



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



In the matter of:)
)
 [Redacted]) ISCR Case No.23-00831
)
 Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

01/24/2024

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines E (Personal Conduct) and H (Drug Involvement and Substance Misuse). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 24, 2021. On June 12, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines E and H. The CAS acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on June 30, 2023, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written

case on September 18, 2023. On September 21, 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 September 29, 2023, and did not respond. The case was assigned to me on January 11, 2024.

Findings of Fact

The SOR alleges that Applicant used marijuana in November 2020 (SOR ¶ 2.a), that he falsified his SCA by failing to disclose his marijuana use (SOR ¶ 1.a), and that he failed to disclose his marijuana use during an interview with a security investigator in May 2021 (SOR ¶ 1.b). In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a and 1.b but denied intentional falsification. His explanation of his conduct alleged in SOR ¶¶ 1.a and 1.b amounts to a denial. His admission of the marijuana use alleged in SOR ¶ 2.a is incorporated in my findings of fact.

Applicant is a 30-year-old security administrator employed by a defense contractor since February 2021. He served on active duty in the U.S. Marine Corps from June 2011 to February 2015 and received an honorable discharge. He served in the inactive ready reserve from February 2015 to June 2018 and received an honorable discharge. He received a bachelor's degree in May 2020. He is unmarried and has no children. His SCA reflects that he received a security clearance in September 2012, while he was on active duty in the Marine Corps, and again in November 2020, while employed by a federal contractor.

Applicant consumed two marijuana edibles in November 2020 after his roommate suggested using them as a sleep aid. He was unhappy with his job and was considering looking for non-federal employment. He submitted applications for several jobs, but his applications were not accepted because of COVID. He was stressed about finding suitable employment and unable to sleep. He had tried melatonin without success. His roommate suggested marijuana edibles and gave him two of them that were purchased from a legal dispensary. They did not work, and he experienced a panic attack after taking the second edible.

Applicant changed his mind about leaving federal employment when he was offered a job by his current employer. He submitted an SCA in March 2021, but he did not disclose his marijuana use. (FORM Item 3)

Applicant was interviewed by a security investigator in May 2021. The summary of the May 2021 interview reflects that he was questioned about his college education, his previous employments, his military service, and an unusual financial transaction. However, the summary does not reflect that he was asked about any drug involvement. (FORM Item 4 at 10-11)

Applicant was interviewed again in November 2022. He told the investigator that he self-reported his marijuana use in September 2022, after his roommate reminded him of the panic attack he experienced after using it. (FORM Item 4 at 14)

In response to DOHA interrogatories in May 2023, Applicant stated that the summary of the November 2022 was incorrect and that he self-reported his marijuana use in November 2021, not September 2022. (FORM Item 4 at 4) He also submitted a statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse would be grounds for revocation of his national security eligibility. (FORM 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.” Exec. Or. 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.” Exec. Or. 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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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.” *Egan*, 484 U.S. at 531.

Analysis

Guideline E, Personal Conduct

The security concern under this guideline is set out in AG ¶ 15:

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. . . .

SOR ¶ 1.a alleges that Applicant deliberately failed to disclose his marijuana use when he submitted his March 2021 SCA. SOR ¶ 1.b alleges that he deliberately failed to disclose it during his interview with a security investigator in May 2021. The following disqualifying conditions under this guideline are relevant:

AG ¶16(a): deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and

AG ¶16(b): deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health

professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

At the time Applicant submitted his SCA, he had served on active duty in the Marine Corps for almost four years. He was a college graduate. He went through the security-clearance process in 2012 and 2020, and he knew that marijuana use violated federal law and was an impediment to obtaining a security clearance. His experience with the marijuana edibles was unpleasant, resulting in a panic attack of sufficient severity to cause him to stop using them. I conclude that the allegation in SOR ¶ 1.a is established, and the evidence is sufficient to establish the disqualifying condition in AG ¶ 16(a).

The summary of the May 2021 interview reflects discussion of several topics unrelated to marijuana use. It does not reflect that Applicant was asked about marijuana use or that he volunteered any information about it. I conclude that the allegation in SOR ¶ 1.b is not established.

The following mitigating conditions are potentially applicable:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(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.

AG ¶ 17(a) is not established. The summary of the November 2022 interview reflects that Applicant volunteered the information about his marijuana use and told the investigator that he had previously self-reported it to his security office. However, his action was not prompt. His response to DOHA interrogatories reflects that he self-reported his marijuana use in November 2021, about eight months after submitting his SCA.

AG ¶ 17(c) is not established. Applicant's falsification was infrequent but it was recent. It did not occur under unique circumstances. It was not "minor." Falsification of a security clearance application "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.)

Guideline H, Drug Involvement and Substance Misuse

The concern under this guideline 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 disqualifying conditions 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;

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 established. Applicant's marijuana use was more than three years ago, it was infrequent, and it has not recurred. It occurred when Applicant was dealing with stress and sleep deprivation, which have been resolved and are not likely to recur.

AG ¶ 26(b) is established. Applicant acknowledged his marijuana use, has not used it again, and submitted the statement of intent in AG ¶ 26(b)(3).

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guidelines E and 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 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 Guidelines E and H, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his marijuana use, but he has not mitigated the concerns raised by his lack of candor during the adjudication of his application for a security clearance.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant

Paragraph 2, Guideline H (Drug Involvement):

FOR APPLICANT

Subparagraph 2.a:

For Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge