



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



In the matter of:)
)
) ISCR Case No. 23-00251
)
Applicant for Security Clearance)

Appearances

For Government: Sakeena Farhath, Esq., Department Counsel
For Applicant: *Pro se*

11/28/2023

Decision

HARVEY, Mark, Administrative Judge:

Security concerns arising under Guideline H (drug involvement and substance misuse) are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On March 14, 2022, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SCA). (Government Exhibit (GE) 1) On March 2, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; Department of Defense (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. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DCSA CAS 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 Guideline H. (HE 2) On

March 29, 2023, Applicant provided a response to the SOR and requested a hearing. (HE 3) On May 16, 2023, Department Counsel was ready to proceed.

On May 26, 2023, the case was assigned to me. On June 15, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice, setting the hearing for August 10, 2023. (HE 1) The hearing was held as scheduled.

Department Counsel offered one exhibit into evidence; Applicant offered two exhibits into evidence; there were no objections; and all proffered exhibits were admitted into evidence. (Transcript (Tr.) 14, 21-23; GE 1; Applicant Exhibit (AE) A-AE B) On August 21, 2023, DOHA received a transcript of the hearing. Applicant provided two exhibits after the hearing, which were admitted into evidence without objection. (AE C-AE D) The record closed on September 1, 2023, when the last exhibit was received.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.a and 1.b. (HE 3) He also provided mitigating information. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 39-year-old corporate officer for a company, which provides highly technical engineering products and services to DOD. (Tr. 6, 9-11) In 2002, he graduated from high school. (Tr. 7) In 2006, he was awarded a bachelor's degree in business administration with majors in marketing and management of human resources. (Tr. 7) In 2010, he was awarded a master's degree in business administration (MBA). (Tr. 8) In 2016, he was awarded a bachelor's degree in electrical engineering technologies, and in 2020, he received an associate degree in applied science. (Tr. 8) He has not served in the military. (Tr. 9) In 2014, he married, and his children are ages 2 and 5. (Tr. 9)

Drug Involvement and Substance Misuse and Personal Conduct

SOR ¶ 1.a alleges Applicant used and purchased marijuana with varying frequency from about September 2001 to about February 2022. He used marijuana three to five times a week at the time he completed his March 14, 2022 SCA. (Tr. 32) From 2011 to 2022, he used marijuana about 500 times. (Tr. 27) He purchases marijuana in a state where possession and use are legal. (Tr. 36, 39-40; GE 1) Applicant uses a vape and edibles to consume marijuana. (Tr. 30, 33) He most recently used marijuana on August 5, 2023, which was five days before his hearing. (Tr. 33) He uses marijuana to help relieve stress. (Tr. 35) He believes marijuana use should be an "inalienable right" because the benefits of marijuana use far outweigh the negatives. (Tr. 41) He acknowledged marijuana possession was illegal under federal law. (Tr. 42)

Applicant was honest about his marijuana involvement. He did not test positive on a urinalysis test, and he does not have any drug-related arrests.

SOR ¶ 1.b alleges he intends to continue to use marijuana in the future. Applicant said at his hearing that he intends to continue to consume marijuana. (Tr. 42) He has not attended any therapy or counseling for abuse of marijuana. (Tr. 48) Even if he receives a security clearance, he would probably continue to use marijuana. (Tr. 48)

Department Counsel moved to amend the SOR to allege that Applicant used marijuana from February 2022 to at least August 5, 2023. (Tr. 34) Applicant did not object, and I granted the motion. (Tr. 34)

Applicant did not believe his marijuana use was relevant in a determination of his trustworthiness. (Tr. 19) His marijuana use cannot be used to coerce or bribe him to obtain classified or sensitive information. (Tr. 19-20, 23)

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 “(g) expressed intent to continue drug involvement and substance misuse.” The record establishes AG ¶¶ 25(a), 25(c), and 25(g).

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 Fact Sheet Marijuana/Cannabis at https://www.dea.gov/sites/default/files/2020-06/Marijuana-Cannabis-2020_0.pdf. (HE 4) See also *Gonzales v. Raich*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I). On October 2022, President Biden announced that he asked the Attorney General to review whether marijuana should remain as a Schedule I controlled substance. (AE C) There is some support in the federal government to move marijuana from Schedule

I to Schedule III. (AE D) Schedule III controlled substances are less addictive and dangerous than Schedule I controlled substances. President Biden announced additional remedies for persons convicted of simple possession of marijuana. (*Id.*) President Biden said:

As I often said during my campaign for President, no one should be in jail just for using or possessing marijuana. Sending people to prison for possessing marijuana has upended too many lives and incarcerated people for conduct that many states no longer prohibit. Criminal records for marijuana possession have also imposed needless barriers to employment, housing, and educational opportunities. (AE C)

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 about 500 times from 2011 to 2023. He knew his marijuana possession or use or both was prohibited by federal law. He used marijuana five days before his hearing, and he said he intended to use marijuana in the future. His decision to repeatedly possess and use marijuana is an indication he lacks the qualities expected of those with access to national secrets.

Applicant provided some important mitigating information. He voluntarily disclosed his marijuana possession and use during the security clearance process. He disclosed

his marijuana use on his SCA, in his SOR response, and during his hearing. He candidly said he intends to continue using marijuana regardless of whether he is granted access to classified information.

I am not convinced Applicant's 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. He is likely to continue to use marijuana in the future. Guideline H security concerns are not 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 Guideline H are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 39-year-old corporate officer for a company, which provides highly technical engineering products and services to DOD. In 2006, he was awarded a bachelor's degree of business administration with majors in marketing and management of human resources. In 2010, he was awarded an MBA. In 2016, he was awarded a bachelor's degree in electrical engineering technologies, and in 2020, he received an associate degree in applied science.

Applicant discussed his history of involvement with marijuana on his SCA, in his SOR response, and at his hearing. His marijuana involvement was not discovered through law enforcement or security investigations. He did not test positive on a urinalysis test, and he does not have any drug-related arrests.

The evidence against grant of a security clearance is more persuasive at this time. Applicant used marijuana about 500 times from 2011 to 2023. He received clear notice in the SOR that use of marijuana was incompatible with holding a security clearance. He

used marijuana five days before his hearing. He candidly stated that he would probably continue to use marijuana in the future even if he receives a security clearance.

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. Applicant was candid and honest about his history of marijuana possession and use.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. *See Dorfmont*, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

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 failed to mitigate drug involvement and substance misuse security concerns.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to be eligible for a security clearance. The determination of an individual's eligibility and suitability for a security clearance is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under his current circumstances, a clearance is not warranted. In the future, he may well demonstrate persuasive evidence of his security worthiness.

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
Subparagraphs 1.a, 1.b, and 1.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge