



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



In the matter of:)
)
) ISCR Case No. 21-00906
)
Applicant for Security Clearance)

Appearances

For Government: Moira Modzelewski, Esq., Department Counsel
For Applicant: *Pro se*

10/29/2021

Decision

HARVEY, Mark, Administrative Judge:

Applicant has a lengthy history of marijuana use. Security concerns arising under Guideline H (drug involvement and substance misuse) were not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On April 1, 2019, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Item 3). On June 18, 2021, the Defense Counterintelligence and Security Agency, Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Item 1)

The SOR detailed reasons why the CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline H. (Item 1)

Sometime after June 18, 2021, the date of the SOR, Applicant provided a response to the SOR, and he requested a decision without a hearing. (Item 2) On June 30, 2021, Department Counsel completed a File of Relevant Material (FORM). On August 2, 2021, Applicant received the FORM. Applicant did not respond to the FORM. On October 9, 2021, the case was assigned to me.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits. Redacted ISCR and ADP decisions and the Directive are available at website https://doha.osd.mil/Doha/doha_sys.aspx.

Findings of Fact

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.a and 1.b. (Item 2) Applicant's admissions are accepted as findings of fact. Additional findings follow.

Applicant is 42 years old, and he has been employed as a senior electrical engineer since July 2018, and as an electrical engineer since July 2015. (Item 3 at 7, 13-14) In 1997, Applicant graduated from high school. (Item 3 at 11) He was awarded a bachelor's degree in 2002. (*Id.*) In 2006 and 2012, he received certificates of completion. (*Id.* at 12-13) He has not served in the military. (*Id.* at 20) He is not married, and he does not have any children. (*Id.* at 22-25)

Drug Involvement and Substance Misuse

SOR ¶ 1.a alleges Applicant used marijuana with varying degrees of frequency from June 1994, to present. SOR ¶ 1.b alleges that in 2003 he was charged with possession of concentrated cannabis, a felony, and later in 2003, he was convicted of a lesser misdemeanor-level offense and placed on three years of probation.

In April 2003, Applicant and his roommates were growing marijuana, and Applicant was arrested for possession of concentrated cannabis. (Item 3 at 35; Item 4 at 8) He was found guilty of a misdemeanor-level marijuana-related charge. He was sentenced to 75 days of custody/work release, which was reduced to 45 days for good behavior. (*Id.*) He paid fines and fees totaling \$4,746, and he successfully completed three years of probation. (*Id.*) Ultimately, his conviction was dismissed and expunged. (Item 3 at 36)

In Applicant's SCA, he said he used marijuana from June 1994 (estimated), to February 2019, for recreational purposes on a daily basis for several months "interspersed with years of abstinence." (Item 3 at 37) He did not use marijuana while holding a security clearance or a sensitive position. (*Id.*) He said, "I do not want to jeopardize my career or national security. If this substance becomes permissible to use while employed with a secret clearance at some point, I may consider using it again." (*Id.* at 38).

On May 15, 2019, Applicant told an investigator from the Office of Personnel Management (OPM) that he used marijuana recreationally with friends, and occasionally by himself, and his most recent marijuana use was in February 2019. (Item 4 at 8) He

said “there is a slim chance he will use THC in the future, it depends on what happens at the federal level.” (*Id.* at 9) In April 2020, Applicant responded to a DOHA question about his marijuana use since February 2019, and he said that he used marijuana “[s]everal times per year usually with holidays.” (*Id.* at 4) He did not specifically indicate his most recent marijuana use.

In the FORM, Department Counsel described Applicant’s security-significant behavior and noted the absence of mitigation. The FORM informed Applicant that he had 30 days from the receipt of the FORM “**in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate.** . . . If Applicant does not file any objections or submit any additional information . . . [his] case will be assigned to an Administrative Judge for a determination based solely” on the evidence set forth in this FORM. (FORM at 3 (emphasis added)) Applicant did not provide any response to the FORM.

