



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



In the matter of:)
)
) ISCR Case No. 22-01968
)
Applicant for Security Clearance)

Appearances

For Government: Brian L. Farrell, Esq., Department Counsel
For Applicant: *Pro se*
05/24/2023

Decision

HALE, Charles C., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on November 4, 2021. On December 7, 2022, the Department of Defense (DoD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines E, H, and J. The DoD 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 Security Executive Agent Directive 4, National Security Adjudicative Guidelines (AG) (December 10, 2016).

Applicant answered the SOR on December 19, 2022, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written case on January 17, 2023. On January 18, 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 8, 2023, and did not respond. The case was assigned to me on May 12, 2023.

The SOR (FORM Item 1) and the Answer (FORM Item 2) are the pleadings in the case. FORM Item 3, the SCA; FORM Item 4, an SCA completed on April 25, 2016; and FORM Item 5, Interrogatories dated November 17, 2022, are admitted into evidence without objection.

Findings of Fact

In Applicant's answer to the SOR, he admitted to all of the allegations. His admissions are incorporated in my findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is a 33-year-old engineer for a defense contractor. He has worked for the defense contractor since May 2016. He is not married and has no children. He earned his bachelor's degree in 2013. He was granted a secret clearance in July 2017.

March 2014 and July 2015 violations of company's substance abuse policy. (Guideline E - SOR ¶¶ 1.a and 1.b). Applicant admitted in his Answer to testing positive on company drug tests for marijuana in March 2014 and July 2015. After the positive 2014 test he completed a drug treatment program. During a random 2015 urinalysis he tested positive again for marijuana and was terminated. He cited succumbing to peer pressure for why he used marijuana again in 2015. (Item 5 at 6, 9.)

From June 2006 until May 2022, used marijuana with varying frequency (Guideline H - SOR ¶ 2.a). Applicant listed in response to interrogatories that he first used marijuana in June 2006, and he estimated he stopped using it either in April or May of 2022. Between June 2006 and February 2014, he used it on a weekly basis. From February 2014 until his termination in July 2015 he used marijuana "very sporadically." From July 2015 until January 2016, he used it "weekly to a few times a week." From January 2016 until April 2022, he used marijuana "a few times sporadically." (Item 5 at 6.)

From July 2017 until May 2022, used marijuana with vary frequency while granted access to classified information (Guideline H - SOR ¶ 2.b). Applicant admitted he had a "lapse in judgment" when he "returned to behavior" that was "not acceptable while having a security clearance." He stated he let "stressors get to [him]." (Item 5 at 6.) On his 2021 SCA he disclosed he used marijuana occasionally from December 2018 until January 2019. (Item 3 at 36.) In response to interrogatories, he said he used marijuana "a few times sporadically" from January 2016 until April 2022, (Item 5 at 6.)

January 2019 arrest for possession of marijuana. (Guideline J - SOR ¶ 3.a).

Applicant admitted to being arrested for possession of marijuana. He was pulled over for failing to stop at a posted stop sign. The officer smelled marijuana and questioned him. He admitted to marijuana possession and showed the officer where it was in his car. He was arrested and charged with "Possession of Marijuana less than 2 oz." He has not heard anything further regarding the charge. (Item 5 at 14.)

Applicant did not respond to the FORM, so he did not provide any updated evidence to be considered in mitigation. He stated in his SCA that he does not intend to continue using marijuana because he wants to retain his security clearance. (Item 3 at 36.) He added in his interrogatory response he had "no intentions of future use." (Item 5 at 6.) He provided no character evidence for consideration under the whole-person concept.

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 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are established for SOR ¶¶ 1.a and 1.b.

(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:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;
- (2) any disruptive, violent, or other inappropriate behavior;
- (3) a pattern of dishonesty or rule violations; and
- (4) evidence of significant misuse of Government or other employer's time or resources.

Applicant's conduct in his workplace prior to having a security clearance reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(d) is therefore applicable. The general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in the general personal conduct security concern of AG ¶ 15 is established.

