



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



In the matter of:)
)
) ISCR Case No. 14-03297
)
Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esq., Department Counsel
For Applicant: *Pro se*

03/31/2015

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guidelines H (drug involvement) and E (personal conduct). Eligibility for access to classified information is denied.

Statement of the Case

On July 30, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. DOD CAF took that action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR set forth reasons why DOD CAF could not find under the Directive that it is clearly consistent with the national interest to grant Applicant a security clearance. On August 25, 2014, Applicant answered the SOR and elected to have a decision based on the administrative record in lieu of a hearing. On February 4, 2015,

Department Counsel prepared a File of Relevant Material (FORM) that contained documents identified as Items 1 through 5. A complete copy of the FORM was mailed to Applicant on February 19, 2015, and he received it on February 27, 2015. He was given 30 days from its receipt to file objections or submit matters in refutation, mitigation, or extenuation. On March 9, 2015, he provided a response to the FORM that has been marked as Item 6. Applicant raised no objections to Items 1 through 5. Department Counsel had no objection to Applicant's response to the FORM. The case was assigned to me on March 20, 2015.

Findings of Facts

Applicant is a 31-year-old employee of a defense contractor. He has worked for his current employer since October 2011. He graduated from high school in 2002 and earned an associate's degree in 2012. He is divorced and has no children. He was granted a SECRET security clearance in June 2003.¹

Applicant served on active duty in the U.S. Air Force (USAF) as an enlisted member from February 2003 to October 2011. In October 2011, he was awarded nonjudicial punishment (*i.e.*, "Article 15") for a drug offense. In his Electronic Questionnaire for Investigations Processing (e-QIP) dated April 25, 2013, he disclosed that he was discharged from the USAF for misconduct due to a "[o]ne time Marijuana usage incident." He provided varying information in his e-QIP about the characterization of his discharge. In one e-QIP entry, he indicated that he was discharged under honorable conditions and in another entry he indicated "Discharge Detail Other than Honorable."²

In his Answer to the SOR, Applicant admitted that he used marijuana in about April 2011 while holding a security clearance. He also stated:

I have been honest and forthcoming about this since the beginning, cooperating with AFOSI [Air Force Office of Special Investigations], my Chain of Command, and all required parties. I acknowledge my mistake and do regret it, but have learned from it greatly. I went to ADAPT (Alcohol and Drug Abuse Prevention and Treatment) voluntarily, through the Air Force, and [I] was determined to not have any issues, or problems with alcohol, or drugs (prescription, or illegal) by the ADAPT personnel.³

In his Response to the FORM, Applicant submitted a Statement of Intent that he would not abuse any drugs in the future. He described his previous use of marijuana as

¹ Item 4.

² Item 4.

³ Item 3.

a one-time lapse in judgment. He also stated that no one in his life is involved in drug usage. He is ashamed of his misconduct and accepts responsibility for it.⁴

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the

⁴ Item 6.

applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

(a) Drugs are defined as mood and behavior altering substances, and include:

(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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under AG ¶ 25 and find the following are potentially applicable:

(a) any drug abuse; and

(g) any illegal drug use after being granted a security clearance.

In about April 2011, Applicant used marijuana while holding a security clearance. The evidence is sufficient to raise the above disqualifying conditions.

I have considered all of the evidence in this case and the mitigating conditions under AG ¶ 26. The following mitigating conditions are potentially applicable:

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

(c) 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.

Applicant's use of marijuana on active duty while holding a security clearance was a significant disregard of the law and a breach of a position of trust. He was punished and discharged from the military for that offense. He stated that he participated in the ADAPT program and was determined to have no drug problem. He submitted a Statement of Intent to not use drugs again and indicated he does not associate with drug users. No prognosis from a duly qualified medical professional was presented. Based on the record evidence, I am unable to find that his drug abuse happened under unusual circumstances, is unlikely to recur, and does not cast doubt on his current reliability, trustworthiness, or good judgment. I find that insufficient time has passed to conclude that he has put his drug abuse behind him. In making that finding, I note that I did not have the opportunity to observe his demeanor or assess his credibility.

AG ¶¶ 26(a) and 26(b) partially apply, but do not mitigate the Guideline H security concerns. AG ¶ 26(c) does not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to Personal Conduct:

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.

AG ¶ 16 describes a condition that could raise a security concern and may be disqualifying in this case:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing

Applicant used marijuana while possessing a security clearance. AG ¶ 16(e) applies.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. The following are potentially applicable:

(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;

(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

For the reasons discussed under Guideline H, I find that none of the above mitigating conditions fully apply to the Guideline E allegation.

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 relevant 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 considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Applicant was punished and discharged from the military due to a drug offense. He failed to provide sufficient whole-person evidence to mitigate the security concerns arising from such misconduct. Applicant's disregard for the law raises doubts about his eligibility and suitability for a security clearance. For all the above reasons, I

conclude Applicant has failed to mitigate the drug involvement and personal conduct security concerns.

Formal Findings

Formal findings 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

James F. Duffy
Administrative Judge