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. Thus, nothing in this decision should be construed to suggest that it is based, 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, Secretary of Defense, and Director of National Intelligence 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 his 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 and Substance Misuse

AG ¶ 24 provides the security concern arising from drug involvement and substance misuse stating:

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.

AG ¶ 25 provides two conditions that could raise a security concern and may be disqualifying in this case: “(a) any substance misuse (see above definition)”; and “(c) illegal possession of a controlled substance. . . .” The record establishes AG ¶¶ 25(a) and 25(c). Additional information is contained in the mitigation section, *infra*.

AG ¶ 26 lists four conditions that could mitigate security concerns:

(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) 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;

(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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2, [App. A] ¶ 2(b).

None of the mitigating conditions fully apply; however, Applicant provided some important mitigating information. He voluntarily disclosed his marijuana possession and use on his SCA, during his OPM interview, in response to DOHA interrogatories, and in his SOR response.

The evidence against mitigation is more persuasive at this time. In ISCR Case No. 16-03460 at 4 (App. Bd. May 24, 2018), the applicant had a history of marijuana use, and the Appeal Board said:

A clearance adjudication is aimed at determining if an applicant has the requisite judgment and reliability to abide by rules designed to protect classified information. . . . [Security concerns arise if] there is doubt as to whether he [or she] will follow the regulatory requirements for handling classified information, which might, in the event, appear burdensome. Access to national secrets entails a fiduciary duty to the U.S. A person who enters into such a fiduciary relationship is charged with abiding by legal and regulatory guidance regardless of whether he or she believes that guidance to be wise.

Possession of a Schedule I controlled substance is a federal criminal offense. Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substance. See Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

In 2003, Applicant and his roommates were growing marijuana. He was charged with possession of concentrated cannabis, a felony, and later in 2003, he was convicted of a lesser misdemeanor-level marijuana-related offense and placed on three years of probation. In his SCA, Applicant said he used marijuana with varying degrees of frequency from 1994 to February 2019. In April 2020, Applicant responded to a DOHA question about his marijuana use since February 2019, and he said that he used marijuana “[s]everal times per year usually with holidays.” (Item 4 at 4) He did not specifically indicate his most recent marijuana use. He did not describe any drug-abuse counseling or treatment in the previous five years.

Applicant’s most recent marijuana possession and use occurred after he was aware of federal rules against marijuana use, and after he completed his SCA. “An applicant who uses marijuana after having been placed on notice of its security significance, such as using after having completed a clearance application, may be lacking in the qualities expected of those with access to national secrets.” ISCR Case No. 17-03191 at 3 (App. Bd. Mar. 26, 2019) (citing ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019) (“An applicant’s misuse of drugs after having been placed on notice of the incompatibility of drug abuse with clearance eligibility raises questions about his or her judgment and reliability)). Applicant has friends who use marijuana, and it is likely that he will be in the vicinity of marijuana in the future. It is unclear when Applicant most recently used marijuana. I cannot rule out his future marijuana use. Guideline H security concerns are not mitigated at this time.

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 circumstances. The 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.

Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline H are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is 42 years old, and he has been employed as a senior electrical engineer since July 2018, and as an electrical engineer since July 2015. He was awarded a bachelor's degree in 2002. In 2006 and 2012, he received certificates of completion.

Applicant disclosed his marijuana possession and use on his SCA, during his OPM interview, in his responses to DOHA interrogatories, and on his SOR response. An honest and candid self-report of drug abuse is an important indication that, if granted security clearance eligibility, the individual would disclose any threats to national security, even if the disclosure involves an issue that might damage his or her own career or personal reputation. However, the mitigating weight of Applicant's disclosures is undermined by his marijuana possession and use beginning in 1994 and continuing after he completed his SCA in February 2019.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. *See Dorfmont*, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate drug involvement and substance misuse security concerns.

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 and 1.b:	Against Applicant

Conclusion

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

Mark Harvey
Administrative Judge