



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 23-02572
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeffrey T. Kent, Esq., Department Counsel
For Applicant: *Pro se*

04/24/2024

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 April 21, 2023. On December 11, 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 DCSA 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 January 8, 2024, and requested a decision on the written record in lieu of a hearing. Department Counsel submitted the Government's

written case on January 10, 2024. On January 23, 2024, 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 January 29, 2024, and did not respond. The case was assigned to me on April 15, 2023.

The FORM consists of six items. FORM Items 1 through 3 are the pleadings in the case. FORM Items 4 through 6 are the evidence submitted by the Government in support of the allegations in the SOR. FORM Items 4 through 6 are admitted in evidence.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a and 2.a. His admissions are incorporated in my findings of fact.

Applicant is a 31-year-old industrial designer employed by a federal contractor since December 2021. He attended a university from October 2016 to June 2020 and received a bachelor's degree. He has never married and has no children. He has never held a security clearance.

Applicant is a U.S. citizen. He was born in the United States and his mother is a citizen of the United States. In his SCA, he disclosed that he also is a citizen of France, because his father is a citizen of France residing in the United States and has a U.S. green card. He holds passports from the United States and France.

When Applicant submitted his SCA on April 21, 2023, he answered "No" to the question asking if he had illegally used any drugs or controlled substances in the last seven years. (FORM Item 4 at 45) SOR ¶ 2.a alleges that this answer was false.

Applicant was interviewed by a security investigator on July 13, 2023. The interview was triggered by evidence of Applicant's foreign citizenship and passport. After questioning Applicant about his foreign citizenship and passport, the investigator asked him if he had used any controlled substances in the past. Applicant responded that he had used marijuana prior to 2020. He disclosed that he used marijuana weekly with friends from 2005 to 2010, did not use it from 2011 to 2014, and used it once every six months in social settings from 2015 to 2020. He told the investigator that he was aware that he may not use marijuana if he receives a clearance. He told the investigator that he did not disclose his marijuana use in his SCA because he thought it looked bad and he was afraid that it would affect his ability to obtain a clearance. (FORM Item 5 at 7-8)

In response to DOHA interrogatories asking him to verify the accuracy of the investigator's summary of their conversation, Applicant responded that the summary was accurate, and he volunteered that he used mushrooms once while he was in high school. FORM Item 5 at 2. When he responded to the SOR, he admitted his failure to disclose his marijuana use, but explained, "I did voluntarily rectify my answer during the in-person interview to correct the mistakes." (FORM Item 3)

In Applicant's answer to the SOR, he admitted his drug involvement. He pointed out that it was legal in the jurisdiction where he lived and that he is not drug dependent. He stated that he has no interest in using marijuana in the future.

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* 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* 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. . . .

Applicant's admission and the evidence in the FORM establish the following disqualifying condition under this guideline:

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.

The following mitigating conditions are potentially relevant:

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. Almost three months elapsed between Applicant's submission of his SCA and his security interview. There is no evidence that Applicant

attempted to correct his omission during that time. His security interview was triggered by concerns about his foreign citizenship and passport. After the discussion of those issues was concluded, the investigator asked an open question about use of illegal substances, which prompted Applicant's admission that he had falsified his SCA. It is not clear whether Applicant would have corrected his admission if he had not been asked a question about use of illegal drugs. The evidence suggests that Applicant's disclosure to the investigator was an effort to avoid the consequences of his earlier falsification rather than a "good-faith effort" to correct a mistake. Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor or to question him about his omission from the SCA. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). Applicant has the burden of mitigating his conduct, and the evidence does not persuade me that he would have made a "prompt, good-faith effort" to correct his omission if he had not been asked an open question about possible drug involvement.

AG ¶ 17(c) is not established. Applicant's falsification of his SCA was recent and did not occur under unique circumstances. It was not minor. An applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the industrial security program. ISCR Case No. 01-03132 at 3 (App. Bd. Aug. 8, 2002)

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 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; 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 fully established. Applicant's drug involvement apparently ended after he graduated from college in June 2020, more than three years ago. However, it was not infrequent, nor did it occur under circumstances making recurrence unlikely.

AG ¶ 26(b) is not established. Applicant submitted no evidence that he has disassociated from his drug-using associates and contacts and no evidence that he has avoided the environment where he used drugs. He has declared that he does not intend to use marijuana in the future, but he has not submitted the signed statement required by 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). After weighing the disqualifying and mitigating conditions under those guidelines and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his personal conduct and drug involvement.

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
Paragraph 2, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraph 2.a:	Against 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