



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



In the matter of:)
)
) ISCR Case No. 22-00144
)
Applicant for Security Clearance)

Appearances

For Government: Nicholas T. Temple, Esq., Department Counsel
For Applicant: Peter Noone, Esq.

07/18/2023

Decision

BENSON, Pamela C., Administrative Judge:

Security concerns arising under Guidelines H (drug involvement and substance misuse) and E (personal conduct) are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On April 5, 2012, Applicant completed and signed a security clearance application (SCA) when applying for enlistment into the U.S. Navy. (Government Exhibit (GE) 2) He filled out another SCA on September 9, 2020, for a position with a government contractor. (GE 1) On March 16, 2022, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Specifically, the SOR set forth security concerns arising under Guidelines H and E. On April 6, 2022, Applicant provided a response to the SOR and requested a hearing.

On March 9, 2023, the case was assigned to me. On April 19, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for May 22, 2023. The hearing was held as scheduled.

Department Counsel offered four exhibits (GE 1-4) into evidence, and Applicant offered seven exhibits into evidence (Applicant Exhibits (AE) A-G). All proffered exhibits were admitted into evidence without objection. On May 30, 2023, I received a transcript of the hearing, and the record closed.

Findings of Fact

In Applicant's SOR response, he admitted all of the SOR allegations under Guidelines H and E. (SOR ¶¶ 1.a -1.f, and 2.a.) His admissions are accepted as findings of fact. Additional findings follow.

Applicant is 31 years old. He enlisted in the U.S. Navy in August 2012 and was honorably discharged in August 2016. From August 2016 to 2020, he was a member of the Navy Individual Ready Reserve (IRR). He worked part time at a car dealership while taking college courses. He earned an associate degree in 2018 and a bachelor's degree in May 2020. Since August 2020, he has been employed by a government contractor. His job title is senior classified systems administrator. He is not married, and he does not have any children. (Tr. 20-22, 27, 42; GE 1)

Drug Involvement and Substance Misuse and Personal Conduct

SOR ¶ 1.a alleges Applicant used marijuana with varying frequency from about 2009 to about May 2020. SOR ¶ 1.b alleges that he purchased marijuana during 2009 until about May 2020. SOR ¶¶ 1.c and 1.e allege that he used and purchased marijuana from September 2016 to May 2020, while granted eligibility for access to classified information. SOR ¶¶ 1.d and 1.f. allege that he used and purchased marijuana from September 2016 to about May 2020, while employed in a sensitive position with the IRR.

Applicant detailed and categorized his marijuana involvement into four distinct periods of his life. (1) from 2009 to 2012, he used marijuana recreationally in high school until his junior year of college; (2) from 2012 to 2016, while serving in the U.S. Navy, he did not use marijuana at all; (3) after his August 2016 discharge from the Navy, he occasionally used marijuana recreationally with friends until May 2020; and (4) from May 2020 to the date of the hearing, he had not used any illegal substance. (Tr. 22-42)

Applicant explained why he resumed his use of marijuana after his 2016 discharge from the U.S. Navy. He was adjusting to life as a civilian, he was back with his hometown friends, and marijuana was legal under state law where he lived. He was employed part-time by a car dealership, he attended college classes, and he was a member of the IRR. His involvement in the IRR was an unpaid position, he did not report to any military

commander or installation or drill, he did not wear his uniform, and he was unaware during that time that he had been granted security clearance eligibility in the event he received orders to mobilize. He has not used marijuana since he graduated from college in May 2020. He stated that he has matured and has no intention of using marijuana again. Applicant provided 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. See AG ¶ 26(b)(3), *infra*. He created strict boundaries with his girlfriend, friends, and family members, letting them know that he will not tolerate anyone using illegal drugs in his presence. He has also agreed to allow his employer to conduct multiple drug tests to confirm his compliance. (Tr. 22-42; AE G)

In May 2023, Applicant participated in a substance abuse evaluation with a substance abuse and mental health professional. He denied any previous substance abuse treatment, positive drug tests, or drug-related criminal charges. He was diagnosed with depression in 2018. He takes prescribed medication daily and denied any current depression or anxiety. Applicant took several administered tests used in the industry to assess whether he had a substance abuse disorder. The results showed that Applicant did not meet the criteria set forth by the American Psychiatric Association for an active cannabis abuse disorder. His final diagnosis was cannabis use disorder – mild – in sustained remission. He was not referred for further treatment or counseling. (AE F; Tr. 44-45)

Personal Conduct

SOR ¶ 2.a alleges Applicant falsified his marijuana use on the April 2012 SCA, when he denied that he had used any illegal or controlled substance within the last seven years. Applicant stated that his recruiter convinced him to omit his marijuana usage when he completed the SCA at the age of 20. The recruiter gave him the impression that Applicant would not be able to enlist into the U.S. Navy if he disclosed his prior use of marijuana, so he followed his recruiter's advice. When Applicant completed his SCA in September 2020, he was more mature and understood the importance of truthfulness. He fully disclosed his past use of marijuana on his 2020 SCA and throughout his 2020 security investigation. (GE 1, GE 2; SOR response; Tr. 45-48, 50-53)

Character Evidence

Three coworkers, including Applicant's manager, chief information officer and an associate director, and a longtime friend, praised his good character, integrity, and outstanding contributions to the DOD. The general sense of their statements is that he is exceptionally intelligent, candid, dedicated, responsible, and a professional employee. Applicant has been promoted twice since he started his employment in August 2020, and he has also received several performance bonuses. (Tr. 55-56; AE A, AE B, AE C, AE D, AE E)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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, these guidelines are applied 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, 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 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 “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Drug Involvement and Substance Misuse

AG ¶ 24 provides the security concern arising from drug involvement and substance misuse stating:

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.

