



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



In the matter of:)
)
-----) ISCR Case No. 20-02044
)
Applicant for Security Clearance)

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: Troy Nussbaum, Esq.

11/08/2021

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, and exhibits, Applicant did not mitigate drug concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

Statement of the Case

On October 30, 2020, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the drug involvement and substance misuse guideline the DoD could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, DoD Directive 5220.6 (January 2, 1992) (Directive); 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.

Applicant responded to the SOR on January 4, 2021, and requested a hearing. The case was assigned to me on May 21, 2021. A hearing was scheduled for July 20, 2021 and heard on the date as scheduled.

At the hearing, the Government's case consisted of one exhibit (GE). Applicant relied on two witnesses (including himself) and six exhibits. The transcript (Tr.) was received on July 16, 2021.

Procedural Issues

Before the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with an additional endorsement. For good cause shown, he was granted three days to supplement the record. Within the time permitted, Applicant supplemented the record with two endorsements. Applicant's submissions were admitted without objections as Applicant's AE G.

Summary of Pleadings

Under Guideline H, Applicant allegedly (a) used marijuana from June 1994 to about April 2019 with varying frequency; (b) used marijuana from about July 2015 to about April 2019 while holding a security clearance with access to classified information; (c) purchased marijuana from June 1994 to about April 2019 on various occasions; (d) purchased marijuana on various occasions while holding a security clearance; and (e) intends to use marijuana in the future.

In his response to the SOR, Applicant admitted all of the allegations with explanations. He claimed the allegations of purchasing marijuana on various occasions is too vague and undefined to admit. He also claimed that he has no intention to continue using marijuana in the future for reasons to be explained at hearing.

Findings of Fact

Applicant is a 44-year-old carpenter for a defense contractor who seeks a security clearance. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant has never married or entered into a legally recognized domestic partnership and has no children. (GE 1) He is currently engaged to a woman who has an adolescent son who has grown close to Applicant, but currently he has no wedding date planned. (Tr. 21, 66-70) Applicant earned a high school diploma in June 1993 and attended three semesters of community college without earning a diploma. (GE 1 and AEs A-B; Tr. 18) He reported no military service. (GE 1)

Since January 2000, Applicant has been employed by his current defense contractor as a carpenter, who has sponsored him for a security clearance. (GE 1; Tr.

19, 46) Previously, he worked for non-defense contractors in carpenter-related jobs. He has held a security clearance since July 2015. (GE 1; Tr. 20)

Applicant's drug history

Between June 1994 and April 2019, Applicant used marijuana with varying frequency, mostly in social situations. (GEs1-2 and AE B; Tr. 23-24) Between July 2015 and April 2019, he used marijuana while holding a security clearance. From 2015 to April 2019, he purchased marijuana from friends for his personal use. (GE 1-2 and AE A; Tr. 27-28) Applicant explained that he used marijuana mainly to relax and sleep at night. (Tr. 26-27) He estimated to have used marijuana roughly twice a week and more on weekends between 2004 and 2011, and less between 2011 and April 2019.

Motivated by a desire to be a better role model for his girlfriend and her young son (11 years of age at the time), he made a personal decision in April 2019 to discontinue all marijuana activity (both use and purchases) that remained illegal in his state of residence despite its decriminalization. (Tr. 25-27, 30, 39) For the years he used marijuana, he never felt any dependent need for the drug. (Tr. 26)

In his June 2015 personal subject interview (PSI with an investigator from the Office of Personnel Management (OPM), Applicant admitted to using marijuana in varying frequencies (mostly with friends in social situations) between June 1994 and June 2015. (AE B; Tr. 27) In this same interview, he admitted to purchasing marijuana from different friends throughout this period. When asked by the OPM investigator about his motivations for using marijuana, he replied that he used marijuana to help him relax and "just have fun." (AE B)

In his PSI, Applicant informed the OPM investigator of a drug-related arrest he incurred in November 1997 (at the age of 20) while driving home with a friend. (AE B; Tr. 38) After spending a night in custody, Applicant appeared in court the following day and was court-ordered to seek counseling and pay a fine. Applicant is credited with enrolling in an outpatient substance abuse counseling and completing the bi-weekly counseling prior to his court appearance. (Tr. 38-39) Appearing in court, Applicant was ordered to enroll in drug counseling and fined. Both imposed conditions were satisfied by Applicant. (AE B; Tr. 38-39)

This 1997 drug-related incident was the only time that Applicant was ever stopped, arrested, and charged by police for marijuana possession. When asked by the interviewing OPM investigator about his intentions to continue using marijuana, Applicant replied (according to the summary of his PSI) that "the chances of recurrence are very little." (AE B; Tr. 32-33, 37-38) Based in part on Applicant's implicit assurances of future abstinence, he was granted a security clearance in July 2015 without any apparent imposed conditions. (GE 1; Tr. 37)

Applicant currently disputes his telling the OPM investigator in his 2015 PSI of his likely avoidance of marijuana in the future (Tr. 33). In his hearing testimony, he claims he told the agent of his intentions to continue using marijuana in the future. (Tr. 33)

Applicant's PSI summary of interview contains no references to any place in the summary where Applicant claimed his intentions to continue using marijuana. (Tr. 33-34) Without more evidence of Applicant's revised account of his PSI statements to the OPM investigator, his revised account of what he claims he told the investigator cannot be accepted based on his verbal claims alone.

