



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [Redacted]) ISCR Case No. 20-01697
)
 Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

05/25/2021

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement and Substance Misuse) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) in August 2016 (FORM Item 7), and he received a security clearance in July 2017. He submitted another SCA in April 2019 (FORM Item 5). On October 20, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on December 12, 2020, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written case on January 29, 2021. On February 4, 2021, 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 February 15, 2021, and did not respond. The case was assigned to me on May 17, 2021.

Findings of Fact

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

Applicant is a 30-year-old employee of a university performing research as a federal contractor. He graduated from high school in May 2008, received a bachelor's degree in May 2014, and received a master's degree in August 2016. He has been an employee of a federal contractor since November 2016. He has never married. He has lived with a cohabitant since September 2013. He has no children.

In Applicant's 2016 SCA, he disclosed that in August 2012, he was stopped for speeding and had marijuana and paraphernalia in his car. He was not intoxicated and was not arrested. He was given a ticket for speeding. He paid the fine for speeding. When he appeared in court on the drug charges, he pleaded guilty to disorderly conduct, pursuant to a plea agreement. He paid \$2,000 in fines and court fees and was placed on unsupervised probation for one year. He completed his probation without incident and his criminal record was expunged in March 2014. (FORM Item 6 at 10 and 13; FORM Item 7 at 31.)

In the 2016 SCA, Applicant also disclosed that he used marijuana several times a month, off and on and mostly on weekends, between July 2008 and May 2016. He stated that he did not intend to use marijuana again "in order to pass drug tests and maintain employment." (FORM Item 7 at 33.) When he was interviewed by a security investigator in March 2017, he stated that he did not associate with illegal drug users and that the likelihood of additional drug use was "zero" because he did not want to jeopardize his career. (FORM Item 6 at 14.)

When Applicant submitted his April 2019 SCA, he repeated his earlier disclosures of marijuana use and added a disclosure that he used it in September 2018. In both SCAs, he admitted that he purchased marijuana for personal use.

When Applicant was interviewed in May 2019, he admitted that he continues to associate with marijuana users and that he used it one time in September 2018 at a party. He also stated that because marijuana is legal in the jurisdiction where he used it, he was not aware that it was an issue for him to use it while holding a security clearance. (FORM Item 6 at 10.) In response to interrogatories in June 2020, he stated that he used "a couple

puffs” of marijuana in September 2018 on weekends. (FORM Item 6 at 5.) In his answer to the SOR, he denied SOR ¶ 1.b, alleging use of marijuana while granted access to classified information, asserting that he was not assigned to any classified programs and has not had access to any classified information.

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 about July 2008 to at least September 2018 (SOR ¶ 1.a), that he used marijuana in about September 2018, after he was granted access to classified information (SOR ¶ 1.b), and that in about August 2012 he was charged with possession of marijuana, possession of drug paraphernalia, and disorderly conduct (SOR ¶ 1.c)

SOR ¶ 1.a is established by Applicant’s admissions in his two SCAs and his answer to the SOR. He denied SOR ¶ 1.b, asserting that he was not assigned to any classified programs and that his purchase and use of marijuana was legal under local laws. His claim that he has never had actual access to classified information misses the point. A security clearance constitutes eligibility for access to classified information; it does not mean actual access.

Regarding Applicant’s assertion that his marijuana purchase and use was legal in the jurisdiction where he purchased and used it, DOHA proceedings are not a proper forum to debate the pros and cons of whether marijuana should be legal for some purposes, how it should be classified as a controlled substance, or the merits of DOD policy concerning drug abuse. ISCR Case No. 14-03734 at 3 (App. Bd. Feb. 18, 2016). Furthermore, in October 2014, the then Director of National Intelligence (DNI), wrote: “An individual’s disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations.” He also pointed out that laws of a state or the District of Columbia legalizing use of marijuana “do not alter the existing National Security Adjudicative Guidelines.” DNI memorandum, *Adherence to Federal Laws Prohibiting Marijuana Use* (Oct. 25, 2014). See ISCR Case No. 16-00258 at n. 1 (App. Bd. Feb. 23, 2018) (“It merits noting, however, that while several states have decriminalized marijuana or allowed its use for medical or recreational purposes, such use of marijuana remains subject to the applicable disqualifying conditions in the Directive.”) Thus, I conclude that SOR ¶ 1.b is established.

Applicant denied SOR ¶ 1.c, asserting that the charges of drug and paraphernalia were dismissed. However, he admitted in his two SCAs and security interviews that he

was charged as alleged. The fact that the charges were not prosecuted does not refute the fact that he was charged. I conclude that SOR ¶ 1.c is established.

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.

Appendix B to the Adjudicative Guidelines prohibits granting or renewing a security clearance to "an unlawful user of a controlled substance." There is no evidence that Applicant used marijuana after September 2018. Thus, he is not currently an "unlawful user," and Appendix B is not applicable.

Applicant's conduct establishes the following 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.

Neither mitigating condition is established. Applicant's marijuana use was recent and did not occur under unusual circumstances. It is arguably infrequent, because it was his first and only marijuana use after he received a security clearance. However, he continues to associate with marijuana users, has not changed his environment, and has not provided a signed statement of intent to abstain from marijuana use.

Applicant acknowledged in his two SCAs and during his security interviews that his marijuana use was inconsistent with federal employment and that he was subject to periodic drug testing. The gravamen of the disqualifying condition in AG ¶ 25(f) is a breach of trust. "A person who broke a promise to abide by drug laws after being placed on notice that drug use is not compatible with access to classified information has not demonstrated the quantum of reliability expected of those with access to classified information." ISCR Case No. 16-03460 at 4 (App. Bd. May 24, 2018)

Guideline E, Personal Conduct

Paragraph 2 of the SOR cross-alleges the conduct alleged in Paragraph 1. The security 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 or sensitive information."

Department Counsel argues that the disqualifying condition in AG ¶ 16(c) is relevant:

[C]redible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

The Appeal Board has recognized that language in Guideline E "continues the longstanding tenet that specific behavior can have security significance under more than one guideline and . . . by focusing on the concepts of questionable judgment and irresponsibility, it contemplates that behavior will have independent security significance under Guideline E in a broad range of cases." ISCR Case No. 06-20964, (App. Bd. Apr. 10, 2008).

I am not persuaded that AG ¶ 16(c) is applicable to this case. Applicant's conduct does not involve "several adjudicative areas," nor is it "insufficient for an adverse determination under any other single guideline." Applicant's conduct falls squarely under

a single adjudicative guideline, and repeating it under Guideline E amounts to unnecessary “piling on” with a redundant allegation. I have resolved SOR ¶ 2.a for Applicant.

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 Guidelines 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). I have considered his candor in disclosing his marijuana use in his two SCAs. After weighing the disqualifying and mitigating conditions under Guidelines 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 drug involvement.

Formal Findings

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

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| Paragraph 1, Guideline H (Drugs): | AGAINST APPLICANT |
| Subparagraphs 1.a-1.c: | Against Applicant |
| Paragraph 2, Guideline E (Personal Conduct): | FOR APPLICANT |
| Subparagraph 2.a: | For Applicant |

Conclusion

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

LeRoy F. Foreman
Administrative Judge