



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



In the matter of:)
)
) ISCR Case No. 22-02225
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

06/15/2023

Decision

HALE, Charles C., 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 March 9, 2022. On December 12, 2022, the Department of Defense (DoD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. 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 adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, National Security Adjudicative Guidelines (December 10, 2016).

Applicant answered the SOR on January 10, 2023, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written case on March 3, 2023. On March 7, 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 March 16, 2023, and submitted a Response and two Response exhibits (RE). The first RE is a certificate of completion labeled RE-B and the second RE is a drug screening result labeled RE-C. The case was assigned to me on June 1, 2023.

The SOR and Answer (FORM Item 1) are the pleadings in the case. Applicant did not include any additional evidence with his Answer or Response. FORM Items 2 and 3 and RE-B and RE-C are admitted into evidence without objection.

Findings of Fact

In Applicant's Answer to the SOR, he admitted the two allegations, SOR ¶ 1.a, that he used marijuana with varying frequency from about January 2018 through at least September 2022 and SOR ¶ 1.b, that he stated he may use marijuana in the future on his SCA and in response to DoD interrogatories.

Applicant is a 21-year-old electrician, never married, and has no children. He graduated from high school in May 2020 and started college in August 2020. He has been working fulltime while in college. He is the process of receiving his associate degree, and he will attend a university in the fall of 2023. He has been employed by a federal contractor since February 2022. (Item 2 at 9, 10-11 and Response.)

When Applicant submitted his SCA in March 2022, he disclosed that he used marijuana from about January 2018 through September 2021, describing the use as "every now and then treated as a celebratory" and added he was "not a frequent smoker." (Item 2 at 26.) He then noted "if not prohibited to be used for work purposes then I would most likely continue to use it every so often. But if my work prohibits I will not." (Item 2 at 26.) He fully discussed his drug use during his background interview in May 2022. In the interview he described his use as about once every six months, typically on a special occasion and added he does not seek it out. While he expressed that he would "likely" partake in use in the future he added he would not partake if is required by his employer to stop. (Item 3 at 8 of interview.) He responded similarly in his interrogatory response. (Item 3 at 2-3.) In his interrogatory response he updated his date of last use of marijuana to September 2022. (Item 3 at 2) In support of his statements, he submitted his most recent drug screening results from March 27, 2023, RE-C, and his certificate of completion of a drug and alcohol awareness class dated April 1, 2023, RE-B.

In his Response he stated he completed the SCA and DoD interrogatories with the "mind set of honesty being the best policy in the questions that were asked...." He affirmed he is fit to carry out his responsibilities, as well as manage himself accordingly, and that he will not smoke marijuana nor partake in any environment or people that affiliate with illegal substances. He stated, "he has made a choice to live a life that is drug free for [his] own personal well-being and a successful future." (Response.)

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 admission in his answer to the SOR and the information in the FORM are sufficient to raise the following disqualifying condition 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.

AG ¶ 26(a) is not established. Applicant used marijuana in September 2022, after he submitted his SCA in March 2022, and after he was interviewed for his background investigation in May 2022. The Appeal Board has “long held that applicants who use marijuana after having been placed on notice of the security significance of such conduct may be lacking in the judgment and reliability expected of those with access to classified information.” ISCR Case No. 20-01772 at 3 (App. Bd. Sep. 14, 2021). See *also* ISCR Case No. 21-02534 at 4 (App. Bd. Feb. 13, 2023) (“[A]fter applying for a security clearance and being adequately placed on notice that such conduct was inconsistent with holding a security clearance, an applicant who continues to use marijuana demonstrates a disregard for security clearance eligibility standards, and such behavior raises substantial questions about the applicant’s judgment, reliability, and willingness to comply with laws, rules, and regulations.”)

AG ¶ 26(b) is partially established. Applicant fully disclosed his drug involvement on his SCA, and throughout the security clearance process, which bolsters his credibility. He consistently stated throughout the security clearance process that if his work prohibits drug use, he will not use illegal drugs. The consistency in his responses and his supporting documents make his Response credible that he does not intend to use illegal drugs in the future. His Response shows his 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; however, it does not precisely incorporate all the terms of AG ¶ 26(b)(3).

Someone who picks and chooses what laws he will follow is not a good candidate for a security clearance. Applicant does not currently hold a security clearance. His recent contingent promise that he will not use illegal drugs if he is granted a security clearance does not generate confidence that he has not continued to use illegal drugs or that he will not use them in the future. None of the mitigating conditions are applicable, and Applicant’s illegal drug use is not mitigated.

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). 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-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