



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



In the matter of:)	
)	
)	ISCR Case No. 22-00338
)	
Applicant for Security Clearance)	

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: *Pro se*

01/24/2023

Decision

LYNCH, Noreen A., Administrative Judge:

This case involves security concerns raised under Guideline H (Substance Abuse and Drugs), and Guideline E (Personal Conduct). Applicant did not mitigate the allegations under Guidelines H and E. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 5, 2018. On April 19, 2022, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H, and E. 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), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016) and implemented on June 8, 2017.

Applicant answered the SOR on May 6, 2022, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written case on August 4, 2022. A complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on August 12, 2022, but did not respond to the FORM. (Items 1-4). I was assigned the case on November 17, 2022.

Findings of Fact

Applicant is a 53-year-old systems engineer employed by a defense contractor since September 2008. He is divorced and has no children. He obtained an undergraduate degree in May 1990. He reported no military service. He obtained a security clearance in 2009. (Item 3) Applicant completed his latest security clearance application (SCA) on September 5, 2018.

Guideline H: Drug Involvement and Substance Abuse

The SOR alleged under Guideline H, ¶ 1.a, that Applicant, with varying frequency, from about March 1999 to at least November 2021, used marijuana after being granted access to classified information in November 2008. (Item 1) Applicant denied the allegation in the SOR. (Item 2)

The SOR alleged under Guideline E, ¶ 2.a, that Applicant falsified his September 2008 SCA by responding "No" to Section 24.a. "Since the age of 16 or in the last 7 years, have you illegally used any controlled substance, narcotics, depressants, hallucinogenics, steroids, or prescription drugs, experimenting or otherwise consuming any controlled substance" as alleged under Guideline E, in SOR ¶ 2.b, the SOR cross alleged the marijuana use allegation in ¶ 1.a. Applicant denied these allegations in the SOR. (Item 2)

In his answer, Applicant denied the SOR allegation that he used marijuana with varying frequency from about 1999 to at least 2021 and stated that he tried marijuana once in 1999 and did not use marijuana again until 2013 when his roommate moved in. He acknowledged that the use of marijuana was after his initial security screening in 2009. He continued to relate that he used it about a handful of times, with the last time being Thanksgiving 2021. (Item 2)

In his September 5, 2018, SCA he acknowledged that he had been smoking marijuana about once a week for recreational use because it provides a good method of relaxation. He specified the time was from March 1999 until August 2018. He admitted that he was using marijuana while holding a security clearance, and that he intended to use the marijuana in the future. (Item 3)

During Applicant's January 2019 interview, he stated that he bought marijuana from friends. He noted that he is not dependent on the illegal use of marijuana and has never tested positive for it.. He commented that it has never affected his judgment or

personality. He claims there has been no negative impact on his work or home life. (Item 3)

Applicant answered DOHA interrogatories in April 2022. He stated that he last used marijuana during Thanksgiving 2021 and further acknowledged that he knew that marijuana was illegal under Federal law and that his employer prohibited the use of all illegal drugs. Applicant stated that he would abstain from further drug use. (Item 4)

Applicant's admissions and the evidence in the record, especially while holding a security clearance is serious. He has not presented in a credible manner a case for granting him a security clearance.

Guideline E: Personal Conduct

The SOR alleged in SOR 2.a and 2.b that Applicant falsified material facts on his September 2008 SCA by answering "NO" to the questions in Section 24 – Illegal Use of Drugs of Drug Activity as set forth in subparagraph 1.a of the SOR. It cross-alleged his marijuana use in SOR ¶ 2.b.