In order to mitigate SOR ¶¶ 1.a and 1.b, Applicant has the burden of establishing one or more of the mitigating conditions under AG ¶ 17. AG ¶¶ 17(c) and 17(d) may have some applicability. They provide:

(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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

As to SOR ¶ 1.a, Applicant acknowledges his use. He continued to use marijuana after taking a position involving drug testing. He continued the behavior of using marijuana after testing positive and after completing a drug treatment program. AG ¶ 17(c) is not applicable.

The relevant issue under AG ¶ 17(d) is whether Applicant's statement that he would stop using marijuana to retain his job is supported by his actions. Applicant failed a drug test after being placed in a treatment program. I conclude that the behavior is likely to recur. AG ¶ 17(d) is not applicable.

Applicant's conduct continues to cast doubt on his current reliability, trustworthiness, and good judgment. Personal conduct security concerns are not

mitigated.

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 record establish the following disqualifying conditions under this guideline, as detailed in AG ¶ 25:

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

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant admitted using marijuana from about June 2006 until May 2022. (SOR ¶ 2.a). AG ¶ 25(a) applies.

SOR ¶ 2.b alleges not only because Applicant used marijuana from July 2017 until May 2022, but also because he did so while granted access to classified information. The portion of this allegation concerning marijuana possession (without regard to classified access) is established but is also covered in SOR ¶ 2.a.

Applicant's answer did not address the status of his access to classified information at the time. He simply stated in his interrogatories that he held a clearance. Further, eligibility for access to classified information and the granting of access to classified information are not synonymous concepts. They are separate determinations. The issuance of a security clearance is a determination that an individual is eligible for access to classified national security information up to a certain level. Security clearance eligibility alone does not grant an individual access to classified materials. In order to gain access to specific classified materials, an individual must not only have eligibility (i.e., a security clearance), but also must have signed a nondisclosure agreement and have a "need to know." See Executive Order 13526, dated December 29, 2009, at § 4.1. See ISCR Case No. 20-03111 (App. Bd. Aug 10, 2022).

Applicant's admitted use of marijuana from July 2017 until May 2022, does not establish that he had access to classified information at the time. AG ¶ 25(f) does not apply, and SOR ¶ 2.b is concluded for Applicant.

The following mitigating conditions are potentially applicable as detailed in AG ¶ 26 to SOR ¶ 2.a:

(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 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 marijuana use from about June 2006 until May 2022 is recent. His actions cast doubt on his reliability, trustworthiness, and good judgment.

AG ¶ 26(b) is not established. Applicant admitted to using marijuana. His actions after losing a job in 2015 for drug use and after being arrested for possession of marijuana are inconsistent with his statements that he intends to avoid future involvement with marijuana to retain his position. The security concern regarding his drug involvement is not mitigated.

Guideline J: Criminal Conduct

AG ¶ 30 expresses the security concern for criminal conduct:

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.

The following disqualifying condition is potentially applicable as detailed in AG ¶ 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.

State law enforcement executed a consent search of Applicant's vehicle and arrested him for possession of marijuana. The above disqualifying condition applies.

The following mitigating conditions are potentially applicable as detailed in AG ¶ 32:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶ 32(a), (c), and (d) do not apply. Applicant's criminal conduct is serious. His criminal conduct is unresolved and continues to cast doubt on his current reliability, trustworthiness, good judgment, and willingness to comply with laws, rules, and regulations. The above mitigating conditions, individually or collectively, are insufficient to alleviate those concerns given his history of using marijuana. He needs to establish the charge has been resolved and a longer record of accomplishment of responsible behavior and compliance with rules, regulations, and the law before his criminal conduct can be considered mitigated.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense 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 E, H, and J in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). 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 E, H, and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his conduct.

Formal Findings

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

Paragraph 1: Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a-b:	Against Applicant
Paragraph 2: Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3: Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	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