



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 22-01584
)	
Applicant for Security Clearance)	

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

06/23/2023

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 February 2, 2021. On October 22, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (CAS) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. 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 guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on January 18, 2023, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's

written case on February 2, 2023, and sent a complete copy of the file of relevant material (FORM) to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. Applicant received the FORM on February 8, 2023, and did not respond. The case was assigned to me on June 1, 2023.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations. His admissions are incorporated in my findings of fact.

Applicant is a 30-year-old hardware test engineer employed by a defense contractor since September 2020. He attended a university from August 2011 to May 2020, when he received a bachelor's degree. He took more than the usual four years to earn his degree, because he worked full time while attending college. He has never married and has no children. He has never held a security clearance.

The SOR alleges multiple instances of drug involvement from May 2007 to September 2022. The evidence concerning each of the allegations of drug involvement alleged in the SOR is summarized below.

SOR ¶ 1.a: use of marijuana with varying frequency from about May 2007 to September 2022. When Applicant submitted his SCA, he disclosed that he used marijuana recreationally a "few times per year," less than 100 times in his lifetime, between May 2007 and August 2020. He stated that people with whom he associates use marijuana regularly because it is legal where he lives. He stated that he does not seek it out or use it regularly, but he uses it at social settings such as parties. (FORM Item 3 at 46)

In response to DOHA interrogatories in August 2021, Applicant stated that he had stopped using marijuana because of a "job requirement." He stated that his last use was in the spring or summer of 2021, in a jurisdiction where marijuana use is legal, when a joint of marijuana was passed around outside a bar. He stated that he did not intend to use illegal drugs or controlled substances in the future. (FORM Item 4 at 3-4)

In response to DOHA interrogatories in September 2022, Applicant admitted that he used marijuana once in July 2022 and once in September 2022. In response to a question whether he intended to use illegal substances in the future, he answered "No." He explained: "I answered No, as I do not intend to use marijuana. My reason is that I never seek it out, it is always a chance occasion that I am offered it and accept. It is very present in [the jurisdiction where he lives] as legal recreational use and I reject it quite often." (FORM Item 5 at 15-16)

SOR ¶ 1.b: purchase of marijuana from March 2010 to about August 2020. Applicant disclosed his purchases of marijuana in his SCA. (FORM Item 3 at 46) When Applicant was interviewed by a security investigator in March 2021, he told the

investigator that he regularly smoked marijuana with a friend but that he does not buy it. He told the investigator that, because marijuana is legal where he lives, he would consider smoking it if it is offered. (FORM Item 5 at 7)

SOR ¶ 1.c: involvement in the purchase of heroin from April to December 2016. Applicant disclosed in his SCA that he was dating a person who was addicted to heroin, and he gave her a ride to the site where she purchased it. (FORM Item 3 at 46) He gave the same answer when he was interviewed by a security investigator in March 2021. He no longer involved with this person. (Answer to SOR; FORM Item 4 at 8)

SOR ¶ 1.d: use of Ecstasy in the fall of 2016. During an interview with a security investigator in March 2021, Applicant admitted using Ecstasy one time at a party in the fall of 2016. He told the investigator that he did not intend to use it again. (FORM Item 5 at 8)

SOR ¶ 1.e: use of cocaine in May 2016 and October 2016. Applicant disclosed in his SCA that he smoked crack cocaine once and snorted cocaine once. He stated that he did not intend to use cocaine again because it is addictive. (FORM Item 3 at 45) He told a security investigator that he used cocaine with a woman who is no longer his girlfriend. (FORM Item 5 at 8)

SOR ¶ 1.f: use of psilocybin mushrooms. Applicant disclosed in his SCA that he used mushrooms twice, once in high school and once in college. (FORM Item 3 at 44) He told a security investigator that he used mushrooms in college and found that they had a psychedelic effect on him. He told the investigator that he would use them again if he were in a country where they were legal. (FORM Item 5 at 8)

SOR ¶¶ 1.g, 1.i, and 1.j: use of prescription medications (Adderall, Vyvanse, and Percocet) that were not prescribed for him. Applicant disclosed in his SCA and during his interview with a security investigator that he used Vyvanse once in high school, Percocet once in high school, and Adderall once in college. (FORM Item 3 at 43-44; FORM Item 5 at 7-8)

SOR ¶ 1.h: use of opium. Applicant disclosed in his SCA that he smoked an opium joint once in March 2012. He stated that he intends to never use opiates again because he has seen firsthand how they destroy the lives of addicted persons. (FORM Item 3 at 43-44)

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 raise the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse (see above definition); and

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

AG ¶ 25(g): expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant's equivocal answers to questions about his future use of marijuana are sufficient to raise AG ¶ 25(g) ("expressed intent to continue drug involvement and substance misuse; or failure to clearly and convincingly commit to discontinue such use"). However, his failure to clearly and convincingly commit to discontinue his marijuana use was not alleged in the SOR. Thus, I have considered his equivocal answers for the limited purposes of evaluating the evidence of mitigation and as part of my whole person analysis. See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

The following mitigating conditions are potentially relevant:

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 established for Applicant's isolated instances of experimentation with Ecstasy, cocaine, opium, mushrooms, prescription stimulants, and prescription pain killers while he was in high school and college. It is not established for his use of marijuana, which is recent and frequent. His equivocal response to the question in the September 2022 interrogatories, asking whether he will use marijuana again, precludes a finding that his use of marijuana is unlikely to recur. A security clearance investigation is not a forum for an applicant to split hairs or parse the truth narrowly. See ISCR Case No. 01-03132 at 3 (App. Bd. Aug. 8, 2002) His answers to questions about future drug involvement fall short of a clear and convincing commitment to discontinue his use of marijuana.

AG ¶ 26(b) is not established. Applicant used marijuana as recently as September 2022. He continues to associate with marijuana users and has not changed the environment where marijuana is used. He has not provided the statement of intent provided for in AG ¶ 26(b)(3).

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). 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 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 and 1.b:	Against Applicant
Subparagraphs 1.c-1.j:	For 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.

LeRoy F. Foreman
Administrative Judge