



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



In the matter of:)
)
) ISCR Case No. 17-04234
)
Applicant for Security Clearance)

Appearances

For Government: Michelle Tilford, Esq., Department Counsel
For Applicant: *Pro se*

11/06/2018

Decision

GLENDON, John Bayard, Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement and Substance Abuse) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

On March 22, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent Applicant a Statement of Reasons (SOR) alleging security concerns under Guidelines E and H. 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016) (AG) for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on April 13, 2018, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on May 2, 2018. A complete copy of the file of relevant

material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on May 11, 2018. His response was undated. It was received by the Defense Office of Hearings and Appeals on June 5, 2018. Department Counsel did not object to Applicant's response, and it is admitted into the record. In his response to the FORM, Applicant did not object to the Government's evidence, which was attached to Department Counsel's FORM as Items 1 through 5. This evidence is admitted into the record and is referred to herein using Department Counsel's numbering for each Item. The case was assigned to me on July 26, 2018.

Findings of Fact¹

In his SOR answer, Applicant admitted all of the SOR allegations. He also provided explanations and clarifications regarding his actions. His admissions are incorporated in my findings of fact.

Applicant is 34 years old and is a 2006 graduate with a bachelor's degree. He has worked for a government contractor since 2007 and has held a secret clearance since 2008. In 2010, his clearance was upgraded to secret.

On June 23, 2015, he submitted a new application (SCA). In the SCA, he disclosed that he used marijuana during the period 2004 to 2015. He commented that his use in the last seven years was less than ten times. He also disclosed that he used marijuana while holding a security clearance.

In his August 2015 background interview, he confirmed his marijuana use while in college (2004-2006) and his use in the last seven years, which was limited to less than ten times. His most recent use was in April 2015, shortly before his application and his background interview. He reported no other drug use on either his SCA or during his background interview. (Item 5 at 3.)

On June 2, 2017, Applicant responded to interrogatories from the DOD CAF in which he addressed his history of using alcohol and drugs. In his responses, he disclosed for the first time that he purchased and used illegal mushrooms twice in 2009. (GE 4 at 7.) He also modified the date of his first use of marijuana from 2004 to 2002, when he was a college freshman. (GE 4 at 6.) He also claimed that he had stopped using any drugs in March or April 2014 (GE 4 at 6), which was one year earlier than his admission in his SCA. He wrote that he has no intention of using either drug in the future. (GE 4 at 9.)

Applicant used marijuana from 2002 to April 2015. (SOR ¶ 1.a.) He states he regrets using drugs while holding a security clearance. He also purchased and used mushrooms at a music festival with friends in 2009 while holding a clearance. (SOR ¶

¹ Applicant's personal information is extracted from his security clearance application, dated June 23, 2015 (FORM Item 3), unless otherwise indicated by a parenthetical citation to the record.

1.b.) As of June 2018, he states that his behavior will not be repeated in the future. (Item 2 at 1; Item 4 at 8-9.)

Applicant also admits the falsification allegation regarding his failure to disclose his use of mushrooms in 2009 (SOR ¶ 2.a) and the falsification allegation regarding his failure to disclose his use of mushrooms while holding a security clearance. (SOR ¶ 2.b.) He commented that he thought the use might have been in 2008 and might have been outside of the seven-year timeframe of the question. He conceded, however, that he was wrong on the date and the timeframe and that this “was both a character mistake and a mathematical mistake on my part.” (Item 2 at 1.) He apologized for withholding this information and repeated that he has no intention to use drugs in the future. (Item 2 at 1.)

Applicant’s response to the FORM focused exclusively on an error by Department Counsel in her reading of Applicant’s admission in his interrogatory responses regarding the frequency of his use of marijuana and mushrooms. He clarified that he used marijuana, not mushrooms, 30-40 times during his four years in college.

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.

The following disqualifying conditions under Guideline H are potentially applicable:

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

AG ¶ 25(f): any illegal drug use while granted access to classified

information or holding a sensitive position.

Applicant's admissions and the documentary evidence in the FORM establish the potentially disqualifying conditions in AG ¶¶ 25(a) and 25(f).

The following mitigating conditions under Guideline H 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;
- (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 involvement or misuse is grounds for revocation of national security eligibility.

AG ¶ 26(a) is partially established. Applicant's last illegal use of a controlled substance occurred about three and one-half years ago. This period of abstinence suggests that the behavior may not recur. However, Applicant was 31 years old at the time he last used marijuana. At that age, he was old enough to know better, especially as a federal contractor employee with a top-secret clearance. The fact that he used both mushrooms and marijuana while holding a security clearance casts serious doubts on his current reliability, trustworthiness and judgment.

AG ¶ 26(b) is partially established. Applicant has established a pattern of abstinence. However, he used illegal drugs over a 13-year period, which undercuts the mitigation value of his much shorter period of abstinence. Moreover, Applicant provided no evidence of actions he has taken to overcome his past problems of drug abuse by providing any evidence such as that detailed in subparagraphs 1-3 of this mitigating condition.

Guideline E (Personal Conduct)

The security concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The following disqualifying condition under this guideline is potentially relevant:

AG ¶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.

Applicant's admissions and the documentary evidence in the FORM establish the above disqualifying condition under this guideline. The record satisfies the Government's burden of proving by substantial evidence that Applicant intentionally falsified his responses to questions in Sections 23 of his June 23, 2015 SCA.

The following mitigating conditions are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

None of the above mitigating conditions apply. Applicant failed to disclose his 2009 use of mushrooms in both his SCA and in his August 2015 background interview. To his credit, he did disclose this 2009 drug use in his interrogatory responses, but that was two years later. Accordingly, he failed to make a prompt, good-faith effort to correct his omissions. In fact, he repeated the falsification in his background interview by only disclosing his marijuana use. Moreover, the falsifications in his SCA were not minor

because he held a top-secret security clearance when he made them. The falsifications cast serious doubt about his reliability, trustworthiness and judgment.

The security clearance investigation is not a forum for an applicant to intentionally omit potentially derogatory information. The Federal Government has a compelling interest in protecting and safeguarding classified information. That compelling interest includes the government's legitimate interest in being able to make sound decisions, based on complete and accurate information, about who will be granted access to classified information. An applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the government's industrial security program. ISCR Case No. 01-03132 at 3 (App. Bd. Aug. 8, 2002).

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 Guidelines E and H in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines H and E, and 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

Subparagraphs 1.a and 1.b: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraphs 2.a and 2.b: Against 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 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