



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



In the matter of:)
)
) ISCR Case No. 22-01887
)
Applicant for Security Clearance)

Appearances

For Government: Erin Thompson, Esq., Department Counsel
For Applicant: *Pro se*

12/08/2023

Decision

BENSON, Pamela C., Administrative Judge:

The statement of reasons (SOR) alleges, and Applicant admitted that he possessed and used marijuana from July 2012 to at least October 2022. He continued his use of marijuana for five years after he stated in 2017 that he did not intend to use marijuana again, and after he was granted a security clearance in early 2018. Security concerns arising under Guideline H (drug involvement and substance misuse) and Guideline E (personal conduct) are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On June 10, 2017, and again on August 15, 2021, Applicant completed and signed the Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SCA). (Government Exhibit (GE) 1 and 2) On January 13, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued an 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.

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 Guidelines H and E. Applicant provided an undated response to the SOR and requested a hearing.

On June 28, 2023, the case was assigned to me. On September 15, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for October 5, 2023. The hearing via Microsoft Teams video teleconference was held as scheduled.

Department Counsel offered four Government Exhibits (GE) into evidence. (GE 1-4) Applicant testified but did not offer any documents, and the Government's proffered exhibits were admitted into evidence without objection. On October 15, 2023, DOHA received a transcript (Tr.) of the hearing.

Findings of Fact

In Applicant's SOR response, he denied SOR allegation ¶ 1.a, and he admitted SOR allegations ¶¶ 1.b and 2.a. Applicant's admissions are accepted as findings of fact. Additional findings follow. (SOR response)

Applicant is a 29-year-old electrical hardware engineer who has worked for a DOD contractor since June 2017. He acknowledged that he was drug tested before he was offered a position with his employer. He is unmarried and does not have any children. He graduated with his bachelor's degree in 2017. In approximately June 2023, he enrolled in a graduate degree program. Applicant has held a DOD security clearance since February 2018. (Tr. 13-15, 22-23; GE 1)

Drug Involvement and Substance Misuse and Personal Conduct

SOR ¶ 1.a alleges Applicant used marijuana with varying frequency from about July 2017 to about October 2022, while granted access to classified information. He intends to continue using marijuana in the future. Applicant admitted in his SOR response that he used marijuana during the specified period but denied that he ever stated he had a clear intention to use marijuana in the future.

SOR ¶ 1.b alleges Applicant purchased marijuana on various occasions from approximately July 2012 to January 2017. Applicant admitted this information in his SOR response but clarified that he purchased marijuana less than 10 times during his five years in college. Both SOR ¶¶ 1.a and 1.b were cross-alleged under Guideline E. (SOR ¶ 2.a)

In June 2017, Applicant completed an SCA and disclosed that he had used marijuana recreationally from July 2012 through January 2017. He listed too that he planned to smoke marijuana for recreation in the future, but only if it became legal and

acceptable to do so. He did not plan to use marijuana while employed by the government and while it remained unacceptable by law. (GE 2)

Applicant participated in a background interview in November 2017, with a DOD authorized investigator during the course of his security clearance investigation. Applicant discussed his use and purchase of marijuana from 2012 through 2017. He stated that he will not use illegal drugs in the future because he did not want to jeopardize his security clearance and employment with a DOD contractor. He was issued a DOD security clearance in February 2018. In October 2022, he reviewed the investigator's report and confirmed the recounted information was true and accurate. (GE 3; Tr. 14, 18-19)

In August 2021, Applicant completed another SCA, and he disclosed that he had used marijuana randomly for recreation from July 2012 through August 2020. He listed:

I do plan to randomly smoke marijuana for recreation in the future, only if it becomes legal and acceptable to do so. I do not plan to partake in marijuana use while unacceptable by law. (GE 1)

In October 2021, Applicant participated in another background interview. The DOD authorized investigator asked him what his future intentions were for smoking marijuana which is illegal under federal law. Applicant stated that he does not plan to use marijuana in the future, but he might if he feels like smoking it in the moment. He has smoked marijuana recreationally and casually. He could not state with certainty what he may or may not do in the future. He enjoys creating music and being involved in musical projects where marijuana is usually involved, and he usually partakes in this type of environment. In October 2022, Applicant reviewed the investigator's report and confirmed the recounted information was true and accurate. (GE 3; Tr. 14, 19-20)

DOHA sent Applicant interrogatories about his illegal drug involvement. In October 2022, Applicant responded to the interrogatories, and he listed that from January 2002 through October 2022, he had used marijuana on approximately four or five occasions. During the October 2023 hearing, Applicant stated that he last used marijuana in October 2022, and he does not intend to use marijuana in the future. (GE 4; Tr. 15-18)

Applicant testified during the hearing that he has matured over the past few years by focusing more on his education and career. He does not intend to use marijuana in the future. He admitted that he is still involved in the music scene and is frequently around colleagues who use marijuana. Although he may not be able to avoid marijuana in that environment, he has made his boundaries clear to his colleagues and he does not intend to participate in the use of marijuana. (Tr. 20-22)

Applicant admitted that his employer provided annual security briefings, but he could not recall specifically if there was any information provided about illegal drug use. He acknowledged that he had learned from the training that if he were ever arrested for violating the law, for example, he would need to report that adverse information to the facility security officer (FSO). When asked if he had ever reported his use of marijuana to

the FSO after he received a security clearance in February 2018, he said he had not. He denied ever participating in a substance abuse counseling program. (Tr. 23- 25)

During the hearing, the following relevant information was addressed:

ADMIN. JUDGE BENSON: Okay. Sir, in your subject interview in November 2017, you said you would not use marijuana in the future because you did not want to jeopardize your security clearance or your job. But you used it after 2017, you used it every year up until October 2022, is that correct?