AG ¶ 25 provides conditions that could raise a security concern and may be disqualifying in this case: “(a) any substance misuse (see above definition);” “(c) illegal possession of a controlled substance. . . .;” and “(f) any illegal drug use while...holding a sensitive position.” The record and Applicant’s admissions establish AG ¶¶ 25(a), 25(c), and 25(f).

AG ¶ 26 lists four conditions that could mitigate security concerns:

(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;

(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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2, [App. A] ¶ 2(b).

Possession of a Schedule I controlled substance is a federal criminal offense. Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substance. See Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

The Security Executive Agent (SecEA) promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications as follows:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a "whole-person concept." This requires adjudicators to carefully weigh a number of variables in an individual's life to determine whether that individual's behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in

light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.

Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position (Dec. 21, 2021) at 2 (quoted in ISCR Case No. 20-02974 at 3-4 (App. Bd. Feb. 1, 2022)).

Applicant used marijuana recreationally from 2009 to 2012 and from after his August 2016 discharge from the Navy until his May 2020 college graduation. He resumed marijuana use after his 2016 honorable discharge because he returned to his hometown friends, his state of residence had legalized the use of marijuana, and he was adjusting to life as a civilian. He was unaware while he was a member of the IRR that he held security clearance eligibility in the event he received orders to mobilize. Since May 2020, he has matured, started a promising career with his current employer, and no longer desires to use marijuana in the future.

Applicant provided some important mitigating information. He voluntarily disclosed his marijuana possession and use during the 2020 security clearance process. He disclosed his marijuana use on his 2020 SCA, in his SOR response, and during his hearing. He provided a signed statement of intent to abstain from all drug involvement and substance misuse, and he acknowledged that any future involvement or misuse is grounds for revocation of national security eligibility. He also participated in a substance abuse evaluation in May 2023, and he received a favorable diagnosis.

Applicant is a valued employee and a trustworthy friend, and he testified credibly during the hearing. I am convinced his marijuana possession and use “happened under such circumstances that it is unlikely to recur [and] does not cast doubt on [his] current reliability, trustworthiness, [and] good judgment.” Guideline H security concerns are mitigated.

Personal Conduct

AG ¶ 15 describes the security concern about personal conduct 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

Based on the record and Applicant's admission, AG ¶ 16 includes one disqualifying condition that could raise a security concern and may be disqualifying in this case:

(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.

AG ¶ 16(a) applies and will be addressed within the mitigation analysis below.

AG ¶ 17 provides conditions that could mitigate security concerns as follows:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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.

SOR ¶ 2.a alleges Applicant falsified his marijuana use on his April 2012 SCA when he denied any illegal drug use within the last seven years. He was 20 years old, and his recruiter advised him to omit his marijuana usage or else he may not be considered a suitable candidate for enlistment into the U.S. Navy.

Although Applicant failed to honestly and candidly disclose derogatory information on his April 2012 SCA, it is important to note he was completely forthright about his marijuana usage when he completed his second SCA in September 2020. Applicant learned the importance of truthfulness while serving four years in the Navy, and he acknowledged his personal growth and maturity. He consistently reported his marijuana use and purchase throughout his 2020 security investigation and during the hearing. I find that when he was 20 years old and easily influenced, he relied on bad advice from his recruiter. More than a decade has passed since that incident, and it happened under such

unique circumstances that it is unlikely to recur. Applicant's past omission does not cast doubt on his current reliability, trustworthiness, and good judgment. Mitigating conditions AG ¶¶ 17(b), 17(c), and 17(d) apply. Personal conduct security concerns are mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The 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.

Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guidelines H and E are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant discussed his history of involvement with marijuana on his September 2020 SCA, in his SOR response, and at his hearing. He did not test positive on a urinalysis test, he has never been treated for a substance abuse disorder, and he does not have any drug-related arrests. He stopped using marijuana over three years ago and promised not to use marijuana in the future. His testimony was credible and candid.

An honest and candid self-report of marijuana use is an important indication that, if granted security clearance eligibility, the individual would disclose any threats to national security, even if the disclosure involves an issue that might damage his or her own career or personal reputation. However, to receive full credit, the self-report must be accurate, and I have found Applicant's accounting sincere. I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant has mitigated the drug involvement and substance misuse and personal conduct security concerns.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraphs 1.a through 1.f:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is granted.

Pamela C. Benson
Administrative Judge