



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



In the matter of:)	
)	
)	ISCR Case No. 23-01433
)	
Applicant for Security Clearance)	

Appearances

For Government: Jenny G. Bayer, Esq., Department Counsel
For Applicant: *Pro se*

05/30/2024

Decision

HALE, Charles C., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 8, 2023. The Department of Defense (DoD) sent her a Statement of Reasons (SOR) dated August 2, 2023, alleging security concerns under Guideline H. The DoD acted under Executive Order (Exec. Or.) 10865, Safeguarding Classified Information within Industry (February 20, 1960), as amended; 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 August 28, 2023, and requested a decision on the written record without a hearing. Department Counsel issued the Government's file of relevant material (FORM) on September 28, 2023, including documents identified as Items 1 through 6. Applicant submitted a Response dated December 4, 2023, which cited

Items 1-6 and included three Applicant exhibits (AE), a statement of intent dated December 4, 2023 (AE A), a drug test dated November 25, 2023 (AE B), and a record of performance rating dated December 4, 2023 (AE C). The case was transferred to me from another Administrative Judge on May 14, 2024.

The SOR, Applicant's Answer (FORM Items 1 and 2), and her December 4, 2023 Response are the pleadings in the case. FORM Items 3 through 6 and AE A through AE C are admitted into evidence without objection.

Findings of Fact

Applicant is a 28-year-old employee of a defense contractor. She started as a systems engineer in July 2017 and is presently a "manager systems engineering." She has held a security clearance since March 2018. She completed a non-disclosure agreement (NDA) shortly thereafter in March 2018. She is married and holds a master's degree. (Item 3; Response.)

In Applicant's Answer to SOR ¶¶ 1.a-1.b, she admits both allegations that she used marijuana from May 2022 to about February 2023 and that she used marijuana while granted access to classified information or holding a sensitive position: For both allegations she stated:

I admit. I thought because marijuana is legal in the state of [X] that I was not breaking any laws, rules, or regulations. As soon as, I found out that using marijuana could jeopardize my clearance I immediately stopped use.

Applicant states in her Response she started to use marijuana to help her get a good night's sleep and that her use occurred about once or twice a month during the period alleged in her own home, never in public or socially. She stated, "I thought I was doing so legally as marijuana is legal in the state of [X]." (Response at 1.) She stopped using when a coworker informed her that marijuana use was still illegal under federal law. Her husband, who is not a federal contractor or an employee of the federal government, occasionally uses marijuana. After this concern was identified, he is not allowed to keep any marijuana in their home, and he does not pressure her to use marijuana now that she abstains from marijuana. (Item 6 at 2; Response at 2.)

Applicant voluntarily disclosed her actions involving marijuana on her SCA and fully discussed them during her security clearance interview. (Item 3 at 40; Item 6.) She has cooperated in the security clearance process and her Response indicates she fully understands her mistake and what steps she must take to mitigate her actions such as her statement of intent and taking a urinalysis. (AE A; AE B.) The evidence available shows her involvement with marijuana is limited in scope and nature, to help her sleep, and that she stopped when she learned it was still illegal federally. Her disclosures indicate her willingness to follow federal law. (Item 3; Item 4; Item 5; Response.)

Applicant had no prior history with drug use. (Item 4.) When she completed her initial SCA she had just completed her undergraduate degree and had competed as a collegiate athlete. As an athlete she was subjected to random drug testing by her school and the NCAA. (Item 4; Response at 2.)

Applicant's work history reflects an excellent employee. (AE C.) She added a master's degree to improve her ability to help her and her colleagues in a technical area. She obtained her master's degree while working full time for her employer. (Item 3; Item 6; Response at 2.)

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 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 in her SCA and Answer are sufficient to raise the following disqualifying conditions under this guideline: AG ¶ 25:

(a): any substance misuse (see above definition);

(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

(f): any illegal drug use while granted access to classified information or holding a sensitive position.

In October 2014, the Director of National Intelligence (DNI) issued a memorandum entitled “*Adherence to Federal Laws Prohibiting Marijuana Use*,” (2014 DNI Memo) which makes clear that changes in the laws pertaining to marijuana by the various states, territories, and the District of Columbia do not alter the existing National Security Adjudicative Guidelines, and that Federal law supersedes state laws on this issue:

[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.

