



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



In the matter of: )  
 )  
 [Redacted] ) ISCR Case No. 21-02635  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Alison O’Connell, Esq., Department Counsel  
For Applicant: *Pro se*

11/29/2022

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline H (Drugs and Substance Misuse). Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on May 8, 2021. On February 11, 2022, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on February 18, 2022, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 29, 2022. Scheduling of the hearing was delayed by COVID-19. The case was assigned to me on October 5, 2022. On October 25, 2022, the Defense Office of Hearings and

Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on November 15, 2022. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses or submit any documentary evidence. I kept the record open until November 22, 2022, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibit (AX) A, which was admitted without objection. DOHA received the transcript (Tr.) on November 28, 2022.

### **Findings of Fact**

The SOR alleges that Applicant used marijuana from approximately December 2020 to about February 2021, while employed by a defense contractor in a sensitive position (SOR ¶ 1.a), and that he intends to use marijuana in the future (SOR ¶ 1.b). In Applicant's answer to the SOR, he admitted the allegation in SOR ¶ 1.a and responded to SOR ¶ 1.b by saying, "Possibly, I admit." His admissions are incorporated in my findings of fact.

Applicant is a 41-year-old machinist employed by a defense contractor since March 2015. He was employed in the civilian sector before being hired by his current employer. He has held a security clearance since about 2017. (Tr. 16.)

Applicant married in May 2003 and has three children, ages 12, 8, and 5. He attended a community college from August 1999 to May 2013 and received a general studies degree in May 2014. He attended a technical school from June to September 2014 and received a certificate in September 2014.

When Applicant submitted his SCA, he disclosed that he used marijuana twice, in January and February 2021. (GX 1 at 30-31.) During an interview with a security investigator in July 2021, he told the investigator that he obtained marijuana from a friend and used it on one occasion with his wife and a second occasion with his brother and sister-in-law. When asked about his motivation for using it, he explained that he knew that marijuana use was about to be decriminalized in July 2021 in the state where he resides, and he "just wanted to try it out." He told the investigator that future use of marijuana was "probable," but that he felt no need to use it. He told the investigator that he wanted to keep his options open because marijuana was legal in the state where he resides. (GX 2 at 5.) In response to DOHA interrogatories about his intention to use marijuana in the future, he responded, "Maybe, no real plans to." (GX 2 at 11.)

At the hearing, Applicant testified that when he used marijuana on two occasions, he was not aware that it might affect his security clearance. His employer's policy regarding marijuana use is to send an employee to rehabilitation classes for the first use, and any subsequent use is grounds for termination. He believed that his employer's policy was a "gray area," similar to alcohol abuse. (Tr. 17-19.)

Applicant testified that he obtained the marijuana from a friend, that he had used all of it, and that he is "too cheap" to buy any more. (Tr. 21.) He unequivocally stated that

he would not use illegal drugs again, because “it just wasn’t worth it.” He explained that he likes his job, is not addicted to marijuana, and does not wish to risk losing his job by smoking it. (Tr. 21-22.) He was asked, “If you have a choice between your job and marijuana, which one are you going to take?” He responded, “Absolutely my job.” (Tr. 26.) After the hearing, he submitted a signed statement of intent to abstain from all illegal drug use, acknowledging that any future involvement would result in revocation of his security clearance. His statement was admitted without objection as Applicant’s Exhibit A.

## **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.

Clearance decisions 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 concern under this guideline is set out in AG ¶ 24:

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.

In October 2014, the then-Director of National Intelligence (DNI), issued a memorandum addressing changes in state laws relating to marijuana. He reminded agency heads that "changes to state laws . . . pertaining to marijuana use do not later the existing National Security Adjudicative guidelines." He wrote, "An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations." Director of National Intelligence Memorandum, *Adherence to Federal Laws Prohibiting Marijuana Use* (Oct. 25, 2014).

Applicant was aware of his employer's drug policy. He knew that the first illegal drug use would result in referral for treatment and the second illegal use could result in termination. His admissions are sufficient to raise the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse (see above definition);

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position; and

AG ¶ 25(g): expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The following mitigating conditions are potentially applicable:

AG ¶ 26(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

AG ¶ 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's use of marijuana was recent but infrequent. He voluntarily disclosed his drug use when he submitted his SCA. His responses to questions about future drug use were ambiguous when he was interviewed by a security investigator and when he responded to the SOR. The security investigator's admonition to be open and truthful apparently made an impression on him and caused him to qualify his answers about future drug use, knowing that the laws regarding marijuana might change in the future. However, he acknowledged at the hearing that he has no desire to trigger the adjudication process again and risk losing his job again by any future marijuana involvement. He is not likely to disassociate from his wife and brother, with whom he smoked marijuana, but he submitted a signed statement of intent to abstain from all illegal drug involvement and acknowledged that any future involvement would result in revocation of his security clearance and loss of his job. He has clearly and convincingly committed to abstain from

using marijuana so long as it remains illegal under federal law and while he is employed in a sensitive position. AG ¶¶ 26(a) and 26(b)(3) are established.

### **Whole-Person Concept**

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. An 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.

I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment. Applicant's naïve attitude about trying out marijuana while holding a clearance and knowing that he was violating federal law is cause for concern, considering his age and work experience. However, he is a product of his generation, unconvinced that recreational use of marijuana should be illegal and equating it to alcohol use. Nevertheless, his experience of finding his continued employment at risk appears to have gained his attention. To his credit, he was candid and open when he submitted his SCA, during security interviews, and at the hearing. He has voluntarily placed himself on probation by submitting his statement of intent.

After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his illegal drug use.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H:

FOR APPLICANT

Subparagraphs 1.a and 1.b:

For Applicant

## **Conclusion**

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman  
Administrative Judge