



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



In the matter of:)
)
) ISCR Case No. 21-00643
)
Applicant for Security Clearance)

Appearances

For Government: Kelly M. Folks, Esq., Department Counsel
For Applicant: *Pro se*

09/15/2022

Decision

HARVEY, Mark, Administrative Judge:

The statement of reasons (SOR) alleges and Applicant admitted that he possessed and used marijuana from 2018 to about June 2020. Some of his marijuana involvement occurred after he was granted an interim security clearance. Security concerns arising under Guideline H (drug involvement and substance misuse) are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On January 27, 2020, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SCA). (Government Exhibit (GE) 1) On May 28, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued an 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. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DCSA 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. (HE 2) On June 22, 2021, Applicant provided a response to the SOR and requested a hearing. (HE 3) On July 23, 2021, Department Counsel was ready to proceed. Processing of the case was delayed due to the COVID-19 pandemic.

On June 28, 2022, the case was assigned to me. On July 12, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for August 18, 2022. (HE 1) The hearing was held as scheduled.

Department Counsel offered two exhibits into evidence; Applicant did not offer any exhibits into evidence; there were no objections; and all proffered exhibits were admitted into evidence. (Transcript (Tr.) 17-18; GE 1-GE 2) On August 26, 2022, DOHA received a transcript of the hearing. Applicant submitted six exhibits after the hearing, which were admitted without objection. (Applicant Exhibit (AE) A-AE F) The record closed on September 9, 2022. (Tr. 43)

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.a through 1.d. (HE 3) He also provided mitigating information. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 54-year-old senior research scientist and technical lead for a highly technical facility. (Tr. 8-9, 19) A DOD contractor has employed him for about 30 months (since October 2019). (Tr. 7-8, 29) In 1985, he graduated from high school, and in 1989, he received an associate's degree. (Tr. 7, 22) In 1991, he received a bachelor's degree with a major in mechanical engineering, and in 1998, he received a master of science degree. (Tr. 7-8, 23) He has not served in the military. (Tr. 7, 24) In 2001, he married, and he separated from his spouse about eight months before his hearing. (Tr. 20) His three children are ages 15, 17, and 19. (Tr. 9, 20-21)

Drug Involvement and Substance Misuse

SOR ¶ 1.a alleges Applicant used marijuana with varying frequency from about 2018 to about June 2020. SOR ¶ 1.b alleges Applicant purchased marijuana from about 2018 to about June 2020. SOR ¶ 1.c alleges Applicant used and purchased marijuana with varying frequency from about March 2020 to about June 2020, while granted access to classified information. SOR ¶ 1.d alleges Applicant intends to use marijuana in the future. In his SOR response, he admitted all of the SOR allegations, except he clarified that he has not had access to classified information. (HE 3)

Applicant was diagnosed with a serious stomach-related disease in his mid-20s. (Tr. 30-31) He tried a variety of drugs and therapies over the years. (Tr. 31) He uses marijuana because he believes it is effective in the treatment of his symptoms. (Tr. 36) He used marijuana two or three times a day. (Tr. 36) He used marijuana about three hours before his hearing. (Tr. 36)

Applicant disclosed on his January 27, 2020 SCA that he has “been prescribed medical marijuana for a stomach condition for approximately two years.” (GE 1 at 31) He fully described his marijuana use during his June 11, 2020 Office of Personnel Management (OPM) personal subject interview. (GE 2) For the past three years, he has had a state medical marijuana card which enables him to purchase marijuana legally under state law. (Tr. 37) He knew federal law prohibited marijuana possession and use. (Tr. 34) On March 31, 2020, he received an interim Secret clearance. (Tr. 35) He has never had access to classified information. (Tr. 36, 41) He would be much more effective in his position if he was authorized to have access to classified information. (Tr. 39-40) His friends, family, and supervisor are aware of his marijuana use. (Tr. 38; AE A-AE D) He would leave his employment before he would end his marijuana use. (Tr. 38)

In his written closing comments, Applicant said in part:

Currently, 40 of the 50 states in the U.S. allow for medical marijuana. If the Federal law is supposed to reflect the will of the majority of the people, 40 of the 50 states is an overwhelming majority and the federal law simply has not kept up.

My use of medical marijuana does not result in being impaired and does not adversely affect my judgment. To the contrary, I believe I have an established record of doing the right thing and this is reflected in the four character reference letters attached to this correspondence. Additionally, while maintaining a clearance was a requirement for my position . . . , the requirement has been waived for me [by my employer]. I believe this is in large part because I have been forthcoming and transparent from the very beginning - when I believed my job was on the line – again keeping with my track record of doing the right thing.

