



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



In the matter of:)
)
) ISCR Case No. 22-02192
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

04/27/2023

Decision

HALE, Charles C., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 21, 2022. On November 18, 2022, the Department of Defense (DoD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The Department of Defense 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 November 29, 2022, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written case on January 3, 2023. On January 4, 2023, 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 acknowledged receipt of the FORM by fax on January 12, 2023. The case was assigned to me on April 3, 2023.

The SOR and the Answer are the pleadings in the case. Applicant did not include any additional evidence with his Answer. FORM Items 2 and 3 are admitted into evidence without objection.

Findings of Fact

Applicant is 23 years old. He was finishing his college requirements at the time he completed his SCA in March 2022. He is unmarried and has no children. (Item 2 at 5, 13, and 14.)

SOR ¶ 1.a -- using marijuana. In his Answer, Applicant admits he used marijuana with varying frequency from about 2017 to about April 2022. He told the investigator during the hiring process in 2022 he stopped using marijuana for a two-month period because he wanted to pass a drug test. (Item 3 at 8, 9.) He states he stopped using five days prior to his security clearance interview. He had vowed to never use marijuana again and said that he had “thrown away the drugs and paraphernalia. (Item 3 at 6.) His last use was on April 23, 2022. (Item 3 at 5.) He states in his Answer and in response to interrogatories he does not intend to continue using marijuana and that he has moved away from where he went to college and no longer associates with people involved in “criminal activity.” (Item 3 at 6.)

SOR ¶ 1.b -- purchasing marijuana. In his Answer, Applicant admits to purchasing marijuana from about 2017 to about April 2022. He would buy the marijuana in one state, at a recreational dispensary, and transport it back to his state because he understood it to be against the law in his state to purchase and possess marijuana. (Item 3 at 5 and 8.) He states in his Answer that he does not intend to possess marijuana in the future. He specified in his interrogatory response he did not sell or manufacture the drug during this time period. (Item 3 at 5.) He also stated he no longer possesses unused drugs, substances, or paraphernalia, and no longer associates with persons who use illegal substances (to include marijuana and derivative products) or frequent places where he may believe illegal substances are being used. (Item 3 at 6-7.)

SOR ¶ 1.c -- using Psilocybin Mushrooms. In his Answer, Applicant admits he used psilocybin mushrooms in about July 2019. Under further questioning during his security clearance interview he admitted to using mushrooms at the beach with his girlfriend. (Item 3 at 9.) He states this was an “eye opening experience and this was the only time he used mushrooms. (Item 3 at 9.)

SOR ¶ 2.a -- falsifying material facts. Applicant admits he falsified his answer to Question 23 of his SCA, which asked whether he had used or otherwise been illegally involved with a drug or controlled substance. He answered “Yes” but disclosed the

marijuana use as limited to a one-year period, from January 2021 through December 2021. He stated in his SCA that he used “it only on special occasions.” (Item 2 at 28.) He failed to disclose the full extent of his marijuana use until his April 28, 2022 security clearance interview. (Item 3 at 8.) He told the investigator he did not want to admit to his employer that he had been smoking marijuana for an extended period of time. (Item 3 at 8.)

SOR ¶ 2.b – falsifying material facts. Applicant admitted he deliberately falsified his answer to Question 23 of his SCA, which asked whether he had any additional illegal use of a drug or controlled substance to disclose . He answered “No” and failed to disclose his use of psilocybin mushrooms in July 2019.

Applicant explained in his April 2022 security clearance interview that after completing his SCA in March 2022 he researched marijuana use and learned he could not use marijuana while holding a security clearance. (Item 3 at 8-9.) He continued to use and possess marijuana up until his security clearance interview. (Item 3 at 9.) In the November 2022 interrogatory responses, he affirms he no longer uses or possesses any marijuana, and he no longer associates with people who do. (Item 3 at 6-7.)

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 admissions in his Answer to the SOR and elsewhere in the record are sufficient to raise the following disqualifying conditions under this guideline: AG ¶ 25:

(a): any substance misuse (see above definition); and

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

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.

AG ¶ 26(a) is not established. Applicant has established a history of illegally purchasing, possessing, and using marijuana in violation of state and federal law. His last drug involvement was on April 23, 2022. He has stated an intent to abstain from all drug involvement and substance misuse and acknowledges that any future involvement or misuse is grounds for revocation of national security. However, this period is not long enough to overcome security concerns raised by his five years of repeated drug abuse. His actions raise questions about his ability and willingness to comply with laws, rules, and regulations.

AG ¶ 26(b) is not established. Applicant stated in his security clearance interview and in written interrogatories that he intends to abstain from all drug involvement and substance misuse. He notes he completed his college education, and he has moved to a new state to work. The one cited two-month period of abstinence was to avoid testing positive on a hiring urinalysis. After researching marijuana use, he continued to use it until just a few days prior to his security clearance interview. His abstinence has been tactical. It is also recent. He has not had time to establish a pattern of abstinence. Further, given Applicant's record of falsifying about the full extent of his drug use (see below), his assertions of changed circumstances are not credible.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant's intentional failure to disclose his use of mushrooms and the full extent of his marijuana use in his March 2022 SCA raises the following disqualifying condition:

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.

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. The evidence reflects that Applicant did not promptly attempt to correct his SCA after he did his research. He admitted his omissions only under questioning by an investigator during his security clearance interview.

AG ¶ 17(c) is not established. Applicant's false statements were not "minor," because such statements strike at the heart of the security clearance process. See ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.) An applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the industrial security program. ISCR Case No. 01-03132 at 3 (App. Bd. Aug. 8, 2002). Applicant's false statements were recent and calculated to give him the most favorable hiring profile because they involved the current adjudication of his application for a security clearance.

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 Guidelines H and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Applicant's marijuana use is recent, and he lied about the full extent of his drug involvement on his SCA. Because Applicant 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). 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 concerns raised by his drug involvement and personal conduct.

Formal Findings

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

Paragraph 1, Guideline H: AGAINST APPLICANT

 Subparagraphs 1.a-1.b: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

 Subparagraphs 2.a-2.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