



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 18-00993

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

10/29/2018

Decision

GLENDON, John Bayard, Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse). Eligibility for access to classified information is denied.

Statement of the Case

On May 3, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended (Exec. Or.); DOD 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 responded to the SOR on May 25, 2018. He requested a hearing before an administrative judge. The case was reassigned to me on July 6, 2018. On the same date, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing, scheduling the hearing on August 8, 2018. I convened the hearing as scheduled.

Department Counsel offered two documents into evidence, which I marked as Government Exhibits (GE) 1-2. These exhibits were admitted into evidence without objection. Applicant offered two documents, which I marked as Applicant Exhibit (AE) A and B and were admitted without objection. He also testified. DOHA received the transcript on August 23, 2018 (Tr.).

Findings of Fact¹

On September 6, 2016, Applicant submitted a security clearance application (SCA) in connection with his employment with a federal government contractor. He is 35 years old, married and has one child. (Tr. 17.) He served in the Air Force from 2006 to 2014 and was honorably discharged with the rank of Staff Sergeant. He was granted a security clearance in 2007. He earned an associate's degree in 2011 and has continued his college education.

He first experimented with smoking marijuana while in high school. He stopped using marijuana while in the military. After he was discharged, he relocated to pursue his education using the GI Bill. He started working for his current employer as a summer intern in 2016, and he continued on a part-time basis after that while continuing his education.

In January 2016, Applicant began smoking marijuana, or tetrahydrocannabinol (THC) oil, an extracted cannabis product, (referred to herein simply as marijuana) before going to bed to help him relax and sleep. He suffers from back pain that wakes him up and makes sleep difficult. The marijuana made it possible for him to sleep well. He obtained a medical marijuana recommendation, which made his use of marijuana legal under the law of the state where he resides.

About 12 years ago, Applicant was treated by a chiropractor, who diagnosed his back pain to be the result of having one leg that was shorter than the other, which causes his hips and spine to be misaligned. (Tr. 13.) This has been a "life-long condition." (Tr. 13.) He has not sought any medical advice from another type of doctor who specializes in back pain to treat his condition and has no plans to do so. (Tr. 20-21.)

Applicant started using marijuana at the suggestion of a friend. (Tr. 8.) He claims that it works better than other alternatives he has tried. He found it so helpful that he has recommended medical marijuana to his wife, who has serious health issues. She has benefited from using medical marijuana. Applicant also convinced his father to use medical marijuana before he died of cancer. Applicant's father also found that medical marijuana gave him significant relief from his condition. (Tr. 14.)

Applicant disclosed in his SCA that he has used marijuana since January 2016. He was granted an interim clearance in late 2016 or early 2017. (Tr. 6.) He used marijuana

¹ Applicant's personal information is extracted from his security clearance application, dated April 16, 2015 (GE 4), unless otherwise indicated by a parenthetical citation to the record.

for a period while holding the interim clearance, but stopped shortly before his November 2017 security clearance background interview. (Tr. 16.) The investigator confirmed to Applicant that he would not be eligible for a security clearance if he continued using marijuana. (Tr. 16-17.) Applicant then stopped using marijuana. (Tr. 17.) He discontinued his use for about one year, and then he started using the drug again about one or two months prior to the hearing. (Tr. 18.)

Applicant intends to continue using marijuana in the future, even if it means that he will not be eligible for a security clearance. Accordingly, Applicant is a current, unlawful user of a “controlled substance,” as that term is defined in 21 U.S.C. § 802 (6). That definition is referenced in AG ¶ 24.

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 and Substance Misuse)

The security 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. 802.² *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

Applicant’s admissions, testimony and the documentary exhibits in the record establish the following potentially disqualifying conditions under this guideline:

AG ¶ 25(a) any substance abuse (see above definitions); and

² Subsection 16 of the cited statute defines “marijuana” as follows: “The term ‘marihuana’ means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.”

AG ¶ 25(f) any illegal drug use while granted access to classified information of holding a sensitive position.

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; and

AG ¶ 26(c): abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended.

AG ¶ 26(a) is not established. Applicant's substance abuse is current, ongoing and frequent. He testified that he has no intent to cease his regular use of the drug. In fact, after a period of abstinence, he started abusing marijuana shortly before the hearing.³ His substance abuse casts doubt on Applicant's current reliability, trustworthiness and good judgment.

AG ¶ 26(c) is partially established. The record reflects that Applicant's use of marijuana is directly connected with his condition of chronic back pain. He testified that he has a recommendation for medical marijuana, which is legal under the laws of his state. This recommended use under state law, however, is not a legal use under federal law, as discussed below. Applicant's abuse has not ceased and will likely continue into the future unless and until he seeks medical advice from a physician who specializes in treating back pain and obtains treatment for the underlying medical condition for which he uses marijuana to mask the symptoms. Applicant did not express at the hearing any interest in seeking medical advice.

Since this case involves the use of marijuana obtained legally with a recommendation from a doctor under applicable state law, further comment on the illegality of marijuana use under federal law is warranted. The U.S. Department of Justice and the Director of National Intelligence have issued guidance as to the impact of state marijuana laws on the federal government and its laws and programs. In short, this guidance emphasizes that changes in state laws regarding the legality of marijuana for medical or any purpose does not alter Congress's determination that marijuana is a

³ The so-called "Bond Amendment," which is codified at 50 U.S.C. § 3343, prohibits the granting or renewing of national security eligibility to an individual who is currently an unlawful user of a "controlled substance," as that term is defined in 21 U.S.C. § 802 and which is referenced in AG ¶ 24. Under Appendix B of the Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), the Bond Amendment prohibition applies to industrial security clearance proceedings. However, Applicant's current use of marijuana did not arise until shortly before the hearing in this matter, and neither this fact nor the Bond Amendment is alleged in the SOR. Accordingly, as a matter of fair notice and due process, I do not make a conclusion based upon this fact and the possible application of the Bond Amendment.

dangerous drug and is classified under the federal Controlled Substance Act as a Schedule 1 drug with a high potential for abuse. See 21 U.S.C. § 812(c) (c) (10).

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).⁴

I have incorporated my comments under Guideline H in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline H, evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his past actions.

Formal Findings

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

Paragraph 1. Guideline H: AGAINST APPLICANT

Subparagraph 1.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.

John Bayard Glendon
Administrative Judge

⁴ 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.