



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 18-01175
)	
Applicant for Security Clearance)	

Appearances

For Government: Brittany Muetzel, Esq., Department Counsel
For Applicant: Dan Meyer, Esq.

11/28/2018

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 19, 2017. On May 1, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DOD CAF acted 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 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 June 18, 2018, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on July 26, 2018, and the case was assigned to me on September 11, 2018. On September 14, 2018, the

Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for October 11, 2018. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. I kept the record open until October 18, 2018, to enable him to submit additional documentary evidence. At Applicant's request, I extended the deadline for submitting additional evidence until October 23, 2018. He timely submitted AX F through I, which were admitted without objection. DOHA received the transcript (Tr.) on October 19, 2018.

Findings of Fact¹

In Applicant's answer to the SOR, he admitted the single allegation of marijuana use from November 2010 through May 2017, but asserted that his conduct has been mitigated. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 38-year-old software designer employed by a defense contractor since March 2017. He graduated from high school in July 1999 and has worked since September 2003 for various employers, including defense contractors, in jobs involving information technology. He has never held a security clearance.

Applicant was diagnosed with ulcerative colitis in his early 20s. He was treated by various gastroenterologists until about 2011, when he lost his medical insurance for a few months. In an effort to treat himself, he started using marijuana about twice a week, which kept his medical condition under control. He used it alone at home and not in social situations. He knew that marijuana use and trafficking in marijuana was illegal in the states where he resided. He learned in May 2017 that his marijuana use was contrary to federal employment policy. He immediately stopped using marijuana and stopped associating with the individuals from whom he purchased it. He reestablished a relationship with a gastroenterologist and now controls his colitis with medication. (Tr. 13-19.) He disclosed his marijuana use in his SCA and during an interview by a security investigator. (GX 1 at 30; GX 2 at 6.)

Applicant was tested for illegal drugs and controlled substances on October 15, 2018, and tests were negative. (AX F.) He was evaluated at an addiction treatment facility on October 17, 2018, where he was again tested for marijuana and controlled substances, and all tests were negative. A medical professional at the addiction treatment facility determined that no substance-abuse treatment was necessary. (AX H; AX I.) After the hearing, Applicant submitted a statement declaring his intent to abstain from illegal drugs, including marijuana, and agreeing that any violation will constitute grounds for automatic revocation of his security clearance. (AX G.)

¹ Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

Applicant's supervisors regard him as skillful, hardworking, and dedicated. He has been candid with his supervisors about his drug involvement and has earned their trust and respect. He has been selected as a mentor for new employees. (AX B; AX C.)

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 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 and the documentary evidence in the record establish the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse (see above definition); and

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

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; . . . [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.

Both mitigating conditions are established. Applicant stopped using marijuana as soon as he learned that it was incompatible with employment by a defense contractor. He stopped his marijuana involvement before he submitted his SCA and well before receiving the SOR. There is no evidence that he was addicted. He acknowledged his marijuana use and was evaluated by a medical professional, who determined that he did not need substance-abuse treatment.

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).²

I have incorporated my comments under Guideline H in my whole-person analysis and applied the factors in AG ¶ 2(d). Applicant has been candid about his marijuana involvement throughout the security-clearance process. He was sincere and credible at the hearing.

After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his drug involvement.

Formal Findings

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

Paragraph 1, Guideline H:

FOR APPLICANT

Subparagraph 1.a:

For Applicant

² 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.

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge