



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



In the matter of:

ISCR Case No. 20-03782

Applicant for Security Clearance

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

September 27, 2021

Decision

GLENDON, John Bayard, Administrative Judge:

Applicant failed to mitigate security concerns regarding drug involvement while holding a security clearance. Based upon a review of the pleadings and the documentary evidence, national security eligibility for access to classified information is denied.

Statement of the Case

On July 27, 2020, Applicant filed a security clearance application (SCA). On February 4, 2021, the Defense Counterintelligence and Security Agency, Consolidated Adjudications Facility (CAF), issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (Drug Involvement and Substance Misuse). The CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended (Exec. Or.); Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in

Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (Dec. 10, 2016), effective within the DoD on June 8, 2017.

Applicant responded to the SOR (Answer). He admitted the single allegation in the SOR and requested a decision based upon the administrative record without a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On April 26, 2021, Department Counsel sent to Applicant a File of Relevant Material (FORM) with four proposed exhibits, Items 1-4, attached. Applicant responded to the FORM on June 3, 2021 (Response). Applicant raised no objection in his Response to any of the Government's proposed exhibits, including FORM Item 3, which is a summary of his September 24, 2021 background interview. In his FORM, Department Counsel had advised Applicant in his FORM that Applicant had the right to object to the admission of this exhibit into the record or he could provide corrections and updates. Applicant did not object, but instead chose to provide two corrections to the summary, one of which was relevant to the issues in this case.

On July 16, 2021, the case was assigned to me. Subject to Applicant's modifications and in the absence of any objections, I have admitted into the record FORM Item 3 and the three other evidentiary items attached to Department Counsel's FORM. Applicant's Response is also admitted.

Findings of Fact

Applicant's personal information is extracted from his SCA unless otherwise indicated by a parenthetical citation to the record. After a thorough and careful review of the pleadings and the documentary evidence in the record, I make the following findings of fact.

Applicant is 33 years old and has worked for a defense contractor since graduating from college in May 2010. He was granted a security clearance in September 2010 and is now seeking to renew his clearance. In 2015, he earned a master's degree, and he married in 2016. The couple have one child. (FORM Item 4.)

In his SCA, Applicant advised that after being granted eligibility for a security clearance, he used marijuana about five times during the period July 2011 to June 2019. In his September 2020 background interview, he repeated this information, including the June 2019 date of his last use of marijuana, and the investigator reported it in his/her Report of Investigation. For a third time, he repeated in his February 18, 2021 Answer the same dates of his use of marijuana. In his Response to Department Counsel's FORM, Applicant wrote that he misspoke during his background interview and that his last use of marijuana was June 2018, one year earlier. He also corrected the spelling of the name of a town appearing in the Investigator's report in which he once used marijuana. (FORM Item 1 at 5; FORM Item 2 at 45; FORM Item 3 at 1; Response.)

The details of Applicant's admitted use of marijuana are that he and his wife traveled to two states in which marijuana could be legally purchased under the laws of

those states and used marijuana a total of four times. He used marijuana a fifth time in his home state where marijuana is not legal under state law. On that occasion, he smoked marijuana purchased illegally by a friend while they played golf with two other friends. He admitted in his background interview that when he smoked marijuana, he was aware that he was not permitted to do so as a security clearance holder. He was also aware that marijuana was not legal under Federal law. He wrote that recognized now that he exercised poor judgment in using marijuana after having been granted a security clearance. He reported his misconduct on his SCA and to the Government investigator in an effort to be transparent and to demonstrate that he was honest and trustworthy. He wrote in his Answer that he promised never to use marijuana in the future and that since his last use, he has matured and is now a father of a young child. He recognizes the responsibilities that having a serious job as a government contractor entails as well as the responsibilities he has to his family. (FORM Item 3 at 2; Answer at 5; Response.)

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.

Adverse clearance determinations 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 security concern under this guideline is set out in AG ¶ 24 as follows:

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 with their intended purpose can raise questions about a person’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 admission in his Answer establishes the following conditions under AG ¶ 25 that could be disqualifying:

(a) any substance misuse (see above definition); and

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

The guideline in AG ¶ 26 contains four conditions that could mitigate security concerns arising from drug involvement and substance misuse. Two of these mitigating conditions have possible applicability to the facts of this case:

(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

(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 ¶ 26(a) is only partially established. Applicant's behavior is quite recent. His last use was either in June 2019 or June 2018. In the absence of a hearing at which I could assess Applicant's credibility of his testimony, I cannot find that he established that his most recent use of marijuana was in June 2018, as he now writes. I conclude that the June 2019 date is more likely, given other record evidence. Applicant disclosed this date in his July 2020 SCA, only a little more than one year after the date provided. He repeated that date two more times, first in his September 2020 background interview (though he has now changed it) and again in his February 2021 Answer. It was only after he received Department Counsel's FORM that he changed this date of last use to one year earlier. Under these circumstances, I do not find his change of dates to be believable. As a result, it has only been about two years since Applicant's last use of marijuana. After an eight-year period of admitted use, that is not sufficiently remote in time to permit a conclusion that it is unlikely to recur. Moreover, even if his last use of marijuana was, in fact, in June 2018, as he now says, that would also be too recent under the circumstances, even if it is less so.

Applicant's admitted use of marijuana was infrequent over an eight-year period, but it did not involve any unusual circumstances. He used the drug with his wife while relaxing on a trip and with friends on a golf course. Most importantly, Applicant's admitted poor judgment in using marijuana when he knew that it was illegal to do so under Federal law casts doubt his current reliability, trustworthiness, and good judgment. Regardless of whether his last use of marijuana was about two years ago or three years ago, Applicant exercised extremely bad judgment using marijuana over a seven or eight-year period, even though infrequently, while he held a security clearance. His actions cast doubt on his reliability, trustworthiness, and judgment.

AG ¶ 26(b) is only partially established. Applicant acknowledges his drug involvement and substance misuse. After his last use, he decided to abstain and has promised that he will never again betray his responsibilities as a security clearance holder and violate the law. He has established a relatively brief pattern of abstinence, but he has not provided any evidence that he has dissociated himself from his drug-using friends. Of course, his most frequent drug-using associate was his wife. He has not provided any evidence from his wife indicating that she has stopped using illegal drugs, just as he did not provide any corroboration from his wife or anyone else to support his assertion that his last use of marijuana occurred a year earlier than he had previously disclosed. Similarly, he has not provided any evidence that he has changed or avoided the environment where drugs were used, which would be difficult again because one of the environments where he used marijuana was in the company of his wife.

Applicant's Answer to the SOR contains the following statement: "I hereby promise to never use recreational marijuana nor any other banned substance that would jeopardize the aforementioned [national security and our nation's interests]." While this statement is similar to a written statement pursuant to the terms of AG ¶ 26(b)(3), he qualifies his promise to abstain from any future use of marijuana so as to leave the door open to the future use of non-recreational marijuana, such as so-called "medicinal marijuana," which is also illegal under Federal law. Furthermore, his written statement leaves out the critical language in the guideline about the potential sanction for breaking his promise to abstain, *i.e.*, that any future involvement or misuse is grounds for revocation of national security eligibility. I conclude that Applicant's promise not to use recreational marijuana in the future does not fully satisfy the requirements of AG ¶ 26(b)(3).

Whole-Person Analysis

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 and applying the adjudicative factors in AG ¶ 2(d), specifically:

- (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). I have considered Applicant's written

commitment to abstain from using marijuana in the future and his assertion that his job and family responsibilities have given him a new understanding of the importance of complying with the law and acting maturely. Because he has a young family, I can understand his sincerity in wanting to become a more mature person. He also voluntarily disclosed his past marijuana use in an effort to be transparent and responsible. However, his actions have not established an adequate track record of responsible, law-abiding behavior. His use of marijuana while holding a security clearance is particularly telling regarding his lack of maturity up until two or three years ago. Also, I do not find his uncorroborated assertion that his last use was actually in 2018, not 2019, to be the actions of a mature individual. The one-year difference is not relevant to the analysis in this decision, but it does suggest that Applicant still has a way to go to become a mature individual. In addition, since Applicant elected not to have a hearing in this case, I did not have the opportunity to observe his demeanor and assess the credibility of his assertions that he sincerely regrets his past mistakes and has indeed matured into a law-abiding, responsible person.

Overall, the record evidence as described above leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the applicable disqualifying and mitigating conditions and evaluating all of the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his drug involvement and substance misuse.

Formal Findings

Paragraph 1, Guideline H:

AGAINST APPLICANT

Subparagraph 1.a:

Against Applicant

Conclusion

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

John Bayard Glendon
Administrative Judge