



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 14-06297
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

02/19/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline H (drug involvement). Clearance is denied.

Statement of the Case

On May 7, 2014, Applicant submitted a Questionnaire for National Security Positions (SF-86). On March 5, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) 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), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline H. The SOR detailed reasons why DOD CAF was unable to find that it is clearly consistent with the national interest to grant 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 granted or denied.

Applicant answered the SOR on April 14, 2015, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM), dated July 10, 2015, was provided to him by letter dated July 20, 2015. Applicant received the FORM on July 28, 2015. He was given 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any information within the 30-day period. The case was assigned to me on November 12, 2015.

Findings of Fact

Applicant admitted all the SOR allegations. After a thorough review of the record, I make the following findings of fact.

Background Information

Applicant is a 31-year-old prospective employee of a defense contractor. He previously worked as a subcontractor for this defense contractor as a field technician and seeks a security clearance as condition of employment. (Item 4.)

Applicant graduated from high school in May 2003. He briefly attended an art institute from February 2009 to May 2009. (Item 4.) Applicant has never married, but is engaged. He did not report having any dependents. (Items 2 and 4) Applicant served in the U.S. Navy from August 2003 to October 2008, and was honorably discharged. He remained in the inactive Navy Reserve until honorably discharged in August 2011. (Item 4.)

Drug Involvement¹

Security concerns under this Guideline were identified as a result of Applicant's self-disclosure of past marijuana use when completing his May 2014 SF-86. His admitted marijuana use was of varying frequency and spanned a 14-year period from June 1999 to December 2013, to include using marijuana after he was granted a security clearance in August 2004. His marijuana use began at

¹During Applicant's background investigation for his security clearance while in the Navy, he made a false statement in a June 2004 interview by stating that he used marijuana his first and only time in February 2003. (Items 5 and 6) During that June 2004 interview, Applicant also stated that he had no intention of using illegal drugs again. (Items 5 and 6) He was subsequently granted a security clearance in August 2004. (Item 3)

age 15 and continued until age 29. (Items 2 and 4) Applicant was required to get a drug waiver when he enlisted in the Navy in 2003 and presumably committed to not using drugs while in the Navy. (Item 2)

Character Evidence

Although Applicant did not submit any reference letters, he did indicate in his SOR answer that he would not use illegal drugs in the future and that he severed his connections with his drug using associate. Applicant added that his fiancée does not tolerate drug use and convinced him that drug use is not worth jeopardizing his career. He emphasized his patriotism, honesty, and trustworthiness. (Item 1)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s 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 meeting the criteria contained in the adjudicative guidelines. 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 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 “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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. 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 about 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. 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 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 security concern pertaining to drug involvement:

[u]se 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 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) any drug abuse,” and “(g) any

illegal drug use after being granted a security clearance.” The Government established its case through Applicant’s admissions and the evidence presented.

AG ¶ 26 provides for 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;

(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.

None of the drug involvement mitigating conditions are fully applicable. Applicant used marijuana for 14 years, well into adulthood, and while on active duty in the Navy after being granted a security clearance. It is noted that he was granted that security clearance after falsely minimizing his past marijuana use during his 2004 background investigation interview. During that interview, Applicant stated that he would no longer use marijuana. Applicant’s recent statement that he will no longer use marijuana ring hollow in light of his past assertions and conduct. His relatively short period of abstinence since his most recent marijuana use in December 2013 is not enough to overcome his prior

misconduct. Based on the evidence present, Applicant has not demonstrated that he has the judgment and reliability required for a security clearance.

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 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.

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. AG ¶ 2(c). My comments in the Analysis section are incorporated in the whole-person discussion.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for his Navy service. Apart from his statements of remorse, he provided no evidence corroborating rehabilitation. If other favorable evidence exists, Applicant did not provide it.

Lastly, in requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the security concerns. By failing to provide such information, and in relying on only several uncorroborated scant paragraphs of explanations, security concerns remain.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the

adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge