



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



In the matter of:)	
)	
)	ISCR Case No. 20-03623
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Adrienne M. Driskill, Esq., Department Counsel
For Applicant: *Pro se*

March 28, 2022

Decision

GLENDON, John Bayard, Administrative Judge:

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

Statement of the Case

On July 17, 2020, Applicant submitted a security clearance application (SCA). On April 26, 2021, the Defense Counterintelligence and Security Agency, Consolidated Adjudications Facility (CAF), issued a Statement of Reasons (SOR) to Applicant stating that it was unable to find that it was clearly consistent with the national interest to grant Applicant access to classified information. The SOR detailed 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) effective within DoD on and after June 8, 2017.

On April 21, 2021, Applicant responded to the SOR in writing (Answer) and requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On October 6, 2021, the Government was ready to proceed with the hearing. The case was assigned to me October 12, 2021. DOHA issued a hearing notice on November 1, 2021, scheduling the hearing for November 30, 2021. Applicant subsequently requested a continuance due to a change in his travel schedule. I granted his request. On March 1, 2022, DOHA issued a Notice of Microsoft TEAMS Video Teleconference Hearing rescheduling the hearing for March 16, 2022.

I convened the hearing as scheduled. Department Counsel presented three exhibits marked as Government Exhibits (GE) 1 through 3. Before the hearing, Applicant submitted two exhibits marked as Applicant Exhibit (AE) A and B. All exhibits were admitted without objection. Applicant testified on his own behalf. DOHA received the hearing transcript (Tr.) on March 23, 2022. (Tr. at 12-16.)

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, Applicant's testimony, and the documentary evidence in the record, I make the following findings of fact.

Applicant is 49 years old. He has been married twice, first in 1999 and then in 2019. His first marriage ended in divorce in December 2017. He has minor child and a stepchild. Applicant earned two bachelor's degrees from a prestigious university in 1983 and a master's degree in 1999. He began working for a DoD agency in 1989 and held a Top Secret security clearance with access to Sensitive Compartmented Information. He worked for that agency until 2003. He began working for a U.S. Government contractor in 2003. He applied to renew his clearance in 2005 and was granted a Secret clearance. He testified that he lost his clearance eligibility in 2007 or 2008 as his duties no longer required him to maintain a clearance. In 2019, he changed employers and now works for a second U.S. Government contractor. Applicant's new employer sponsored him to apply for a clearance in July 2020. He was granted an interim clearance. The clearance was revoked a short period thereafter. (Tr. at 18-21; GE 1; GE 3.)

SOR Allegations and Answer

Paragraph 1, Guideline H - The SOR sets forth four allegations regarding Applicant's use of marijuana. Paragraph 1.a alleges that Appellant used marijuana with varying frequency from about December 2006 to at least January 2021. Paragraphs 1.b and 1.c allege that he used marijuana after having been granted a security clearance in December 2006 and again in August 2020. Paragraph 1.d alleges that Applicant intends to continue using marijuana in the future.

In his Answer, Applicant admitted SOR paragraphs 1.a and 1.d and denied 1.b and 1.c. He also commented that he only used marijuana once in December 2006. He

wrote that he was not actively involved in classified work at that time. He provided the same comment with respect to the later time period. He also wrote in his Answer that he disagreed with the basis of the AG, cited in the SOR, that marijuana use gives rise to security concerns. He argued that alcohol use gave rise to similar concerns as marijuana use and Guideline G is the more appropriate adjudicative guideline to be used to assess the security risks raised by his continued use of marijuana.

At the hearing, Applicant testified about his past marijuana use. He said that he used marijuana once on a family vacation in 2006. He estimated that he used marijuana five to six times in the 2010-to-2014-time period. He started smoking marijuana about once a month during the period 2014 until 2016 when the recreational use of marijuana was legalized in his state of residence. During that two-or-three-year period, he used a medical marijuana card and smoked marijuana to ease certain psychological and physical problems he was experiencing due to the end of his first marriage. After 2016, he began ingesting edibles containing THC or using a vape pen to inhale smoke containing CBD oil. He purchased these marijuana products from state-licensed dispensaries. The frequency of such use during the period 2016 up to the present time is about once or twice a month. He intends to continue using marijuana/THC in one form or another in the future. His last use was four days before the hearing. (Tr. at 28-31, 37.)

With respect to the SOR allegations that he used marijuana while holding a security clearance, he testified that during the periods in question he was not engaged in working with classified information. He said that he stopped working with classified information in 2003 when he left his DoD position. He also testified that he cannot be certain that he used any marijuana product after he was briefly granted an interim security clearance in 2020 and before it was revoked. (Tr. at 34-36.)

Applicant submitted two articles in support of his argument about alcohol and marijuana. Applicant also argued that the Federal Government has *de facto* legalized marijuana and that it is inappropriate to assess security risks under Guideline H, which is the basis for the SOR allegations. He contends that the more appropriate adjudicative guideline is Guideline G (Alcohol Consumption). (Tr. at 25; AE A; AE B.)

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

Paragraph 1, Guideline H

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 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.

The following potentially disqualifying conditions under AG ¶ 25 could apply to the facts of this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant's admitted past use of marijuana establishes AG ¶¶ 25(a), (c), and (f). The record evidence, however, does not support a conclusion that Appellant used marijuana during the brief period after he was granted an interim clearance in 2020. His numerous statements of intent to continue using marijuana, including during his hearing testimony, as corroborated by his ongoing use up until four days before his hearing, establish disqualification under AG ¶ 25(g).

AG ¶ 26 sets forth four mitigating conditions under Guideline H. The following mitigating condition has possible application to the facts in 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.

Mitigation under AG ¶ 26(a) has not been established. Applicant intends to continue using marijuana in the future, which casts doubt on his current reliability, trustworthiness and judgment. He has not shown that he is willing to comply with rules and regulations with which he disagrees, and stated his intent to continue such conduct.

On the issue raised by Applicant regarding the U.S. Government policy with respect to marijuana, the U.S. Food and Drug Administration (FDA) conducted a scientific

and medical review of the status of marijuana as a Schedule I controlled substance under the Controlled Substances Act. The report is available for review at <https://www.fda.gov/files/Marijuana%20Schedule%20I%20Recommendation.pdf> . The FDA declined to reclassify marijuana. Applicant’s position that marijuana has been *de facto* legalized at the Federal level is simply incorrect. Moreover, that argument has no legal merit. It is black letter law that a DOHA administrative adjudication proceeding is not an appropriate forum to seek policy changes. ISCR Case No. 14-03734 at 2 (App. Bd. Feb. 18, 2016) (DOHA proceedings are not a proper forum to debate the merits of DoD policy concerning marijuana).

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). 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 his intent to use marijuana in the future.

Formal Findings

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a,1.c, and 1.d:	Against Applicant
Subparagraph 1.b:	For 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