



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



In the matter of:)
)
-----) ISCR Case No. 21-02470
)
Applicant for Security Clearance)

Appearances

For Government: Andrew Henderson, Esq., Department Counsel
For Applicant: Bruce R. Heurlin, Esq.

02/27/2023

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, and exhibits, Applicant did not mitigate drug and criminal conduct concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

Statement of the Case

On December 22, 2021, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the drug involvement and substance misuse and criminal conduct guidelines the DoD could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, DoD Directive 5220.6 (January 2, 1992) (Directive); 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.

Applicant responded to the SOR on January 5, 2022, and requested a hearing. The case was assigned to me on August 23, 2022. A hearing was scheduled for December 7, 2022, and heard on the date as scheduled. At the hearing, the Government's case consisted of three exhibits (GEs 1-3). Applicant relied on one witness (himself) and nine exhibits (AEs A-I). The transcript (Tr.) was received on December 16, 2022.

Summary of Pleadings

Under Guideline H, Applicant allegedly used and purchased marijuana about June 1996 to about September 2019; (b) was terminated from his employment in October 2014 after he tested positive for marijuana during a urinalysis screening; (c) was arrested and charged with marijuana-possess/use, failure to appear (2nd degree), and paraphernalia violation, to which he pled guilty to drug paraphernalia in October 2012; (d) was arrested and charged with narcotic drug-possess/use (felony), marijuana-possess/use (felony, dangerous drug-possess/use (felony, drug paraphernalia-possess/use (felony), for which he was found guilty of attempted narcotic drug violation (felony) in November 2009, and sentenced to three years of probation; and (e) was arrested and charged in January 2006 with marijuana-possess for sale (felony) and drug paraphernalia violation (felony), for which he was found guilty of marijuana violation (misdemeanor) in June 2006, and sentenced to 18 months of probation. These allegations were cross-alleged under Guideline J.

In Applicant's response to the Guideline H allegations in the SOR, he admitted all of the allegations pertaining to his marijuana activity with explanations and clarifications. He claimed prior marijuana use with explanations. He claimed he rarely used marijuana between 2015 and 2019 and last used the substance in September 2019 during a family trip. He claimed his job termination in October 2014 was attributable to his drug use, and he passed similarly administered drug tests with other employers in 2015. He further claimed that he could not remember the circumstances surrounding his drug-related citation in 2009. He claimed, too, that he completed his three years of supervised probation within two years while staying sober with the support of his family and friends at the time. And he claimed he was selling marijuana in small amounts to people he knew in 2005-2006 to support his family during his return to college.

Addressing the cross-alleged criminal allegations associated with his drug arrests and charges, Applicant claimed he never meant to harm people with his poor choices in of drug selling. Going forward, Applicant claimed he is committed to providing and setting a his best example for his children while doing what he can to atone for his past mistakes

Findings of Fact

Applicant is a 43-year-old civilian for a defense contractor who seeks a security clearance. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in May 2019 and has two children from this marriage (ages 14 and nine), in addition to an adult daughter from a prior relationship (age 23) and a stepson (age 22) from this marriage. (GE 1; Tr. 13-14, 33) He earned a high school diploma in May 1997 and an associate's degree in August 2008. (GE 1 and AE B; Tr. 17-18, 34) Applicant attended college classes between August 2008 and May 2009 without earning a degree or diploma. (GE 1) He reported no military service.

Since March 2021, Applicant has been employed by his current defense contractor as a product test specialist. (AE B; Tr. 16) He earns \$60,000 from this employment. (Tr. 20) Between March 2015 and February 2021, he was employed as a crew leader for a landscape company. (GE 1; Tr. 17) Previously, he worked as an inside customer representative for a non-DoD employer. (GE 1) Applicant has never held a security clearance.

Applicant's drug history

Applicant was introduced to marijuana in high school in 1996. (GEs 1-2; Tr. 32-34) In the ensuing years, he increased his use of the drug to regular use. (GE 2; Tr. 32) Between 2007 and September 2019, Applicant used and purchased marijuana with varying frequency before giving up marijuana altogether. (GEs 1-2; Tr. 44-45) Applicant attributed his marijuana use and purchases to being young and immature. (GE 2; Tr. 45-46)

Between 2006 and 2012, Applicant was arrested and charged with marijuana-related offenses on three occasions: in January 2006, in June 2009, and in October 2012. (GEs 1-3) Records document Applicant's being arrested and charged in January 2006 with marijuana-possession for sale (a felony) of a weighted amount of between $\frac{1}{4}$ and $\frac{1}{2}$ of a pound of marijuana and a drug paraphernalia violation (a felony). The felony charges were reduced to a misdemeanor, and Applicant was found guilty of a marijuana violation (a misdemeanor) in June 2006. In turn, he was sentenced to 18 months of unsupervised probation. (GEs 1-3; Tr. 29, 36)

Following his completion of his probation conditions in 2007, Applicant resumed his usage of marijuana. (Tr. 37-38) Returning from college in May 2009, he reinstated his purchasing and selling of marijuana to earn money to pay his bills (typically $\frac{1}{4}$ to $\frac{1}{2}$ of a pound). (Tr. 28-29, 36-37) In June 2009, Applicant was stopped and searched by police while driving his wife's car. During their search of his wife's car, police found $\frac{1}{4}$ of a pound of marijuana in the trunk. (Tr. 39)

After searching Applicant's wife's vehicle, the police arrested Applicant and charged him with narcotic drug-possession or sale (felony), and marijuana possession/use (felony). (GEs 1-3; Tr. 39-40) Appearing in court November 2009 to answer charges, Applicant was found guilty of marijuana violation and sentenced to three years of probation. (GEs 1-3; Tr. 40-41) Applicant's felony conviction was later reduced to a

misdemeanor, and his probation conditions were reduced to 30 months of probation. (Tr. 40-41) Applicant was able to obtain an expungement of his marijuana violation and restoration of his voting rights in 2016. (Tr. 40-41)

Between 2009 and 2012, Applicant resumed his use of marijuana but did not engage in any selling of the substance. (Tr. 42) In October 2012, he was arrested and charged with marijuana-possess/use, failure to appear (2nd degree), and drug paraphernalia violation. (GEs 1-3; Tr. 30-31 and 42-43) After he was stopped and searched in his car, police found a bag of marijuana (1/2 of an ounce) and drug paraphernalia. (GEs 1-3; Tr. 30, 43)

Appearing in court to answer his 2012 drug charges, Applicant pled guilty to the drug paraphernalia violation charge in October 2012 and was fined \$300 and ordered to perform 20 hours of community service. (GEs 1-3; Tr. 43) After paying the fine and completing the court-ordered 20 hours of community service, Applicant was able to obtain an expungement of these charges as well. (Tr. 43)

In October 2014, Applicant was involved in an altercation in a gambling casino and was detained by police for disorderly conduct. (GEs 1-3; 31, 46-48) Applicant had smoked marijuana earlier in the day but was certain of his not being under the influence of marijuana when he was detained by police. (Tr.47) Applicant self-reported the incident to his facility security office (FSO) and was referred for a randomized urinalysis. (GE 2; Tr. 45), After failing his administered drug test, he was terminated for cause. (GE 2) Applicant has never been cited for any other failed urinalysis.

Since September 2019, Applicant has sustained his abstinence from marijuana use and has avoided old acquaintances and others who use marijuana and who may be involved in marijuana activities. (Tr. 32-33) He signed and submitted a statement of intent never to use marijuana or other illegal drugs again at the risk of having his security clearance suspended or revoked should any illegal drug be found in his system. He submitted this statement with the understanding that marijuana is banned by federal law and DoD policy. (AE A; Tr. 25-26, 48-51) Asked whether his statement of intent should be interpreted to include a waiver of his due process rights, he responded in the affirmative. (Tr. 51)

Endorsements and work recognitions

Applicant is well-regarded by his manager, supervisor, coworkers, and friends who have known Applicant for many years. (AEs B-H); Tr. 21-23) They credit Applicant with overall honesty, integrity, strong work ethic, and trustworthiness. (AEs B-H) Applicant's factory manager credited Applicant with "shout outs" of support from his coworkers for his expedited handling of company work orders. (AE I)

Whether Applicant's character references were aware of Applicant's past marijuana use and activities when they endorsed him is unclear. None of his references acknowledged awareness of his past misuse of marijuana or any other illegal drugs.

Nonetheless, his references provided strong backing of his overall reliability and trustworthiness and their letters are entitled to considerable weight.

Policies

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), “no one has a ‘right’ to a security clearance.” 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. Eligibility for access to classified information may only be granted “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 AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These AG guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified information. The AG guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant’s life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant’s conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Drug Involvement

The Concern: The illegal use of controlled substances, to include the misuse of 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.

Criminal Conduct

The Concern: Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

Burdens of Proof

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. See also Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

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 [or her] 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

Security concerns are raised over Applicant's multiple usage, purchases, and sales of marijuana in varying frequencies over a 23-year period (beginning in high school), and continuing to September 2019. Applicant's involvement with illegal drugs raise security concerns over whether Applicant's actions reflect pattern marijuana use and involvement incompatible with the judgment, reliability, and trustworthiness requirements for gaining access to classified information.

Drug involvement concerns

Applicant's admissions of using marijuana raise security concerns over risks of recurrence as well as judgment issues. On the strength of the evidence presented, two disqualifying conditions (DCs) of the AGs for drug involvement apply to Applicant's situation: DC ¶¶ 25(a), "any substance misuse"; and 25(c), "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of Illegal drugs or drug paraphernalia."

