



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
 [Redacted] ) ISCR Case No. 19-01098  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Aubrey V. De Angelis, Esq., Department Counsel  
For Applicant: *Pro se*

02/07/2020

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised by Applicant’s illegal drug involvement. Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on January 24, 2018, seeking to continue a clearance he has held since 2004. On June 20, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H (Drug Involvement and Substance Misuse) and B (Foreign Influence). The DOD CAF acted under Executive Order (Exec. Or.) 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 July 16, 2019, and requested a decision on the written record without a hearing. Department Counsel submitted the Government’s written

case on December 4, 2019, and withdrew the Guideline B allegations. On the same day, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on December 14, 2019, and timely submitted Applicant's Exhibit (AX) A, which was admitted without objection. The case was assigned to me on January 29, 2020.

### **Procedural Ruling**

The SOR originally alleged security concerns under Guideline B. It alleged that Applicant's wife is a citizen and resident of Uzbekistan (SOR ¶ 2.a) and his step-daughter and step-son-in-law are citizens of Russia (SOR ¶ 2.b). Applicant refuted SOR ¶ 2.b in his answer to the SOR by producing evidence that his step-daughter and step-son-in-law are Canadian citizens. He asserted in his answer to the SOR that his wife intended to live in the United States and had applied for a visa.

In Department Counsel's submission of the case, she stated, "The Government is not moving toward with the Guideline B allegations at this time, and is only moving forward with the Guideline H allegation." This statement is somewhat ambiguous. I have construed it to mean that Department Counsel withdrew the Guideline B allegations in accordance with Directive ¶ E3.1.6. Her statement also could be construed to mean only that she did not intend to submit evidence regarding the Guideline B allegations. However, holding allegations in abeyance after the case has been submitted for a decision is not an option under the Directive. Having concluded that Department Counsel intended to withdraw the Guideline B allegations, I have made no findings regarding them.

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted the allegation in SOR ¶ 2.a and denied the allegations in SOR ¶¶ 1.a and 2.b. His admissions are incorporated in my findings of fact.

Applicant is a 66-year-old software developer employed by a federal contractor since August 2011. He received a bachelor's degree in 1975. He worked for other federal contractors from February to October 2001, July 2006 to February 2008, and from March 2011 until he began his current job. According to his SCA, he has held a security clearance since about 2004. (FORM Item 4 at 48.)

Applicant married in January 1981, divorced in February 2012, and married in December 2017. He has two sons from his first marriage, ages 32 and 29.

When Applicant submitted his SCA in January 2018, he did not disclose any use of illegal substances. In an affidavit provided to a security investigator in May 2018, he disclosed that he used a substance he believed was marijuana as well as liquid forms of tetrahydrocannabinol (THC) and cannabidiol (CBD) from February 2015 to November 2017. At the time, he lived in a state where the substances were legal. He stopped using

them when he moved to another state were the substances were illegal. Both THC and CBD are extracts of marijuana and are prohibited substances under the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*

Applicant used the illegal substances every one or two weeks. He used the substances for pain relief, because he was grossly overweight but was unable to exercise due to severe knee pain. He told the security investigator that he used the illegal substances because he felt that his health was more important than the rules for holding a security clearance. He also told the investigator that he did not intend to continue to use the illegal substances because they were illegal in his state of residence and he no longer suffered from knee pain.

Applicant told the security investigator that he did not disclose his marijuana use in his SCA, because he was worried that it might jeopardize his security clearance. (FORM Item 5 at 2.) His failure to disclose his drug involvement in his SCA is not alleged in the SOR.

### **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 SOR alleges that Applicant used marijuana, with varying frequency, from approximately February 2015 to at least November 2017, while granted access to classified information. 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.

Applicant's admissions establish three disqualifying conditions under this guideline:

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

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

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position.

The following mitigating conditions 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; and

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 ¶ 20(a) is not established. Applicant's use of illegal substances was frequent and did not occur under unusual circumstances. He stopped using them in November 2017, when he moved to a state where they were illegal and no longer suffered from knee pain. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant chose to conceal his illegal drug use, knowing that disclosing it would jeopardize his security clearance. His intentional concealment of his drug use in his SCA

was not alleged in the SOR. However, conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered his falsification of his SCA for these limited purposes.

Applicant's attitude toward illegal drug use, as expressed in his interview by a security investigator, and his intentional failure to disclose his drug use in his SCA are inconsistent with "successful rehabilitation." When faced with a painful knee condition, he decided that remedying his pain was more important than following the rules about drug use. There is no evidence in the record that he tried other lawful means of dealing with his knee pain before resorting to illegal drugs. His attitude about his drug use and his lack of candor in his SCA leave me with serious doubts about his current reliability, trustworthiness, and good judgment.

AG ¶ 26(b) is partially established. Applicant has abstained from illegal drugs since November 2017, but he has not signed the statement of intent required to establish AG ¶ 26(b)(3).

### **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(d):

- (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 Guideline H in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his use of illegal drugs.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline B:	Withdrawn
Subparagraph 2.a and 2.b:	Withdrawn

### **Conclusion**

I conclude that it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman  
Administrative Judge