Claiming that he believed his being honest and forthright about his future intentions to continue using marijuana was enough, he continued his use of marijuana under a claimed implicit understanding that he could do so despite his awareness of state and federal bans on marijuana use and possession. (Tr. 36-37, 41-42)

In May 2021, prior to his scheduled hearing, Applicant completed a statement of intent never to use "any illegal drugs in the future" (AE C) He agreed to an automatic revocation of any suitability determination, fitness determination, or security clearance he may hold should he violate his promise never to use illegal drugs. (AE C) However, he qualified his intention to abstain from marijuana activity, by limiting his intention to abstain for only so long as federal rules and regulations governing sensitive positions proscribed his use of the substance. (AE C) In his hearing testimony, he affirmed his narrowed understanding of what laws and regulations he would abide by while holding a security clearance and did not rule out his resumption of marijuana use were the Government to lift its federal ban without regard to the legal status of marijuana use and possession in his state of residence. (AE C; Tr. 32-33 and 43-44)

In 2016, the legislature of Applicant's state of residence decriminalized possession of marijuana and drug paraphernalia and substituted civil fines for criminal penalties without fully legalizing marijuana use and possession. (Tr. 34-35) Legislative studies are continuing in Applicant's state on the subject of legalization of marijuana, and some legislative movement is expected in 2022. But for now, marijuana use and possession remains illegal in Applicant's state of residence.

With this legislative background, Applicant's claimed implicit understanding that his continued use of marijuana following his receipt of a clearance was permissible must be weighed against the backdrop of his admitted awareness of state and federal bans on marijuana use and possession. (Tr. 33-35) While Applicant was not aware of any specific anti-drug policies maintained by his employer, he fully acknowledged his awareness, at all relevant times, of the DoD's ban on all illegal drugs (marijuana included) in his PSI interview in 2015, and reaffirmed his same understanding of both the federal ban on marijuana possession and his state's decriminalization of marijuana possession in his hearing testimony. (Tr. 29-30, 49-41)

Apparently because he was honest about his marijuana use throughout the investigation process about his marijuana use and likely discontinuance of future use, Applicant was granted a security clearance in July 2015 with no apparent restrictions on future marijuana activity communicated to Applicant. With no reported input from his facility security officer (FSO) on his continued marijuana use, he continued to believe (his account) that he had implicit permission to continue using the substance. (Tr. 41-43)

With all of the information available to him about state and federal bans on marijuana use and possession, Applicant's claimed understanding that his continued use of marijuana was permissible is quite a stretch by any objective measures and reasoning. True, he has been generally upfront about his past marijuana use whenever he was called upon to account and has disassociated from many of his old friends and acquaintances who used marijuana, although not all. (Tr. 33) Under these special circumstances, Applicant's claimed understanding of his implicit permission to continue using marijuana after being granted a security clearance cannot be accepted at face value without more corroborative evidence.

With the support of his fiancé and her son, Applicant has matured considerably and has moved away from marijuana and most of his past friends and acquaintances who used marijuana. (Tr. 66-68) Since his last use of marijuana in April 2019, Applicant has maintained his abstinence from all illegal drugs, inclusive of marijuana. (Tr. 36-37) To corroborate and reinforce his abstinence assurances, he enrolled in a 16-hour marijuana education program and documented his successful completion of the program. (AE D) All of his efforts are encouraging.

However, Applicant brings to these proceedings a lengthy history of marijuana usage and purchases to meet his personal needs and has furnished a qualified commitment to abstinence in his state of intent and hearing testimony. Acknowledging the continued federal and state bans on marijuana use and possession (save for the substitution of civil for criminal penalties in his state's legal ban), he could not rule out a return to marijuana use should one of two events occur: his retirement or the repeal of the federal ban. He offered nothing about his recurrence intentions should his state's ban remain in place.