To his credit, Applicant has committed to abandoning all involvement with marijuana. For over three years, he has remained abstinent from illegal drugs (inclusive of marijuana) and exhibits no visible signs or indications of succumbing to any risks or pressures he might encounter to return to illegal drug use in the foreseeable future. For his past involvement in marijuana misuse, he expressed regret for the poor decisions he made in using, purchasing, and selling the substance.

Recognizing his need to set a better example for his wife and children (even in a state where marijuana is currently legalized), he abandoned illegal drugs and changed his lifestyle for the better. Overall, he has shown marked improvement in his judgment and maturity level in the three-plus years he has abstained from marijuana use and purchases and disassociated from individuals known for their involvement in illegal drugs.

Applicant's assurances of sustained abstinence from illegal drugs (inclusive of marijuana) are encouraging. And, his efforts warrant partial application of two mitigating conditions (MCs) of the drug involvement guideline: MC ¶¶ 26(a), "the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment"; and 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"

Still, with the combination of extensive quantities of marijuana Applicant was exposed to over his 23 years of use, purchases, and illegal drug activity, it is still too soon to absolve Applicant of risks of recurrence. Without more time to establish a more probative pattern of sustained abstinence from the use, purchase, and sale, of illegal drugs, none of the mitigating conditions are fully available to Applicant at this time. With only three-plus years of demonstrated abstinence from marijuana and involvement, more time with more corroborating evidentiary sources to support his continued abstinence are needed to facilitate safe predictions that he is no longer a recurrence risk.

Applicant's drug-related criminal arrests and convictions, while aged, reflect part of a historical pattern of illegal drug abuse and cannot be severed from his years of continued marijuana use and purchases without engaging in a piecemeal analysis long disfavored by the Appeal Board. See ISCR Case No. 19-02136 at 4 (App. Bd. March 8, 2021); ISCR Case No. 08-01075 at 6-7 (App. Bd. July 26, 2011) (favorable clearance decision reversed because the judge's "application of the mitigating condition and the whole-person factors did not consider the totality of Applicant's conduct and was erroneous.") Considered together, separate events and incidents may have a significance that is missing when each event is viewed separately in isolation. See ISCR Case No. 19-02136 at 4 (App. Bd. March 8, 2021)

Criminal conduct concerns

Security concerns over Applicant's drug-related arrest history are cross-alleged under Guideline J. Applicable DCs are (a), ¶¶ 31(a), "a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness" and 31(b), "evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct regardless of whether the individual was formally charged, prosecuted, or convicted." Trust in a person's ability to exercise good judgment, follow rules and regulations, and demonstrate reliability and

trustworthiness are core criteria for determining whether a person is able to meet the minimum requirements for holding a security clearance.

In the face of multiple proven acts of drug use, purchases, and sales of a federally banned substance (marijuana), more time is needed to restore trust in Applicant's ability to avoid recurrent acts of drug-related criminal activity in the foreseeable future. His laudatory endorsements from managers, supervisors, coworkers, and friends, while impressive, are not enough to counter his history of drug-related criminal conduct associated with his past marijuana sales.

While this is not a close case, even close cases must be resolved in the favor of the national security. See *Dept. of Navy v. Egan, supra*. Quite apart from any illegal drug concerns the Government may have for the clearance holder employed by a defense contractor, the Government has the right to expect good judgment and trustworthy behavior or sustained periods of time from the trust relationship it has with the clearance holder. See *Snepp v. United States*, 444 U.S. 507, 511n.6 (1980) Three-plus years of sustained abstinence from marijuana use and purchases, while encouraging, are not enough to facilitate safe predictions that he can avoid recurrent marijuana use and purchases and other marijuana-related activities in the future.

Whole-person assessment

From a whole-person perspective, Applicant has failed to establish enough independent probative evidence of his overall maturity, good judgment, reliability, and trustworthiness required of those who seek eligibility to hold a security clearance or sensitive position. While he presents with many positive reinforcements from his managers, supervisors, coworkers, and friends, of his overall reliability and trustworthiness, he lacks a sufficient track record of sustained avoidance of resumed use, purchases, and sales of marijuana to facilitate safe predictions he is at no risk of recurrence.

Considering the record as a whole at this time, including Applicant's recognized contributions to the nation's defense efforts, and granting due weight to the positive steps Applicant has taken to sustain his commitments to avoidance of illegal drug involvement, there is insufficient probative evidence of sustainable mitigation in the record at this time to make safe predictable judgments about Applicant's ability to avoid illegal drugs and drug activities in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant's drug-related activities over a 23-year period with only three-plus years of sustained avoidance, he does not mitigate security concerns with respect to the allegations covered by SOR ¶¶1.a-1.e of Guideline H and 2.a of Guideline J.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person, I conclude drug involvement and personal conduct security concerns are not mitigated. Eligibility for access to classified information is denied.

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:

GUIDELINE H (DRUG INVOLVEMENT):	AGAINST APPLICANT
Subparagraph 1.a-1.e:	Against Applicant
GUIDELINE J (CRIMINAL CONDUCT):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Roger C. Wesley
Administrative Judge