



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



In the matter of:)
)
) ISCR Case No. 15-02442
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*
03/31/2016

Decision

DAM, Shari, Administrative Judge:

Applicant illegally used marijuana three times in early January 2013 and has not used it since then. He disclosed the misconduct in his security clearance application. He mitigated the drug involvement security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On January 28, 2013, Applicant submitted a security clearance application (SF 86). (Item 3.) On September 30, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline H, Drug Involvement. It detailed reasons why the DOD was unable to find that it is clearly consistent with the national interest to continue a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be denied, granted, continued, or revoked.

On November 2, 2015, Applicant answered the SOR (Answer), and requested that his case be decided on the written record rather than a hearing. (Item 2.) On January 13, 2016, Department Counsel prepared a File of Relevant Material (FORM) containing four Items, and mailed Applicant a complete copy of it. Applicant received the copy on January 29, 2016, and had 30 days from its receipt to file objections and submit additional information. Applicant timely filed a Response to the FORM, and submitted a document, which I marked as Applicant Exhibit (AE) A. He did not file any objections to the Government's Items, and the Government did not object to Applicant's submission. All four Items and AE A are admitted into the record. On March 7, 2016, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me.

Findings of Fact

Applicant admitted the allegation in the SOR ¶ 1.a, and denied the allegation in SOR ¶ 1.b. His admission is accepted as a factual finding.

Applicant is 36 years old, married, and a new father. He earned a bachelor's degree in 2003 and a master's degree in 2012. He served on active duty in the Air Force from 2003 to 2007, when he received an honorable discharge. He held a security clearance while serving in the military. Since 2007 he has worked for a defense contractor, assisting the Air Force. (Item 3.)

When Applicant completed his January 28, 2013 SF 86, he disclosed that he illegally used tetrahydrocannabinol (THC), a chemical in marijuana, three times in early January 2013 for recreational purposes.¹ He explained that he tried it in baked goods because it was legalized in his state. He also stated that "If Federal and State legislation agree on the legality of THC I may choose to use very sparingly for recreational use. I do not smoke." (Item 3.) Based on this information, DOD issued the SOR.

In his Answer to the SOR, Applicant clarified his statement. He said he has not used marijuana since the incidents in 2013 and has no intention to do so. He meant that only if Federal and state law were consistent on its legality would he ever consider it. (Item 2.)

In his Response to the FORM, Applicant further explained that when he tried marijuana in 2013, he was in another's person's house and did not leave after ingesting it. The three incidents occurred within a three-day time period, and the person who gave him the drug has since moved to another state. Applicant's friends and family do not engage in drug abuse. He recently took a new leadership position with his employer and wants to do a good job. He wrote, "I have learned and grown from my experiences and am fully aware of the consequences of any further recurrence. My internal desire to support the USAF, or DOD, outweighs any curiosity to use THC in any form or situation." (AE A.)

¹ THC will be referred to as marijuana in this Decision.

Policies

Eligibility for a security clearance is predicated upon meeting the criteria contained in the Adjudicative Guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Adverse clearance decisions are made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned." See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995) § 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant's allegiance, loyalty, or patriotism. It 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. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Under Directive ¶ E3.1.15, an applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Drug Involvement

AG ¶ 24 articulates the drug involvement security concerns:

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 ¶ 25 describes a condition that could raise a security concern and may be disqualifying:

(a) any drug abuse.²

This disqualifying condition applies because Applicant admitted that he illegally used THC three times in January 2013.

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

(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;

(b) a demonstrated intent not to abuse any drugs in the future, such as:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence; and

(4) a signed statement of intent with automatic revocation of clearance for any violation.

²AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

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

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no “bright line” rules for determining when such conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004.) In his January 2013 SF 86, Applicant disclosed that he illegally used marijuana three times earlier that month. He has not used marijuana since then, more than three years ago. Based on his honest disclosures and remorse, the circumstances surrounding his misconduct, his promotion, and the recent birth of his child, similar conduct is unlikely to recur. AG ¶ 26(a) provides mitigation.

Applicant no longer associates with the person who supplied, and with whom he used, the illegal drugs. His family and friends do not engage in drug abuse. He has not used any illegal drugs for three years, and does not intend to use them in the future. The evidence establishes mitigation under AG ¶¶ 26 (b) (1), (2), and (3).

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse drugs after being issued a lawful prescription under federal law. He did not need or participate in a drug abuse treatment program, and hence did not provide proof of satisfactory completion, including rehabilitation and aftercare requirements, or a favorable prognosis by a duly qualified medical professional.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant’s eligibility for a security clearance by considering the totality of the Applicant’s conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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.

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. I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

The factors in favor of granting Applicant access to classified information are persuasive. Applicant honestly disclosed using marijuana three times in 2013 with a former associate. While his illegal drug use in 2013 raised a security concern, his statements of remorse about his misconduct, along with a recent promotion and commitment to his work with the Air Force, lead me to believe that he has sufficiently matured in the past three years, and will not use marijuana or other illegal substances in the future. He must realize at this time that similar conduct in the future may result in the loss of his security clearance and employment. Overall, the record evidence leaves me without concerns as to Applicant's present eligibility and suitability for a security clearance. He met his burden to mitigate the security concerns arising from his drug involvement.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Shari Dam
Administrative Judge