



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)
)
)

ISCR Case No. 17-03186

Appearances

For Government: Brian Olmos, Esq., Department Counsel
For Applicant: *Pro se.*

08/13/2018

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated drug involvement. Personal conduct concerns associated with his alleged falsification of his security clearance applications cover his past drug use are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On December 18, 2017, the Department of defense (DoD) Consolidated Adjudications facility (CAF) issued a Statement of Reasons (SOR) detailing reasons under the drug involvement and personal conduct guidelines why DoD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under executive Order (Exec. 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 DoD 5200.02, *Procedures for the Personnel Security Program* (PSP)

Applicant responded to the SOR on January 25, 2018, and requested a hearing. The case was assigned to another judge on March 23, 2018, reassigned to me on April 9, 2018, and scheduled for hearing on May 8, 2018. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At the hearing, the Government's case consisted of five exhibits (GEs 1-5). Applicant relied on one witness (himself) and no exhibits. The Government's exhibits were admitted without objection. The transcript was received on May 16, 2018.

Summary of Pleadings

Under Guideline H, Applicant is alleged to have used and purchased marijuana from approximately 2007 to April 2016. Allegations also include charges in November 2012 of aggravated battery with a dangerous weapon and failed urinalyses administered by the jail, testing positive for marijuana, for which he was ordered to attend drug court for a weekly urinalysis test until the urinalysis results reflect no marijuana in his system (which took two to three months to test clean of marijuana). Allegations of drug use and purchases under Guideline H are also covered by Guideline J and are incorporated by reference.

Under Guideline E, Applicant allegedly (a) continues to use and purchase marijuana; (b) falsified his electronic questionnaires for electronic processing (e-QIP) of June 2016 and September 2016, respectively, by omitting his past use and purchases of marijuana. Under Guideline J, the allegations covered by Guideline H are incorporated by reference.

In his response to the SOR, Applicant admitted all of the allegations covering his drug activities and e-QIP omissions. Applicant did not answer the allegations pertaining to Guideline J, and these allegations were withdrawn by the Government. Addressing the drug-related allegations, Applicant claimed he stopped using and purchasing illegal drugs prior to April 2016 (uncertain about dates). He claimed he no longer associated with friends who used and purchased drugs after coming to work for his current employer. And, he claimed he thought the question pertaining to his drug-related omissions in his e-QIP referred to a much larger scale of drug users than smaller users like himself.

Procedural Issues

Before the close of the hearing, the Government withdrew the allegations covered by Guideline J. Assigned grounds for the Government's withdrawal were that the allegations were adequately covered under Guideline H.

Findings of Fact

Applicant is a 35-year-old communications engineer for a defense contractor. He seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant has never married and has no children. He attended an accredited college between August 2009 and April 2010 but earned no degree or diploma. (GEs 1-3; Tr. 58) He reported no military service.

Since August 2016, Applicant has worked for his current employer. (GEs 1-3; Tr. 51) Between August 2006 and August 2016, he worked for non-defense employers in various jobs that did not require a security clearance. (GEs 1-3; Tr. 30-31, 55-56) He held an interim clearance with his current employer before it was rescinded following the issuance of the SOR. (Tr. 58)

Applicant's drug history

Applicant was introduced to marijuana in about 2007 (precise dates not recalled), and he smoked it two to three times a week (mostly with friends) for the ensuing nine years. (GE 3; Tr. 31-33) More specifically, between 2007 and April 2016, he used and purchased marijuana two to three times a week on a regular basis because he liked it. (GE 3) He acknowledged that he contributed money to his friends to purchase marijuana to meet his personal needs. (Tr. 41)

While Applicant seemed to think he ceased using marijuana earlier in time than in August 2016 (Tr. 38-40), he provided no corroborating evidence to warrant amending his time-line admission in his response. For evidentiary purposes, his accepted span of use extended from 2007 to August 2016. Applicant acknowledged his awareness of his current employer's anti-drug policy in effect when he last used marijuana. (Tr. 47)

Following his arrest for aggravated battery with a dangerous weapon, Applicant failed a drug urinalysis test and was court-ordered to attend a drug court for weekly urinalysis tests until the urinalysis results reflected no marijuana in his system. (GE 3) Applicant reported that it took two to three months of urinalysis testing to produce negative test results. (GEs 3-4; Tr. 36-37) Asked whether his employer was aware of his positive drug test, Applicant indicated he did not believe his employer was aware of the test and positive results. (Tr. 52)

Applicant continued to smoke marijuana with friends after his 2012 drug-related arrest and continued to associate with friends who still used marijuana in his presence after he himself ceased using the substance. (GE 3; Tr. 45-46) His claims of disassociation from these friends who use marijuana are not corroborated or substantiated and cannot be accepted without more probative evidence.

E-QIP omissions

Asked to complete an e-QIP in June 2016, and again in September 2016, Applicant omitted his past use and purchases of marijuana. (GEs 1-2) In his response, he attributed his **no** answers to his belief that the questions posed in section 23 of each

e-QIP were concerned with sales and trafficking and did not apply to recreational users like himself.

Pressed at hearing to explain his reasons for his omissions of his drug involvement in both e-QIPS, he revised his answers to acknowledge that he did not want to disclose his past marijuana use and purchases (claiming he did not believe the questions were serious ones) and, unaware of the repercussions of lying, he just wanted to get on with his life. (Tr. 30-32, 42-46, 52-53) Applicant's revised answers reflect material lapses of candor and are entitled to more weight than the explanations he provided in his response to the SOR allegations of falsification.

Considering all of the evidence presented, Applicant's revised explanations reflect the most accurate reasons for his drug use and purchase omissions. While truthful, his hearing explanations of his drug use/purchase omissions warrant drawn inferences of knowing and wilful omission.

