



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



In the matter of:)
)
) ISCR Case No. 15-02918
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: Eric Eisen, Esq.

05/23/2016

Decision

HESS, Stephanie C., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). Applicant’s illegal drug use is recent and his stated intention of no future use is insufficient to mitigate the concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on August 14, 2014. On November 12, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines B, C, H and E. The DOD CAF acted under Executive Order 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) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on December 20, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on February 9, 2016, and the case was assigned to me on March 16, 2016. On March 23, 2016, the

Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for April 12, 2016. Counsel for Applicant entered his appearance on March 24, 2015. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant's Exhibits (AX) A-C and E were admitted in evidence without objection. The document identified as AX D is discussed below. Hearing Exhibit 1 is Department Counsel's discovery letter which is appended to the record for administrative purposes. DOHA received the transcript (Tr.) on April 21, 2016.

Procedural Matters

The SOR originally also contained allegations under Guidelines B and C. However, on Department Counsel's motion and without objection, I amended the SOR by striking ¶¶ 1 and 2. Applicant's counsel offered Hearing Exhibit 2, which is a document that explains the basis of the mitigation of Guidelines B and C, which I appended to the record without objection.

Applicant's counsel requested that I take judicial notice of AX D. AX D is a compilation of a magazine article and two newspaper articles. The magazine article focuses on the attitudes of individuals, aged 30 and under, about the use of marijuana. One of the newspaper articles is an editorial which Applicant's counsel characterized as stating "that unlimited government develops an appetite for intervening in society's dynamics" and that the editorial makes the "point that the marijuana laws...are due for reexamination and reform." (Tr. 18-19.) The other newspaper article is about individual state laws regarding marijuana. (Tr. 19.) Department Counsel objected to AX D, stating that the subject matter was inappropriate for judicial notice, and on the basis of relevance. I sustained the objections.

On October 25, 2014, the Director of National Intelligence issued a memorandum entitled, "Adherence to Federal Laws Prohibiting Marijuana Use." That memorandum states, in part, "Changes to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines... An individual's disregard of federal law pertaining to the use, sale or manufacture of marijuana remains adjudicatively relevant in national security determinations."

Findings of Fact

The SOR, as amended, alleges that Applicant used marijuana between February 2007 and October 2013; routinely purchased marijuana between July 2007 and July 2013; used mushrooms twice between April and June 2012; used cocaine a few times between August 2012 and January 2013; and that in April 2009 he was arrested for and later pled guilty to sale and distribution of marijuana. In his Answer, Applicant admitted each of these allegations. He also described the circumstances under which he used marijuana once in September and once in October of 2015, and explained that the 2009 conviction was expunged. The SOR also cross-alleges the Guideline H allegations under Guideline E. Applicant neither admitted nor denied the Guideline E allegation, so I deem that he has denied it.

Applicant is a 27-year-old computer analyst employed by a defense contractor in his current job since June 2014. He received a bachelor's degree in 2011 and a master's degree in 2014, both in mechanical engineering. (GX 1, Tr. 30.) In their reference letters, Applicant's supervisor, program director, and former professor, for whom Applicant worked as a teaching assistant, stated that Applicant is well-liked and considered to be professional, capable and trustworthy. (AX A; AX B.) Applicant stated that he told each of these individuals that the reason he needed the reference letters was because of his past drug use, however, he did not disclose his September and October 2015 uses to them. (Tr. 57-58.)

Applicant began occasionally using marijuana in high school in February 2007. He continued to use marijuana in college and graduate school and purchased it between 2007 and 2013. (GX 1.) In April 2009, he was arrested in his dormitory room and charged with sale and distribution of marijuana. He claims that his roommate, not he, was selling marijuana. However, at the advice of his attorney, Applicant pled guilty and was sentenced to six months' probation. Following this event, he took a semester off school, during which time he lived with and worked for his best friend's parents in their historic house renovating business. His friend's parents each provided a letter of reference. (AX C.) He then transferred to the university from which he ultimately received his degrees. (Tr. 27-30.)

Applicant stated on his e-QIP, "I have used marijuana recreationally for a few years, but stopped during my last year of graduate school." In response to why he either intended or did not intend to use marijuana in the future, he wrote, "I am no longer interested in it." (GX 1.) In his personal subject interview (PSI) on November 14, 2014, he again stated that he had no future intent of using illegal drugs. (GX 2.)

Applicant's use of cocaine, between 2012 and 2013, and mushrooms, between 2011 and 2012, occurred when he was in college. He stated on his e-QIP and in his PSI that he has no intention of using either of these substances in the future. (GX 1; GX 2.)

In about September 2015, the Government sent Applicant interrogatories requesting that he verify the accuracy of his PSI and make any necessary additions or deletions to it. He stated that the PSI was not accurate and made several additions, deletions, and updates. He amended his original statement that he had "[N]o ongoing contact with anyone engaged in drug usage," by stating, "some friends/family may still use" drugs. He did not make any changes, corrections, or amendments regarding his own drug use. On October 21, 2015, he signed the interrogatory responses, verifying under oath, that subject to his changes, the information was accurate. (GX 2.)

