 2016. He requires a security clearance for this employment. Between August 2013 and September 2015, while he was in college, he worked as an intern for his current employer. He earned a bachelor's degree in May 2016. Applicant is single and has no children.

In his July 24, 2016 SCA, Applicant admitted to using marijuana¹ and other drugs between August 2011 and May 2016 (Item 3 at 36-40). Applicant first used marijuana while attending college. He continued to use marijuana while working as an intern and while employed full-time by his current employer. During an April 2017 interview with a Government investigator, Applicant revealed he used marijuana as recently as March 2017 (Item 4 at 8). His marijuana use continued until August 2017, the same month he submitted an Interrogatory Response to DOHA. Since January 2017, he has used marijuana approximately once a week by himself, but he still associates with friends who use marijuana (Item 4 at 8-9). Applicant admitted SOR ¶ 1.a., which includes an allegation that he intends to continue to use marijuana in the future.

Applicant first purchased marijuana in September 2011 and last purchased it in December 2016. He told the Government investigator that he no longer intends to purchase marijuana, but will use marijuana offered to him. He also told the Government investigator that in 2014 he believed he was dependent upon marijuana, but does not believe he is currently marijuana dependent (Item 4 at 10 and 12).

Between approximately March 2012 and May 2014, Applicant experimented with a variety of other illegal drugs. These drugs included: various psychedelic drugs (LSD, 2C-B, LSA, 4-AcO-DMT, 25I-NBOMe, MDPV, and Ethylphenidate),² MDMA (ecstasy), cocaine, and 6-APB.³ He also illegally used Percocet and Adderall without a prescription. He told the Government investigator that he does not intend to use any of these drugs again.

¹ Marijuana is a Schedule I drug.

² LSD, 2C-B, 25I-NBOMe, and MDPV are Schedule I drugs. LSA is a Schedule III drug. Ethylphenidate and 4-AcO-DMT are not currently illegal in the United States.

³ MDMA and 6-APB are Schedule I drugs. Cocaine is a Schedule II drug.

In 2013, Applicant was arrested and cited with Possession of Marijuana (Item 3 at 34). He admitted he was smoking marijuana at the time he was detained and the police found marijuana and a pipe on him (Item 4 at 8). As a result of this arrest, he was given a citation and ordered to appear in court. The charges were waived after he completed an Intervention Program for Substance Abuse (IPSA). He claims he attended the IPSA program between April 2013 and July 2013, and completed online course work and mandatory drug tests. He claims he discontinued drug use while he was in this program.⁴ He offered no documentation concerning completion of the substance abuse program or any other post-SOR evidence in mitigation.

Policies

“[N]o one has a ‘right’ to a security clearance.”⁵ 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.”⁶ 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.”⁷

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.

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.”⁸ Thus, a

⁴ The SOR did not allege this derogatory information as an allegation. Hence, it will not be analyzed as a potential disqualifying condition, but may be considered under the analysis of mitigating conditions and the whole-person concept.

⁵ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

⁶ *Egan* at 527.

⁷ EO 10865 § 2.

⁸ EO 10865 § 7.

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.⁹ “Substantial evidence” is “more than a scintilla but less than a preponderance.”¹⁰ The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability.¹¹ Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.¹² An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.¹³

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”¹⁴ “[S]ecurity clearance determinations should err, if they must, on the side of denials.”¹⁵

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 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

⁹ See *Egan*, 484 U.S. at 531.

¹⁰ See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

¹¹ ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

¹² Directive ¶ E3.1.15.

¹³ ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

¹⁴ ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

¹⁵ *Egan*, 484 U.S. at 531; See also AG ¶ 2(b).

term adopted in this guideline to describe any of the behaviors listed above.

AG ¶ 25 describes three conditions that could raise a security concern and be disqualifying in this case:

- (a) any substance misuse (see above definition);
- (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 between August 2011 and August 2017, and he intends to continue to use marijuana. He also used experimented with a variety of other illegal substances between March 2012 and May 2014. The evidence raised these disqualifying conditions.

After the Government raised potentially disqualifying conditions, the burden shifted to Applicant to rebut or prove mitigation of the resulting security concerns. AG ¶ 26 provides two conditions that could mitigate security concerns 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.

Applicant used and purchased marijuana during and after college. He used marijuana after he was arrested in 2013, after he submitted his SCA in 2016, and after his background interview in March 2017. He used marijuana as recently as August 2017, while working for his current employer and while applying for a security clearance.

He also used a variety of other illegal drugs. Applicant's illegal drug use is ongoing, it is not isolated, nor did it occur under unusual circumstances. He still associates with individuals who use marijuana, and he has indicated an intention to continue to use marijuana in the future. AG ¶¶ 26(a) and 26(b) do not apply.

Applicant chose to use illegal drugs, and his decision to do so continues to reflect negatively on his current security worthiness. Applicant's decision to use illegal drugs, after he applied for a security clearance, cannot be considered a minor lapse in judgment, but a pattern of behavior that indicates an unwillingness to follow rules and regulations. Security clearance decisions are not limited to conduct during duty hours;¹⁶ off-duty conduct, especially where it reflects poor judgment, provides a rational basis for the government to question an applicant's security worthiness.¹⁷ Applicant'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.

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 following 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 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 I 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 that Applicant has not mitigated the drug involvement concerns. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility for access to classified information.

¹⁶ See, e.g., ISCR Case No. 98-0620 at 3 (App. Bd. Jun. 22, 1999).

¹⁷ 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).

Formal Findings

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

Paragraph 1, Drug Involvement: AGAINST APPLICANT

Subparagraphs 1.a. – 1.g.: 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. Eligibility for access to classified information is denied.

Caroline E. Heintzelman
Administrative Judge