When initially questioned by an OPM investigator about his drug activities in a follow-up OPM interview in November 2016, Applicant denied any past drug involvement and was not confronted by the investigator with any drug-related information. (GE 3; Tr. 44) In a second interview conducted by another OPM investigator in April 2017, Applicant was asked again whether he had any past drug use testing to report, and he again answered in the negative. (GE 3; Tr. 44-45) This time, the investigator confronted Applicant with information about his 2012 drug-related arrest. (GE 3)

Once the OPM investigator confronted Applicant, he acknowledged the arrest and proceeded to provide his whole history of drug activity. (GE 3; Tr. 44-45) Applicant's drug-testing and drug-activity disclosures represent credible corrections but cannot credibly be considered voluntary disclosures.

Endorsements

Applicant did not provide any personal endorsements from his supervisors and coworkers. Nor did he provide any performance evaluations, character references, nor evidence of community contributions.

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the

guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

Drug Involvement

The Concern: Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. AG ¶ 24.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. AG ¶ 15.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). Because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Analysis

Applicant presents as a communications engineer for a defense contractor who seeks a security clearance. Principal security issues in this case center on Applicant's drug involvement falsifications of his e-QIPs.

Drug concerns

Over a number of years spanning 2007 and April 2016, he used and purchased marijuana two to three times a week on a regular basis. (GE 3) He acknowledged t

Applicant's admissions to using illegal drugs raise security concerns over risks of recurrence as well as judgment issues. On the strength of the evidence presented, two disqualifying conditions of the AGs for drug involvement and substance abuse are applicable: DC ¶ 25(a), "any substance misuse," and DC ¶ 25(c), "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia."

Applicant's significant recurrent use and purchases of marijuana over an extended number of years (2007 to April 2016) raises questions over the strength of his abstinence commitments. Because of the extended time and amounts of marijuana usage and purchases availed of by Applicant, his recurrent involvement with the controlled substance creates continuing security concerns. While Applicant's recurrent use of illegal drugs between 2007 and 2016 has never been resumed since April 2016 in any proven way, his drug activities make the likelihood of recurrent use too great to facilitate safe predictions of continued abstinence.

Applicant, to his credit, has made noticeable gains in his efforts to mitigate his past drug activities. Still, his multiple drug activities covered a considerable period (over nine years) are still relatively recent, and have not been accompanied by any cognizable counseling or programmatic rehabilitation. Considering the regularity and quantity of his marijuana use and purchases over a substantial period time, most of the mitigating conditions for drug involvement are not available to Applicant.

Because it is still unclear when Applicant ceased contact with his old friends who continue to use marijuana, potential mitigating conditions, MC ¶ 26(b)(1), "disassociation from drug-using associates and contacts," and MC ¶ 26(b)(2), "changing or avoiding the environment where drugs were used," are not available to him at this time. So, while Applicant's assurances that his drug involvement is a thing of the past are encouraging, more time is needed to draw safe inferences that he is not a recurrence risk.

Considering the record as a whole, at this time there is insufficient probative evidence of sustainable mitigation to make predictable judgments about his ability to avoid drugs and drug purchases in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant's drug activities over a nine-year period, he does not mitigate security concerns with respect to the allegations covered by subparagraphs 1.a through 1.c of the SOR.

Personal conduct concerns

Security concerns are raised as well over Applicant's judgment, reliability, and trustworthiness under Guideline E as the result of his use and purchases of illegal drugs. Questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, are each core policy concerns of the personal conduct guideline (AG ¶ 15). Judgment concerns are tied to Applicant's drug activities whether considered under Guideline H or Guideline E. The same concerns that attach to Applicant's repeated drug involvement apply with equal force to the judgment concerns

associated with his drug activities under the personal conduct guideline. Because of his omissions of his past drug activities raise separate trustworthiness concerns, they may be considered independently as incorporated concerns raised under Guideline E. See ISCR Case No. 06-20964, at 6 (April 10, 2008).

Applicant's continuing marijuana activities between July 2007 and April 2016 coupled with his deliberate omissions thereof in the e-QIPs he completed in 2016 invite application of DC ¶¶ 16(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 16(d)(3), "a pattern of dishonesty or rule violations."

Applicant fully acknowledged his 2012 drug-related arrest only after being confronted by an OPM investigator in a follow-up second interview in April 2017. His full disclosures of his past drug use that he provided in the interview, while welcomed, were neither prompt nor voluntary and preclude him from availing himself of the mitigating benefits of MC ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts."

In evaluating all of the circumstances surrounding Applicant's active drug activities between July 2007 and April 2016, his ensuing admissions under questioning by an OPM investigator, and his explanations and whole-person considerations, are insufficient to enable him to convincingly refute or mitigate personal conduct concerns associated with his continued drug use and e-QIP omissions. Overall, Applicant's explanations are not enough to warrant conclusions that his judgment lapses associated with his material drug activities over a period years and ensuing omissions of his drug use in successive e-QIPs are mitigated.

Whole-person assessment

From a whole-person perspective, Applicant has established insufficient probative evidence of his overall honesty, trustworthiness, and understanding of DoD policy constraints on the use of illegal substances. He lacks enough positive reinforcements, however, to facilitate safe predictions he is at no risk of recurrence. Evaluating all of the facts and circumstances developed in the record, Applicant fails to mitigate security concerns associated with the allegations covered by Guidelines H and E.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE H (DRUG INVOLVEMENT): AGAINST APPLICANT

Subparas. 1.a through 1.c: Against Applicant

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Subparas. 2. a through 2.g: Against Applicant

GUIDELINE J (CRIMINAL CONDUCT): WITHDRAWN

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge