



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



In the matter of:)
)
) ISCR Case No. 23-00931
)
Applicant for Security Clearance)

Appearances

For Government: Alison P. O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

01/18/2024

Decision

HARVEY, Mark, Administrative Judge:

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

Statement of the Case

On November 1, 2022, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SCA). (Government Exhibit (GE) 1) On June 8, 2023, the Department of Defense (DOD) 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. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DOD 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. (HE

2) On July 29, 2023, Applicant provided a response to the SOR and requested a hearing. (HE 3)

On September 15, 2023, the case was assigned to me. On September 22, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice, setting the hearing for October 11, 2023. (HE 1) The hearing was held as scheduled.

Department Counsel offered three exhibits into evidence; Applicant did not offer any exhibits into evidence; there were no objections; and all proffered exhibits were admitted into evidence. (Transcript (Tr.) 10, 15-16; GE 1-GE 3) On October 20, 2023, DOHA received a transcript of the hearing.

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, 1.b, 1.c, 2.a, 2.b, and 2.c. (HE 3) He also provided mitigating information. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is 27 years old, and he works in imagery and artificial intelligence, and his current employer has employed him for 17 months. (Tr. 6, 8, 17-18) In 2012, he received a general education degree (GED). (Tr. 6, 17) He has not attended college, and he has not served in the military. (Tr. 7) He has never married, and he does not have any children. (Tr. 8)

Drug Involvement and Substance Misuse

SOR ¶ 1.a alleges Applicant used marijuana with varying frequency from about November 2012 to at least October 2022. He first used marijuana when he was 16 years old, and for the last two or three years, he used marijuana three or four times a week. (Tr. 19-20) He most recently used marijuana three weeks before his hearing. (Tr. 19) Recreational and medical use of marijuana have not been illegal under state law in his state of residence since January 2022. (Tr. 20) He has friends and family who use marijuana, and he is in an environment where marijuana is used. (Tr. 21)

SOR ¶ 1.b alleges Applicant used cocaine or crack cocaine with varying frequency from about July 2019 to at least May 2021. He did not use cocaine before July 2019 or after May 2021. (Tr. 23-24) He used cocaine about 10 times. (Tr. 25) He used cocaine with his former partner and his brother. (Tr. 24) He has no intent to use cocaine in the future. (Tr. 24)

SOR ¶ 1.c alleges Applicant intends to use marijuana in the future. At the time Applicant completed his November 1, 2022 SCA, was interviewed by an Office of Personnel Management (OPM) investigator on December 8, 2022, and responded to the SOR on July 28, 2023, he promised to stop using marijuana if he received a security

clearance. (Tr. 23; HE 3; GE 1) At his hearing, he said he is more mature now, and he does not intend to use marijuana in the future. (Tr. 22) Applicant instructed his friends not to give him illegal drugs or drug paraphernalia even if he asks for them. (Tr. 29)

Personal Conduct

SOR ¶ 2.a cross-alleges the information in SOR ¶ 1 and its subparagraphs, *supra*.

SOR ¶ 2.b alleges Applicant used an inhalant (amyl nitrate), which is illegal under state law, with varying frequency from about October 2019 until at least September 2022. Applicant said he used inhalants of either amyl nitrate or isobutyl nitrate until around September 2023, which was about four weeks before his hearing. (Tr. 25-26) He used the inhalant about once a week. (GE 1 at 40) He acknowledged that his use of the inhalant was illegal under the state law where he resides. (Tr. 27)

SOR ¶ 2.c alleges Applicant intends to use illegal inhalants in the future. At his hearing, he said he does not intend to use inhalants or illegal drugs in the future. (Tr. 28, 30)

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). Additional discussion is in the mitigation section, *infra*.

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 Schedule I or II controlled substances 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 and cocaine is a Schedule II controlled substance. See Drug Enforcement Administration, <https://www.deadiversion.usdoj.gov/schedules/#:~:text=Substances%20in%20this%20s>

[chedule%20have%20a%20high%20potential%20for%20abuse,Sublimaze%C2%AE%2C%20Duragesic%C2%AE.](#)

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 frequently possessed and used marijuana the last two or three years up to about three weeks before his hearing. He used cocaine 10 times. He knew his marijuana and cocaine possession or use or both was prohibited by federal law. Prior to his hearing, he said he intended to use marijuana in the future until or unless he was granted a security clearance. His decisions to repeatedly possess and use marijuana and cocaine are 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 and cocaine use on his SCA, during his OPM interview, in his SOR response, and during his hearing. At his hearing, he said he ended his marijuana use three weeks before the hearing, and he did not intend to use marijuana or cocaine in the future. He instructed his friends not to give him illegal drugs or drug paraphernalia even if he asks for them.

I am not convinced Applicant’s marijuana and cocaine 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 may use marijuana and cocaine in the future. More time without illegal drug use is necessary to mitigate Guideline H security concerns.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. . . .

AG ¶ 16 provides personal conduct disqualifying conditions that are relevant in this case. AG ¶¶ 16(c), and 16(e)(1) read:

(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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing

SOR ¶ 2.a cross-alleges the information in SOR ¶ 1 and its subparagraphs, *supra*. SOR ¶ 1.a is sufficient for an adverse determination, and AG ¶ 16(c) is not implicated by SOR ¶ 2.a.

Applicant repeatedly disclosed the information in SOR ¶¶ 2.a, 2.b, and 2.c to security officials, and he is in not vulnerable to exploitation, manipulation, or duress. He is not embarrassed or ashamed about his involvement with illegal drugs. AG ¶ 16(e)(1) is not established.

Applicant said he used inhalants of either amyl nitrate or isobutyl nitrate until around September 2023, which was about four weeks before his hearing. He used an inhalant about once a week. He acknowledged that his use of the inhalant was illegal under the state law where he resides. AG ¶ 16(c) is established for SOR ¶ 2.b.

AG ¶ 17 includes conditions which could mitigate personal conduct security concerns:

(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;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

None of the mitigating conditions apply to Applicant's illegal use of inhalants. I have lingering concerns that his lapses in judgment are likely to recur and continue to cast doubt on his reliability, trustworthiness, and good judgment. More time without illegal use of inhalants is necessary to mitigate personal conduct security concerns.

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 disclosed his history of involvement with marijuana, cocaine, and inhalants on his SCA, during his OPM interview, in his SOR response, and at his hearing. His involvement with illegal drugs was not discovered through law enforcement investigation or security interviews of witnesses. He did not test positive on a urinalysis test.

The evidence against grant of a security clearance is more persuasive at this time. Applicant used cocaine about 10 times, marijuana numerous times, and inhalants numerous times. He received clear notice in the SOR that use of marijuana and inhalants was incompatible with holding a security clearance. He used marijuana and illegal inhalants up to about three weeks before his hearing. He stated that he did not intend to use marijuana and inhalants in the future.

An honest and candid self-report of illegal drug 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, cocaine, and inhalants possessions and uses.

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 and personal conduct 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 and 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a and 2.c:	For Applicant
Subparagraphs 2.b:	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