APPLICANT: Yes, based on what I reported there, yes. And what I reported is true.

ADMIN. JUDGE BENSON: So, every time you used it after that statement you made, you knew it was wrong, correct?

APPLICANT: Yeah, after that statement, yeah, I have to take accountability for any use that happened whether I initiated it or not. (Tr. 25)

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

Guideline H: 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. . . .”; “(f) any illegal drug use while granted access

to classified information or holding a sensitive position”; and “(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.” The record establishes AG ¶¶ 25(a), 25(c), and 25(g).

AG ¶ 25(f) is not established. Applicant held a security clearance; however, there is no evidence that he actually had access to classified information. ISCR Case No. 20-03111 (App. Bd. Aug. 10, 2022) (discussing access to classified information). There is no definition in the Directive defining a sensitive position, and the evidence did not establish Applicant’s position was sensitive at the time he was possessing and using marijuana.

AG ¶ 26 lists three 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;

(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

(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 mitigating conditions fully apply. To his credit, Applicant voluntarily and candidly disclosed his marijuana possession and use during the security clearance process. In 2017 he could not state with certainty whether he would, or would not, use marijuana in the future. His indecision is especially troubling because he was aware that marijuana use was prohibited by federal law and could jeopardize his security clearance and job. During the hearing, however, Applicant stated that he does not intend to use marijuana in the future because he has matured, and he is more focused on his education and career. Although his response provides encouraging and positive information, the evidence against mitigation is more persuasive at this time. An individual who acts only when they have been placed on notice that their security clearance is in jeopardy may be lacking the judgment and self-discipline in the long term that is expected of security clearance holders when they are not facing an immediate threat.

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 substances. 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 Director of National Intelligence (DNI) Memorandum ES 2014-00674, "Adherence to Federal Laws Prohibiting Marijuana Use," October 25, 2014, states:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

See ISCR Case No. ISCR Case No. 20-01772 (App. Bd. Sept. 14, 2021) (noting continued relevance of October 15, 2014 DNI Memorandum in the application of Guideline H for marijuana cases).

In 2017, Applicant knew his marijuana possession and use was prohibited by federal law, and he acknowledged that doing so may have an adverse effect on his employment and security clearance eligibility. Applicant's decision to repeatedly possess and use marijuana for another five years is an indication he lacks "the qualities expected of those with access to national secrets." ISCR Case No. 17-03191 at 3 (App. Bd. Mar. 26, 2019) (citing ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019) ("An applicant's misuse of drugs after having been placed on notice of the incompatibility of drug abuse with clearance eligibility raises questions about his or her judgment and reliability")).

Applicant has demonstrated that even though he was fully aware that his actions of using marijuana were inconsistent with holding a security clearance and could raise questions about his reliability, trustworthiness, and willingness to abide by law, rules, and regulations, his own personal preferences were more significant. I have lingering concerns about his future compliance with federal law, DOD security rules, and his employer's drug-free workplace policy. Guideline H security concerns are not mitigated at this time.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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. . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: . . .

(3) a pattern of dishonesty or rule violations; and

(e) personal conduct ...that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Guideline H allegations ¶¶ 1.a and 1.b are cross-alleged under Guideline E ¶ 2.a. Each of them is established by the record evidence. Applicant's drug involvement and substance misuse reflect questionable judgment and an unwillingness to comply with rules and regulations. The conduct also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶¶ 16(c) and 16(d) are not fully applicable because the alleged conduct is sufficient and is explicitly covered for an adverse determination under the drug involvement and substance misuse guideline. However, the

general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

AG ¶ 17 sets forth potentially applicable mitigating conditions under Guideline E:

(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.

Applicant last used marijuana about a year ago, and he continued to use marijuana for four-and-a-half years after he had been granted a security clearance. He acknowledged his misconduct and is remorseful. I find that Applicant is intelligent, candid, and unlikely to use marijuana in the future, but his behavior is too recent to overcome the personal conduct security concerns. AG ¶¶ 17(c) and 17(d) do not apply for the same reasons as set forth in the analysis under Guideline H, above.

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 has been fully candid about his involvement with marijuana, and he has stated that he does not intend to use marijuana in the future. The evidence against the

continuation of a security clearance is more persuasive at this time. Applicant's lengthy period of marijuana use while holding a security clearance showed poor judgment and unreliability. Despite knowing that marijuana use was illegal under federal law, he made the personal choice to ignore the law in effect which prohibited such use. It is disconcerting that Applicant broke the commitment he made in his 2017 SCA to not use marijuana in the future while it is unacceptable by law.

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)).

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more time without possession or use of marijuana or any other conduct of security concern, and a longer track record of behavior consistent with his obligations, he may be able to demonstrate persuasive evidence of his security clearance worthiness. 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. Drug involvement and substance misuse and personal conduct security concerns are not mitigated.

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 and 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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 continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge