



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



In the matter of:)
)
) ISCR Case No. 22-01234
)
Applicant for Security Clearance)

Appearances

For Government: Karen Moreno-Sayles, Esq., Department Counsel
For Applicant: *Pro se*

09/28/2023

Decision

LAFAYE, 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 September 28, 2021. On February 16, 2023, 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 February 22, 2023, 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 March 23, 2023, including Items 1 through 4. On March

24, 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 April 12, 2023, and did not respond. The case was assigned to me on July 14, 2023. The Government exhibits, including Items 1 through 4, are admitted in evidence without objection.

Findings of Fact

In his answer to the SOR, Applicant admitted, without comment, the single allegation of drug involvement (SOR ¶ 1.a). His admission is incorporated in my findings of fact.

Applicant is a 49-year-old systems engineering manager sponsored by a successive defense contractor since January 2021. He graduated from high school in June 1992, and subsequently enrolled in a full-time university program of study in August 1992. He completed the program in May 1996 and was awarded a bachelor's degree. He continued his education in August 1998 and was awarded a master's degree in May 2004. Applicant married in November 2003, and divorced in about April 2007. He does not have children. (Items 2 and 3)

Applicant disclosed he first used marijuana in high school in May 1991, and that he continued to use it casually through about 1995. (Item 4 at 3) In August 1995, he disclosed he was criminally charged with possession of drug paraphernalia. After admitting responsibility and satisfying program requirements, he successfully completed probation before judgment, a pretrial diversion program. He stated the charge was later expunged from his record. (Item 2 at 45, and Item 4 at 3) Applicant's drug involvement in 1995 is not alleged in the SOR.

In about April 2011, Applicant completed his first application for a public trust position. He was granted eligibility for access to sensitive information about a month later. He subsequently submitted an SCA in April 2018, seeking eligibility for access to classified information. Applicant stated in his 2021 SCA, that he was granted eligibility for access to top-secret information during the same month. (Item 2 at 50)

In his September 2021 SCA, Applicant disclosed he purchased and used marijuana from about July 2021 through August 2021. (SOR ¶ 1.a) He explained that he sustained a "debilitating back injury" and decided to use marijuana to help alleviate his sciatic nerve pain. He purchased the marijuana he used in the form of edibles, from a local dispensary. He stated he ingested it about three to five times during this period. (Item 2 at 47-48; and Item 3 at 5)

Applicant stated he also sought medical treatment through a chiropractor, and that after a few weeks of rehabilitation and after purchasing a new mattress, he stopped using marijuana in about August 2021. He has not received drug counseling or treatment, and he stated he does not socialize or associate with any person who uses drugs illegally. (Item 2 at 47-48; and Item 3 at 5)

In his September 2021 SCA, Applicant responded “yes” to the question of whether he used marijuana while possessing a security clearance. (Item 2 at 48) (SOR ¶ 1.a, in part) Notwithstanding this disclosure, there is no independent evidence in the record to establish he was “granted access to classified information” when he used marijuana from July 2021 through August 2021, as alleged. Applicant also acknowledged understating at the time he purchased and used marijuana, that marijuana remains a federally illegal controlled substance.

Applicant stated his intention to refrain from using marijuana or any illegal drugs in the future in his September 2021 SCA, and later signed a similar sworn statement in February 2023. (Item 2 at 48, and Item 4 at 4)

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.

The guidelines note several conditional that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

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

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

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position.

The admitted allegations in this case establish the above disqualifying conditions in AG ¶ 25(a) and AG ¶ 25(c), and shift the burden to Applicant to provide mitigation of the Government's security concerns. Applicant's use and purchase of marijuana in July and August 2021 is established by his admission to SOR ¶ 1.a; and by his disclosures in his September 2021 SCA and December 2021 interview with a DOD investigator, authenticated in February 2023.

Notwithstanding Applicant's admission to SOR ¶ 1.a without comment, it is not established that his 2021 drug use occurred "while [he was] granted access to classified information" as alleged, and as required by AG ¶ 25(f). In making this determination, I considered the Appeal Board guidance provided in ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022), recently affirmed in ISCR Case No. 22-01661 at 4 (App. Bd. Sep. 21, 2023). The Appeal Board determined that AG ¶ 25(f) requires proof of a signed nondisclosure agreement and evidence of need-to-know access to classified or sensitive information, neither of which are present in the record. AG ¶ 25(f) is not established.

Guideline H lists conditions in AG ¶ 26 that could mitigate security concerns raised by the potentially disqualifying conditions above. The following mitigating conditions are potentially applicable in this case:

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 not established. Applicant's use of marijuana, starting in high school in 1991 and continued through August 1995 after he was criminally charged with a drug offense, is not recent. However, his purchase and use of marijuana from July through

August 2021 is recent, having occurred only weeks before his current SCA completed in September 2021. Notably, his use also occurred while employed by a federal defense contractor, following applications both a position of public trust in 2011, and a top-secret security clearance in 2018. See ISCR Case No. 22-01661 at 3 (App. Bd. Sept. 21, 2023).

AG ¶ 26(b) is not fully established. Though Applicant acknowledged his 2021 drug involvement and signed a sworn statement to refrain from using marijuana or any illegal drugs in the future, providing some mitigation under AG ¶ 26(b)(3); he has not mitigated concerns regarding his decision and action to purchase and use marijuana in the first place. Applicant has a prior history of illegal drug involvement starting in 1991. He also acknowledged being fully aware that marijuana remains a federally illegal controlled substance prior to purchasing and using it in 2021. Moreover, though his debilitating back injury was undoubtedly painful, he stated he was able to successfully treat the condition after a few weeks of rehabilitation work with a chiropractor, and purchasing a new mattress. Applicant has not established a pattern of abstinence here. He has not provided sufficient evidence to mitigate security concerns regarding his drug involvement.

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 Guidelines 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 question him about his prior actions or his future intentions of marijuana use, or 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. Overall, the record evidence leaves me with questions and doubts about his eligibility and suitability for a security clearance.

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 LaFaye
Administrative Judge