



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 23-01969
)	
Applicant for Security Clearance)	

Appearances

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

06/03/2024

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 27, 2023. On November 15, 2023, Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. 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), which became effective on June 8, 2017.

Applicant answered the SOR on December 12, 2023, and requested a decision on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on January 18, 2024. On January 22, 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 February 2, 2024, and did not respond. The case was assigned to me on May 3, 2024.

The FORM consists of four items. FORM Items 1 and 2 are the pleadings in the case. FORM Items 3 and 4 are the Government's evidence in support of the allegations in the SOR. FORM Items 3 and 4 are admitted in evidence.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations in the SOR. His admissions are incorporated in my findings of fact.

Applicant is a 42-year-old professor employed by a state university since January 2022. He also has been self-employed as a consultant since June 2013. He received a bachelor's degree in December 2003, a master's degree in December 2006, and a doctorate in December 2010. He married in January 2004 and has two children, ages 17 and 15. He has never held a security clearance.

Applicant has applied for a security clearance so that he can work on a U.S. Army study on future military vehicles. In his SCA, he disclosed that he has used cannabis products multiple times a week since July 1997. He stated that when he is in a location where it is legal, he tends to binge and use it nearly every evening. He stated that he uses marijuana because, "It helps me relax (managing stress and anxiety) and helps me sleep well through the night. It also helps me be creative when I am playing music or working on hobby craft projects." He stated that he has friends in cannabis-legal states who purchase it for him. Because he lives in a state where cannabis is not legal, he admitted that he sometimes purchased it illegally and consumed it in private. (FORM Item 3 at 37)

Applicant also disclosed that he has consumed psilocybin mushrooms about once a week. He stated that his use of mushrooms has improved his everyday mood and makes him a sharper scientist and a more creative artist. He disclosed that he tried LSD once about five years ago and does not intend to use it again. (FORM Item 3 at 35-38)

When Applicant was interviewed by a security investigator in June 2023, he stated that he used marijuana every other day and consumed one mushroom a month. He told the investigator that the benefits of using marijuana and mushrooms outweigh the benefits of having a security clearance, because he can work on the Army projects without a clearance. He confirmed his single use of LSD and his intention to not use it again. He told the investigator that he intended to continue using marijuana unless it will adversely affect his employment at the university. (FORM Item 4 at 5-6)

When Applicant responded to the SOR, he stated that he had reevaluated his life

choices since his security interview and that he will give up his use of marijuana if he is granted a security clearance. He stated that he stopped using mushrooms. He stated that he intended “to abstain from all drug involvement and substance misuse,” and he acknowledged “that any future involvement or misuse is grounds for revocation of national security eligibility.”

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 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.

The following disqualifying conditions under this guideline are potentially applicable:

AG ¶ 25(a): any substance misuse (see above definition);

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(g): expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

AG ¶¶ 25(a) and 25(c) are established by Applicant's admissions in his SCA and his answer to the SOR. AG ¶ 25(g) is established by his admissions in his SCA and during his security interview. Although he recanted his admissions in his answer to the SOR, I have given his recantation little weight because the limited record reflects that he recanted

his admissions after he received the SOR and realized that his drug involvement was an impediment to obtaining a clearance.

The following mitigating conditions under this guideline 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 established. Applicant's drug involvement was recent, frequent, and did not happen under circumstances making it unlikely to recur.

AG ¶ 26(b) is not established. Applicant has acknowledged his drug involvement, but he has not established a pattern of abstinence. To the contrary, he promised to refrain from drug involvement only if he is granted a clearance. He offered no evidence of disassociation from drug users or changing his environment. His statement of intent in his answer to the SOR was conditional, reciting that he would abstain from drugs "if and while granted a security clearance."

Guideline E, Personal Conduct

SOR ¶ 2.a cross-alleges Applicant's drug involvement under this guideline. 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. . . ."

The following disqualifying condition is established by Applicant's admissions and the evidence in the FORM:

AG ¶ 16(e): personal conduct, or concealment of information about one's

conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes . . . engaging in activities which, if known, could affect the person's personal, professional, or community standing.

The following mitigating conditions under this guideline are potentially applicable:

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(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; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(c) is not established. Applicant's drug use is not "minor," because it is prohibited by federal law and disqualifies him from holding a security clearance. His drug use is recent, frequent, and has not happened under unique circumstances making it unlikely to recur.

AG ¶ 17(d) is not established. Applicant has acknowledged his illegal drug use, but he submitted no evidence of counseling. He submitted no evidence that he has stopped his illegal drug use. His carefully crafted response to the SOR is conditional, promising to stop using illegal drugs in the future if he is granted a clearance.

AG ¶ 17(e) is not established. Applicant promised to stop his illegal drug use if he is granted a security clearance, but he submitted no evidence that he has already stopped his illegal drug use.

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 H and E 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 H and E and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his drug involvement and personal conduct.

Formal Findings

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

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	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