Since submitting his e-QIP, being interviewed by a DOD investigator, and starting employment with a DOD contractor, Applicant used marijuana on September 25, 2015, while at a musical festival with his best friend, and on October 31, 2015, while at another music festival with "new acquaintances." (Answer.) The October 31, 2015, use was ten days after he completed his responses to interrogatories. (GX 2.)

At the hearing, in response to the question, “Do you associate with people who use marijuana at this point?” Applicant stated, “I can’t be sure.” (Tr. 34.) However, although his best friend lives in another state, Applicant continues to associate with him and sees him several times a year. He also maintains contact through social media with the acquaintances he used marijuana with in October 2015. (Tr. 44-45.)

During the hearing, Applicant expressed the following opinions about marijuana use:

I just think as long as it is done in moderation, and moderation is a relative term, it is fine. There are no problems with it. I don’t think it has any effect on judgment, or the ability to keep government secrets...as opposed to alcohol where, you are over a certain limit, your lips are flying. So I think there is, definitely, some hypocrisy here. (Tr. 47.) It is around. Friends have it, I don’t ask for it, they just - - it is pretty much a staple in my generation’s idea of relaxing...Just like beer. (Tr. 33-34.)

Concerning his 2015 marijuana use after his 2014 stated intent not to use in the future on his e-QIP and during his PSI, Applicant stated, “In my opinion, that was not a promise to never do it again. I truthfully did intend not to do it, at that time. Circumstances sometimes change, and I’m not saying what I did was right. But at the moment, and at that time, I do [sic] not intend to do it. And now, after signing the statement that I have signed, it will never, it won’t happen again.” (Tr. 49.)

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant’s meeting the criteria contained in the AG. 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.” See 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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; see AG ¶ 2(b).

Analysis

Guideline H (Drug Involvement)

The concern under this guideline is set out in AG ¶ 24: “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.” Drugs are defined in AG ¶ 24(a)(1) as “[d]rugs, 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).”

Applicant’s admissions, corroborated by the record evidence, establish the potentially disqualifying conditions under this guideline:

AG ¶ 25(a): any drug abuse, defined in AG ¶ 24(b) as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved

medical direction”;

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

The following mitigating conditions are potentially relevant:

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): 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.

AG ¶ 26(a) is not established. Applicant's use of illegal drugs is recent. He used marijuana at two music festivals in 2015, with individuals with whom he maintains contact. His use after completing the e-QIP, being interviewed by a DOD investigator, and after completing the interrogatory responses casts doubt on his judgment. Conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3. *Id.*; ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003).

AG ¶ 26(b) is not established. Applicant associates with individuals who use drugs and frequents environments where marijuana is present. He has only been abstinent for less than seven months. The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006). The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006). This short period of abstinence, compared to the eight years that Applicant used marijuana and experimented with other illegal drugs, combined with his overall accepting attitude about marijuana use, is insufficient to mitigate the concern.

Applicant previously attested to the Government his intention not to use illegal drugs in the future August 2014, when he certified the accuracy of his e-QIP; again in November 2014, during his PSI, when he agreed to tell the truth; and finally in October 2015, when he signed his interrogatory responses, affirming their accuracy. Yet, after these avowals, he used marijuana.

Accordingly, Applicant's April 2016 signed and notarized statement of intent not to use illegal drugs in the future carries little weight and does not establish AG ¶ 26(b). His claim that the statement of intent is a genuine promise, as opposed to the previous avowals, is unconvincing. Given his overall attitude about marijuana use, his continued purchasing and use following his 2009 arrest, the recentness of his last use, his ongoing association with people who use marijuana, the availability of marijuana in his current social circle, and his previous avowals not to use illegal drugs in the future on which he reneged, it is simply too soon to unequivocally conclude that Applicant has changed his pattern of behavior and will never use marijuana again.

Guideline E (Personal Conduct)

The 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant's use of marijuana in 2015, after having completed the security clearance process, to include responding to interrogatories, raises concerns about his willingness to comply with rules and regulations and lack of judgment. As with the other Guidelines, the disqualifying conditions listed for Guideline E are illustrative only, not exhaustive and exclusive. See, e.g., ISCR Case No. 07-0085 at 4 (App. Bd. May 27, 2008). The Guideline addresses conduct that shows, among other things, a lack of judgment, raising questions about an applicant's reliability, trustworthiness, and ability to protect classified information. Directive, Enclosure 2 ¶ 15. ISCR Case No. 12-01698 at 4 (App. Bd. June 13, 2014). None of the mitigating conditions are established.

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. An 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.

I have incorporated my comments under Guidelines H and E in my whole-person analysis and I have considered the factors in AG ¶ 2(a). Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but I have also considered the following:

Applicant's self-reporting his uses of marijuana in 2015 demonstrates a level of maturity and honesty. However, his overall cavalier attitude about the illegal act of using marijuana is not consistent with the high degree of trust the government needs to have in individuals with access to classified information.

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 drug use. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline C (Foreign Preference):	WITHDRAWN
Paragraph 2, Guideline B (Foreign Influence):	WITHDRAWN
Paragraph 3, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraph 1.a – 1.c:	Against Applicant
Paragraph 4, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Stephanie C. Hess
Administrative Judge