Applicant denied the falsification allegations because he believes he made a mistake and misinterpreted the question in assuming the other sections correlated. He claimed he answered the question incorrectly by an honest mistake. He claims he was not trying to hide anything or be deceptive, or lie. He has held a security clearance since 2009. On his SCA, he answered "NO." to have you ever illegally used or otherwise been illegally involved with a drug or controlled substance while possessing a security clearance other than previously listed? He did not add any information concerning this issue in his DOHA interrogatories. He insisted that he had no ill intentions because his work position is strongly reliant on his clearance and he has been truthful in his representation to the best of his ability. (Item 2)

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 security concern for this guideline is set forth in AG ¶ 24, where it is noted that the illegal use of a controlled substance, and the use of other substances that can 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. This is 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.

Applicant's admissions establish that he used and purchased marijuana as alleged in the SOR for some years and while holding a security clearance. The record also establishes that Applicant used illegal drugs after being employed with a Federal contractor. Applicant's statement that he would continue to use it does not lend credibility to his one statement that he would abstain in the future. Applicant's use of marijuana after he knew that his position with a federal contractor required him to refrain from using illegal drugs shows a reckless disregard for rules and regulations. This is sufficient to raise AG ¶ 25(a): any substance misuse, AG ¶ 25(c) illegal possession of a controlled substance, including ... purchase or sale; AG ¶ 25(f) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse. The Government's substantial evidence, as provided by Applicant's admissions, raises security concerns under Guideline H. Therefore, the burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate related security concerns.

Under Guideline H, conditions that could mitigate security concerns arising from drug involvement and substance misuse are enumerated. The following mitigating conditions under AG ¶ 26 potentially apply to Applicant's 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; and

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions 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 last use of marijuana, an illegal substance, took place in 2021. He has just recently stated that he would abstain from marijuana use because it is a tangible threat to his security clearance. He believes his open and honest response to his investigator should prove that he is trustworthy. He argued that although he has been a drug user since college and after, because he is finally forthright, the Government should ignore the former illegal marijuana use because he made a mistake by not putting it on his security clearance application in response to Section 23 . This does not mitigate his case. This conduct casts doubt about his judgment and reliability. I find that none of the mitigating conditions apply.

Guideline E, Personal Conduct

The SOR alleged that Applicant falsified his SCA by deliberately failing to disclose his use of illegal drugs in his 2018 SCA SOR 2.a and cross alleged in SOR ¶¶ 2.b.

The security concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

The following disqualifying conditions under this guideline are relevant:

AG ¶ 16(a): deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities,

AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of . . . a pattern of dishonesty or rule violations; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes . . . engaging in activities which, if known, could affect the person's personal, professional, or community standing.

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant

to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant is a mature adult who has completed the adjudication process at least twice during his career. He knew that the policy is against use of marijuana. His claim that he just made a mistake or an error on his security clearance application is unsupported by corroborating evidence. I find that he intentionally falsified his applications and that he did not report that he used marijuana while holding a security clearance.

Based on all the evidence, I conclude that Applicant deliberately failed to disclose material information in Section 24 of his 2008 SCA, by answering "NO". He falsified his information in ¶ 2.a. Thus, I also conclude for the reason listed above that the disqualifying conditions in AG ¶¶ 16(a) and 16(e) that his use of marijuana created a vulnerability as contemplated by AG ¶16(e), which applies to SOR 2.b. The following mitigating conditions are potentially relevant:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

AG ¶ 17(a) is not established. Applicant did not attempt to correct the omission and stated he misinterpreted the question.

AG ¶ 17(c) is not established. Applicant's falsification is arguably infrequent, but it was recent and did not happen under unique circumstances. It was not minor, because falsification of a security clearance application "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.)

Whole Person

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 Guidelines H, and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). I have considered Applicant's career as an employee of defense contractors. I have also considered that he held a security clearance since 2009. Because he requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor or to question him about the allegations in the SOR. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). After weighing the disqualifying and mitigating conditions under Guidelines H, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns under Guideline H and Guideline E.

Formal Findings

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

Paragraph 1, Guideline H :	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	Against APPLICANT
Subparagraphs 2.a-2b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is denied.

Noreen A. Lynch
Administrative Judge