



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



In the matter of:)	
)	
)	ISCR Case No. 22-01566
)	
Applicant for Security Clearance)	

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: *Pro se*

08/14/2023

Decision

MANNS, Gatha, 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 signed and submitted a security clearance application (SCA) on March 4, 2021. On December 8, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (CAS) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement and substance misuse). The CAS acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on June 8, 2017.

Applicant responded to the SOR on December 16, 2022, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on January 5, 2023, including Items 1 through 4. On

January 9, 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 10, 2023, and did not respond. The case was assigned to me on May 15, 2023. The Government exhibits, including Items 1 through 4, are admitted in evidence without objection.

Findings of Fact

In Applicant's answer to the SOR, he admitted, without comment, to the single allegation of drug involvement in this SOR. His admission is incorporated in my findings of fact.

Applicant is a 25-year-old engineer currently sponsored by a defense contractor. He graduated from high school in May 2016, and subsequently enrolled in a full-time university program of study in August 2016. He completed the program in May 2020, and was awarded a bachelor's degree. Applicant has never been married and does not have children.

Applicant completed his first SCA in March 2021, while being sponsored by the U.S. Customs and Border Protection (Customs). He disclosed that Customs determined he was ineligible for a security clearance and thus denied his request for a clearance. (Item 4 at 7, and Item 3 at 60) He previously disclosed in his SCA that he purchased and used marijuana from September 2016 through February 2021, and that the frequency of his marijuana use was "approximately 4-5 times per month." He stated he used marijuana for "stress relief." (Item 2 at 43 through 44) He also indicated his intention to continue using marijuana in the future, responding "yes" to this question. (Item 2 at 44)

Applicant subsequently completed his second nearly identical SCA in November 2021, this time, sponsored by a defense contractor. (Item 3) He made additional updated disclosures in his second SCA. For example, he disclosed he continued to use marijuana through September 2021, with the same frequency and for the same stated purpose of stress relief. He also continued to purchase marijuana during this period. He did not include the additional dates because marijuana, he stated, was no longer illegal in his state. Rather than through friends and others, he purchased marijuana through a state dispensary. (Item 3 at 57 through 59) He again stated his intention to continue using marijuana in the future. (Item 3 at 58)

In his February 2022 interview, after the investigator informed him using marijuana was federally illegal, Applicant stated he would discontinue using marijuana if this affects his job and that he would have no future intent. He previously stated during the same interview that he was not dependent on marijuana, that he could stop using it at any time, and that he had never received treatment or counseling for marijuana use. He also told the investigator marijuana had a calming effect on him and that he used it to relieve stress. (Item 4 at 7)

In about November 2022, prior to issuance of the SOR, Applicant verified the accuracy of his summarized interview with DoD investigators, and responded to specific questions concerning his most recent drug involvement. (Item 4) He admitted he continued his use of marijuana through October 2022, stating he used it “about every 10 days.” He also reiterated prior statements made concerning his future intent, namely, that he would continue using marijuana in the future, and that he had no intent to change his behavior. (Item 4 at 9)

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.” EO 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.” EO 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 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." Department of the Navy v. Egan, 484 U.S. 518, 531 (1988); see AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse 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 disqualifications 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.

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; and

AG ¶ 26(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.

None of the above mitigating conditions apply to the facts of this case. Applicant's drug involvement is recent and frequent. He has taken no action to discontinue his federally illegal use of marijuana. Instead, he doubled down on his stated desire and intention to continue possessing and using marijuana in the future. Finally, he has never received treatment or counseling for his use of marijuana.

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 relevant 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), 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. I have incorporated my comments under Guideline H in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the drug involvement security concerns. He is not a suitable candidate for access to classified information.

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: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Gatha Manns
Administrative Judge