



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



In the matter of:)
)
-----) ISCR Case No. 17-03486
)
Applicant for Security Clearance)

Appearances

For Government: Julie Mendez, Esq., Deputy Chief Department Counsel
For Applicant: *Pro se*

09/27/2018

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. He presented insufficient evidence to explain, extenuate, or mitigate the security concern stemming from his drug involvement and substance abuse. Accordingly, this case is decided against Applicant.

Statement of the Case

On June 12, 2017, Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format). On October 18, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised security concerns under the drug involvement and substance misuse guideline.¹ Applicant answered the SOR on November 17, 2017, and requested a hearing to establish his eligibility for continued access to classified information.

¹ This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on June 8, 2017, apply here.

A hearing was scheduled for July 18, 2018, a date mutually agreed to by the parties. Applicant testified at the hearing and offered two exhibits (Applicant's Exhibits (AE) A and B, which were admitted without objection. The exhibit offered by the Government at the hearing was admitted without objection (Government Exhibit (GE) 1). The transcript (Tr.) was received on July 26, 2018.

Findings of Fact

Applicant is 37 years old, a college graduate, and married with two children (ages three and seven months). Since January 2004, he has worked for a defense contractor. This is Applicant's first security clearance application.²

Under Guideline H, the SOR alleged that Applicant used marijuana with varying frequencies from about January 2000 to about May 2017. The SOR also alleged that he used cocaine with varying frequencies in about January 2017.³ Applicant denied the marijuana use, observing that the reporting period was the past seven years, but the SOR alleged use back to 2000. Applicant also denied the cocaine use, stating that "varying frequencies" was not based in fact.⁴ The SOR, however, is based on facts provided by Applicant in his security clearance application.⁵

Applicant testified that he began using marijuana during his undergraduate days, beginning in January 2000. Thereafter, he used marijuana once or twice a year at social occasions in college. After Applicant married in 2013, his marijuana use was once or twice a year or less. His use decreased after his first child was born in 2015. He never used it in the presence of his family or his wife. Applicant never purchased, possessed, or supplied marijuana. Applicant used cocaine once at a party in January 2017.⁶ He did not buy or supply the cocaine. Applicant knew marijuana use and cocaine use were illegal.⁷ His last use of marijuana was at a concert in May 2017. His wife and in-laws were present. He did not smoke marijuana that time; it was in a candy gummy bear, and he just took a bite.⁸

A number of factors affected Applicant's marijuana use over time. First, he married in March 2013. His use of marijuana decreased as a result. He never used marijuana with

² GE 1; Tr. 20-26, 29.

³ SOR ¶ 1.

⁴ Answer ¶ 1.a and ¶ 1.b.

⁵ GE 1.

⁶ Applicant's use of cocaine was once or twice, at most in January 2017. GE 1.

⁷ Tr. 22-26, 30-31.

⁸ Tr. 26-31.

his wife. Second, the birth of Applicant's first child in 2015 caused him to think about the implications of his marijuana use. Third, when Applicant was informed in May 2017 that he would be applying for a security clearance, he decided to abstain altogether. He has done so. Applicant will continue to abstain and will participate in random drug testing, if necessary.⁹

Law and Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individuals are eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865 § 2; SEAD-4, ¶ E.4.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. SEAD-4, Appendix A, ¶¶ 2(c), 2(d).

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

Administrative Judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). In resolving the ultimate question regarding an applicant's eligibility, "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." SEAD-4, Appendix A, ¶ 2(b). See also SEAD-4, ¶ E.4. Moreover, the Supreme Court has held that officials making "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

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. 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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

⁹ Tr. 12, 15, 22, 24, 29.

Discussion

Guideline H, Drug Involvement and Substance Misuse

Under Guideline H for drug use,¹⁰ suitability of an applicant may be questioned or put into doubt because drug use can both impair judgment and raise questions about a person's ability or willingness to comply with laws, rules and regulations:

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including. . . purchase.

I have also considered all of the mitigating conditions under AG ¶ 26 and found the following relevant:

- (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

¹⁰ AG ¶¶ 24, 25 and 26 (setting forth the concern and the disqualifying and mitigating conditions).

involvement or misuse is grounds for revocation of national security eligibility.

Marijuana and cocaine are Schedule I controlled substances, the possession of which is regulated by the federal government under the Controlled Substances Act.¹¹ The knowing or intentional possession and use of any controlled substance is unlawful and punishable by imprisonment and or a fine.¹² In an October 25, 2014 memorandum, the Director of National Intelligence reaffirmed that the use of marijuana is relevant to national security determinations, regardless of changes to state laws concerning marijuana use.¹³

The evidence established that Applicant used marijuana on a recreational basis once or twice a year from January 2000 to May 2017. He deliberately decided to abstain altogether in May 2017. His use of cocaine was far less often than his use of marijuana, perhaps once or twice at a party in January 2017. This illegal drug use triggers security concerns under AG ¶¶ 25(a) and (c). The next inquiry is whether those concerns are mitigated.

Applicant's last admitted drug use was in May 2017. He used cocaine, giving him the benefit of the doubt, at most twice and only in January 2017. These recent usages, however, prevents AG ¶ 26(a) from applying.

Applicant relies heavily on his period of abstinence from May 2017 to present. He also relies on his stated intention to abstain from all drug abuse in the future. Applicant also points to his marriage and the birth of his two children as positive factors. Those are, indeed, all positive factors.¹⁴ The problem is that his recent period of abstinence is outweighed by his 17 years of marijuana usage. In this context, 14 or so months of abstinence is not a long enough established pattern of abstinence. AG ¶ 26(a) does not apply.

The record raises doubts about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.¹⁵ Accordingly, I conclude that Applicant did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

¹¹ 21 U.S.C. § 811 *et seq.*

¹² 21 U.S.C. § 844.

¹³ James R. Clapper, Director of National Intelligence, Memorandum: *Adherence to Federal Laws Prohibiting Marijuana Use* (October 25, 2014). See also <http://www.dea.gov/druginfo/ds.shtml>.

¹⁴ That being said, it should be noted that his marriage and the birth of his first child did not deter him from the illegal use of drugs. Those events may, however, have decreased his usage.

¹⁵ AG ¶ 2(a)(1)-(9).

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, Guideline H:	Against Applicant
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Subparagraphs 1.a-1.b:	Against Applicant
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Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant access to classified information.

Philip J. Katauskas
Administrative Judge