The DOHA Appeal Board has cited the 2014 DNI memo in holding that “state laws allowing for the legal use of marijuana in some limited circumstances do not pre-empt provisions of the Industrial Security Program, and the Department of Defense is not bound by the status of an applicant’s conduct under state law when adjudicating that individual’s eligibility for access to classified information.” ISCR Case No. 14-03734 at 3-4 (App. Bd. Feb. 18, 2016).

The current National Security Adjudicative Guidelines went into effect on June 8, 2017, after the 2014 DNI memo was issued. Nevertheless, the principle continues to apply.

Moreover, on December 21, 2021, DNI Avril D. Haynes issued a memorandum entitled, “*Security Executive 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*.” (2021 DNI Memo) The memo incorporates the AGs (at reference B) and the 2014 DNI memo (at reference G) among various other relevant Federal laws, executive orders, and memoranda. I take administrative notice of the 2021 DNI memo here, given its relevance to this case, its reliance on the AGs, and its recency.

The 2021 DNI memo specifically notes that “under policy set forth in SEAD 4’s adjudicative guidelines, the illegal use or misuse of controlled substances can raise security concerns about an individual’s reliability and trustworthiness to access classified information or to hold a sensitive position, as well as their ability or willingness to comply with laws, rules, and regulations.” Thus, consistent with these references, the AGs indicate that “disregard of federal law pertaining to marijuana remains relevant, but not determinative, to adjudications of eligibility for access to classified information or eligibility

to hold a sensitive position.” (2021 DNI Memo.) The issuance of a security clearance is a determination that an individual is eligible for access to classified national security information up to a certain level. Security clearance eligibility alone does not grant an individual access to classified materials. In order to gain access to specific classified materials, an individual must have not only eligibility (i.e., a security clearance), but also must have signed a nondisclosure agreement and have a “need to know.” See Executive Order 13526, dated December 29, 2009, at § 4.1. See ISCR Case No. 20-03111 (App. Bd. Aug 10, 2022).

The following mitigating conditions are potentially applicable under 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

(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 for SOR ¶¶ 1.a and 1.b. There is no evidence in the record that Applicant understood her use to be problematic at the time and there was no evidence to the contrary. The Appeal Board has noted that:

Applicants cannot be expected to be constitutional law experts or versed in the concept of Federal supremacy. The ambiguity between state and Federal drug laws and the ensuing confusion was addressed by the Security Executive Agent in December 2021 in “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” (SecEA Clarifying Guidance). Relevant to the topic of notice, the Guidance encourages employers “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 [SCA].” SecEA Guidance at 2. Implicit in this guidance is the recognition that the SCA itself no longer puts applicants on notice and that employers should affirmatively be providing notice to prospective employees. The SecEA’s guidance to employers, however, cannot be presumed to have been followed. See ISCR Case No. 23-02476 at 5 (App. Bd. May 1, 2024).

Applicant's prior use of marijuana for sleeping does not raise questions about her current reliability, trustworthiness, or good judgment. Her admitted ignorance of the law under these specific facts shows a rational connection for the choice she made. Her subsequent actions after learning of her mistake reflect her reliability, trustworthiness, good judgment, and willingness to comply with laws, rules, or regulations. See ISCR Case No. 20-02974 at 6 (App. Bd. Feb. 1, 2022).

AG ¶ 26(b) is established for SOR ¶¶ 1.a and 1.b. Applicant voluntarily disclosed her actions on her SCA. She fully acknowledges her past actions. She submitted a statement of intent to abstain from marijuana use in the future. Her Response reflects her understanding that any future involvement in marijuana is grounds for revocation of a security clearance.

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 Guideline H in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). I considered Applicant's admissions and explanations, including her explanation for why she started using marijuana. Applicant's responses in her SCA, security interview, and Response regarding her marijuana involvement reflect her recognition that she must stop use of marijuana and have control of her home environment. The drug testing, she was subjected to as collegiate athlete support her statements that her present-day use of marijuana was for a limited period and for the specific purpose of helping her sleep. After weighing the disqualifying and mitigating conditions under Guideline H and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his drug involvement.

Formal Findings

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

Paragraph 1, Guideline H: FOR APPLICANT

Subparagraphs 1.a-1.b: For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

Charles C. Hale
Administrative Judge