



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



In the matter of:)
)
) ISCR Case No. 22-01014
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

01/13/2023

Decision

HALE, Charles C., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 21, 2020. On July 8, 2022, the Defense Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DCSA 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).

Applicant answered the SOR on July 12, 2022, and requested a decision on the written record without a hearing. Department Counsel submitted the Government’s written case on August 4, 2022. On August 8, 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 29, 2022, and did not respond. The case was assigned to me on December 1, 2022.

The SOR and the answer (FORM Items 1 and 2) are the pleadings in the case. Applicant did not include any additional evidence with his answer or response. FORM Items 4 and 5 are admitted into evidence without objection.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations that he used marijuana with varying frequency from about November 2015 to July 2021, to include after being granted access to classified information and that he had been arrested and charged with marijuana possession in September 2020.

Applicant is a 24-year-old software engineer, never married, and has no children. He earned a bachelor's degree in August 2020 and has been employed by a defense contractor since August 2020. He received a security clearance in April 2020 and executed a nondisclosure agreement (NDA) two weeks later. (FORM Item 5.)

When Applicant submitted his SCA in January 2020, he disclosed that he used marijuana from about November 2015 until December 2019. He did not answer the question on his SCA regarding the nature of use, frequency, and number of times used, and simply listed "recently stopped" on the line provided for the question. (FORM Item 3 at 23.) In response to the request in the SCA, for an explanation on why he intended or did not intend to use marijuana in the future, he responded, "Can hinder me from obtain [sic] security clearance and jobs in the future."

In response to DOHA interrogatories, he listed "socially" in the Frequency of Use box. (FORM Item 4 at 8.) During his enhanced subject interview (ESI) conducted in November 2021, and authenticated by him in June 2022, he disclosed he had been charged and pled guilty to possession of marijuana in September 2020. (FORM Item 4 at 6.) He also admitted in his ESI to using marijuana in July 2021 on two occasions and acknowledged he still associates with people with whom he used marijuana. (FORM Item 4 at 7.)

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.

Applicant's admission in his answer to the SOR and the information in the FORM are sufficient to raise the following disqualifying condition under this guideline: AG ¶ 25(a): "any substance misuse (see above definition)."

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.

Neither mitigating condition is established. Applicant's marijuana use did not occur under circumstances making recurrence unlikely. He acknowledged his marijuana use in his SCA and in his response to the FORM, but he continued his use of marijuana after completing his SCA and signing his NDA after being granted a security clearance. He started using marijuana in 2015, when he was 18, and has continued to use it until 2021. He did not answer the question on the frequency of his use. He continues to associate with those with whom he used marijuana. His actions after completing his SCA and receiving his security clearance are indicative that not enough time has passed. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant's long-term use of marijuana in violation of federal law raises questions about his ability or willingness to comply with laws, rules, and regulations. He has not provided a signed statement of intent to abstain from all drug involvement and substance misuse and acknowledged that any future involvement or misuse is grounds for revocation of national security. Because he requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). Based on the totality of the evidence, I am not convinced that he will continue his abstinence from marijuana use once the pressure of qualifying for a security clearance is removed.

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 and applied the adjudicative factors in AG ¶ 2(d). 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 not mitigated the security concerns raised by his drug involvement.

Formal Findings

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

Paragraph 1, Guideline H: AGAINST APPLICANT

Subparagraphs 1.a-b: Against Applicant

Conclusion

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

Charles C. Hale
Administrative Judge