In conclusion, I can see no evidence of my conduct that casts doubt on my reliability, trustworthiness or good judgement. Additionally, although my job is not in jeopardy as a result of the outcome of this hearing, my not having a clearance would be a roadblock that would require significant workaround and undoubtedly delay the time it will take to [accomplish his employer’s objectives]. With this in mind, it is obvious that allowing me to keep my security clearance is clearly consistent with the interest of national security. (AE E)

Character Evidence

Four friends and coworkers who have known Applicant for several years praised his good character and contributions to the national defense. (AE A-AE D) The general sense of their statements is that he is an exceptionally intelligent, diligent, skilled, talented, driven, trustworthy, and professional employee. He has an important patent; however, his current employer is not involved in using the patent. (AE F) His character evidence provides important support for his access to classified information.

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 conditions that could raise a security concern and may be disqualifying in this case: “(a) any substance misuse (see above definition);” “(c) illegal possession of a controlled substance. . . .”; “(f) any illegal drug use while granted access to classified information or holding a sensitive position”; and “(g) express intent to continue drug involvement and substance misuse.” The record establishes AG ¶¶ 25(a), 25(c), and 25(g).

AG ¶ 25(f) is not established. Applicant held an interim security clearance; however, he did not actually have access to classified information. See ISCR Case No. 20-03111 (App. Bd. Aug. 10, 2022) (comparing holding a security clearance with actual access to classified information in the context of AG ¶ 25(f)). There is no definition in the Directive defining a sensitive position, and the evidence did not establish Applicant’s position was sensitive at the time he was possessing and using marijuana.

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 during the security clearance process. He has a state medical marijuana card, and his marijuana possession and use does not violate state law. His character evidence clearly supports his access to classified information.

The evidence against mitigation is more persuasive at this time. Applicant used marijuana on a daily basis after completion of his SCA, OPM personal subject interview, and receipt of the SOR. He intends to continue using marijuana.

In ISCR Case No. 16-03460 at 4 (App. Bd. May 24, 2018), the applicant had a history of marijuana use, had completed an SCA, but did not have an approved security clearance. The Appeal Board reversed the grant of a security clearance and 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).

The Security Executive Agent (SecEA) promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications as follows:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a “whole-person concept.” This requires adjudicators to carefully weigh a number of variables in an individual’s life to determine whether that individual’s behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.

Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position (Dec. 21, 2021) at 2 (quoted in ISCR Case No. 20-02974 at 3-4 (App. Bd. Feb. 1, 2022)).

Applicant used marijuana and disclosed his marijuana use on his SCA, to an OPM investigator, and during his hearing. He knew his marijuana possession or use or both was prohibited by federal law and security clearance policies. Applicant's decision to repeatedly possess and use marijuana is an indication he lacks "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 did not indicate that he received any drug-abuse counseling or treatment. At his hearing, he said he plans or intends to continue to use marijuana. The DOHA Appeal Board has stated in such instances that "security concerns persist regarding Applicant's judgment, reliability, and willingness to comply with security requirements." ISCR Case No. 20-02974 at 6 (App. Bd. Feb. 1, 2022) (reversing grant of security clearance where applicant used marijuana six weeks after receiving the SOR). 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 a 54-year-old senior research scientist and technical lead for a highly technical facility. A DOD contractor has employed him for about 30 months (since October

2019). In 1991, he received a bachelor’s degree with a major in mechanical engineering, and in 1998, he received a master of science degree.

Four friends and coworkers praised his good character and contributions to the national defense. The general sense of their statements is that he is an exceptionally intelligent, diligent, skilled, talented, driven, trustworthy, and professional employee. He has an important patent. The character evidence provides important support for his access to classified information.

Applicant disclosed his history of involvement with marijuana on his SCA, during his OPM personal subject interview, in his SOR response, and at his hearing. He did not test positive on a urinalysis test, and he does not have any drug-related arrests. An honest and candid self-report of marijuana use 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.

The evidence against grant or continuation of a security clearance is more persuasive at this time. Applicant used marijuana after he received the SOR on a daily basis up to and including the day of his hearing. He said he intends to continue to use marijuana. He used marijuana to treat a serious medical condition. He has a state medical marijuana card which authorizes his marijuana possession and use under state law. His marijuana possession and use while holding an interim security clearance, but not while being granted access to classified information, showed poor judgment in the context of security rules. His marijuana possession and/or use violated federal law and security policies.

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 through 1.d:	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