



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 22-02044
)	
Applicant for Security Clearance)	

Appearances

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

05/22/2023

Decision

FOREMAN, LeRoy F., 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 June 27, 2022. On October 31, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudication Service (DCSA CAS) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H.¹ The CAS 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

¹ The letterhead for the Statement of Reasons incorrectly reflects that it was sent by the Department of Defense Consolidated Adjudications Facility (DOD CAF). On June 17, 2022, the DOD CAF was renamed the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS).

guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on November 16, 2022, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written case on January 31, 2023. On February 6, 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 received the FORM on February 13, 2023, and submitted a timely response. The case was assigned to me on April 26, 2023.

Evidentiary Issue

The FORM included a summary of a personal subject interview (PSI) conducted on March 26, 2015. (FORM Item 4) The summary was not authenticated as required by Directive ¶ E3.1.20. Department Counsel informed Applicant that he was entitled to comment on the accuracy of the summary; make any corrections, additions, deletions or updates; or object to consideration of the summary on the ground that it was not authenticated. Applicant submitted a response to the FORM but did not comment on the accuracy or completeness of the summary, nor did he object to it. I conclude that he waived any objections to the summary. Although *pro se* applicants are not expected to act like lawyers, they are expected to take timely and reasonable steps to protect their rights under the Directive. ISCR Case No. 12-10810 at 2 (App. Bd. Jul. 12, 2016).

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegation in SOR ¶ 1.a (using marijuana with varying frequency from about November 2016 to about May 2022). He also admitted the allegation in SOR ¶ 1.b (intending to continue to use marijuana in the future), but with an explanation. His admissions are incorporated in my findings of fact. explanation:

Applicant is a 24-year-old test engineer employed by a defense contractor since March 2022. At the time he submitted his SCA, he was unmarried and lived with his parents. He graduated from college with a bachelor's degree in December 2021 and worked in various non-federal jobs until he was hired for his current position.

When Applicant submitted his SCA, he answered "Yes" to the question whether he had illegally used any drugs or controlled substances within the last seven years. He estimated that he used marijuana from November 2016 through May 2022. He stated that his use was "recreational not too often from time to time." He stated that he intended to use marijuana in the future, explaining, "I have friends who will be living in states where the drug is legal for recreational use and will possibly use it while visiting." (FORM Item 3 at 35-36)

During a PSI on August 2, 2022, Applicant told an investigator that he uses marijuana about once a month with his brother or with friends. He told the investigator that he does not illegally purchase marijuana but that he obtains it from dispensaries in adjoining states where it is legal. He also told the investigator that he has not had any drug counseling or treatment. (FORM Item 4 at 4)

When Applicant responded to the allegation in SOR ¶ 1.b, he admitted the allegation with the following explanation:

I admit to 1.b of claiming to continue use of marijuana in the future during initial interviews for security clearance. I would like to add that as of now I do intend to stop the use of marijuana consumption. After speaking with someone more knowledgeable of the process for [obtaining a] security clearance I am aware that use of marijuana will affect me being granted a security clearance. Not being granted clearance will affect my livelihood and the use of marijuana is not worth the overall problems it may cause in my life.

In the FORM, Department Counsel argued, “In his SOR Response, Applicant admits his marijuana use and states that he intends to stop using marijuana. It does not appear as though Applicant has in fact ceased marijuana use, which is not compatible with holding a clearance.” Applicant responded to Department Counsel’s argument as follows:

This letter is to make a correction to the argument that I have not stopped use of marijuana. My early statement of intention to stop was to never use marijuana again. I have not had any association with marijuana since October 2022 and will not have any association again. If needed I can take and provide a drug screening to show proof that I have ceased use.

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 and the evidence in the FORM establish 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; 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.

AG ¶ 26(a) is not established. Applicant's use of marijuana was recent, frequent, and did not happen under circumstances making recurrence unlikely.

AG ¶ 26(b) is not fully established. Applicant acknowledged his drug involvement in his SCA, and he stated that he last used marijuana in May 2022, shortly after he was hired by for his current employer and before he submitted his SCA. In his response to the FORM, he stated that his last association with marijuana was in October 2022, after he submitted his SCA. He has not claimed that he has disassociated from drug-using associates, including his brother. He has not changed or avoided the environment where he used drugs. Although he declared in his answer to the SOR and response to the FORM that he will not use marijuana again, he has not provided the signed statement of intent described in AG ¶ 26(b)(3).

Applicant did not disavow his answers to drug-related questions in the SCA until he received the SOR and realized that his marijuana use was an impediment to obtaining a clearance. It is not clear from the limited record whether he sincerely decided that obtaining a clearance was more important to him than his recreational use of marijuana, or whether he simply readjusted his statement of intent in an attempt to overcome the impact of his admission in the SCA. 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).

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.

The inconsistency between Applicant's answers in the SCA and his responses to the SOR and the FORM raises doubt about his true intent. Once a concern arises regarding an Applicant's eligibility for access to classified information, there is a strong