Endorsements

Applicant is well-regarded by his supervisors, coworkers, and friends who have known and worked with him. (AEs E and G) They credit him with being a great worker and leader, trustworthy, and a carpenter who is admired by all who have worked with him. (AE E) His fiancé acknowledged her awareness of his marijuana use when they first met in 2016, but credited him with giving up marijuana altogether after they bought a house together in March 2019. (AE E; Tr. 68) She described Applicant with being a good role model for her teenage son, who treats him as his father, and she expressed complete confidence in Applicant's maintaining his abstinence from marijuana and illegal drugs in general in the foreseeable future. (AE E; Tr. 68-70)

Over the course of the past two years, Applicant has successfully completed numerous training and awareness courses (11 in all) sponsored by his employer. (AE F) His completed courses covered asbestos operations (January 2020), OSHA/USACE annual awareness (February 2020), USACE and OSHA protection (February 2021), insider threats (February 2020), lift truck operation (March 2020), and scaffolding safety practices. (AE F)

Policies

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court they credit him with in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), “no one has a ‘right’ to a security clearance.” 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. Eligibility for access to classified information may only be granted “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 AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These AG guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified information. The AG guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant’s life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant’s conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for

pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Drug Involvement

The Concern: The illegal use of controlled substances, to include the misuse of 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.

Burdens of Proof

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 Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

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 [or 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

Security concerns are raised over Applicant’s use and purchases of marijuana with varying frequency over an extended number of years (1994-2019), some of which occurred while he held a security clearance (2015-2019). Considered together, Applicant’s involvement with marijuana raises security concerns over whether Applicant’s actions reflect pattern misbehavior incompatible with the judgment, reliability, and trustworthiness requirements for gaining access to classified information. On the strength of the evidence presented, three disqualifying conditions (DCs) of the AGs for drug involvement apply to Applicant’s situation: DC ¶¶ 25(a), “any substance misuse,” 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of illegal drugs or drug paraphernalia,” and 25(f), “any illegal drug use while granted access to classified information or holding a sensitive position.”

To his credit, Applicant has committed to sustained abstinence from all involvement with marijuana (albeit with a commitment that is limited in scope) and with the support of his fiancé and her adolescent son, he has maintained his abstinence from marijuana and all illegal drugs for over two years. With the aid of drug education, he exhibited no visible signs or indications of succumbing to any risks or pressures he might encounter to return to marijuana use. He fully understands that marijuana and other controlled drugs remain illegal under federal law and the DoD’s anti-drug policy; even though marijuana has since been decriminalized under his state’s law.

To be sure, Applicant has exhibited candor about his past involvement with marijuana throughout the investigation process, has discontinued his past acquaintances with friends and contacts known to have been involved in marijuana activities, and has shown marked improvement in his judgment and maturity level in the two years he has moved away from his marijuana involvement. Still, his commitment to future abstinence from marijuana is limited by the duration of the federal ban and his own need for a security clearance. As framed, his commitment to abstinence must be treated as a qualified one,

Applicant’s assurances of sustained abstinence from marijuana are encouraging. And, his efforts warrant partial application of two mitigating conditions (MCs) of the drug involvement guideline: MC ¶¶ 26(a), “the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment,” and 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.”

Applicant is entitled to credit with being honest to both the Government and his fiancé about his past marijuana use. With over two years of demonstrated abstinence from marijuana and increased understanding of the importance of giving up marijuana to facilitate his being a better role model to his fiancé and her adolescent son, Applicant’s progress in abandoning marijuana after so many years of sustained use is encouraging. His efforts to date, however, still remain a work in progress that require more time in sustained abstinence to facilitate safe predictions that he is no longer a recurrence risk.

Whole-person assessment

From a whole-person perspective, Applicant has established independent probative evidence of his overall honesty, trustworthiness, maturity and good judgment required of those who seek eligibility to hold a security clearance or sensitive position. His efforts to date still fall short of the evidentiary requirements for mitigating security risks associated with his long history of marijuana activity and still a relatively brief period of sustained abstinence.

Considering the record as a whole at this time, there is insufficient positive evidence of sustainable mitigation in the record to make safe predictable judgments about his ability to avoid marijuana and other illegal drugs in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant’s past marijuana use, his strong endorsements and contributions to the defense industry, and relatively brief period of sustained abstinence (just over two years), he does not mitigate security concerns with respect to the allegations covered by SOR ¶¶1.a-1.e. Offering a conditional abstinence commitment in these circumstances is not enough to absolve him of recurrence risks in light of his many years of using and purchasing marijuana, including over four years of continued use after he received a security clearance.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude drug involvement security concerns are not mitigated. Eligibility for access to classified information is denied.

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:

GUIDELINE H (DRUG INVOLVEMENT):	AGAINST APPLICANT
Subparagraph 1.a-1.e	Against Applicant

Conclusion

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

Roger C. Wesley
Administrative Judge