



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



In the matter of:)
)
) ISCR Case No. 22-02036
)
Applicant for Security Clearance)

Appearances

For Government: Nicole Smith, Esq., Department Counsel
For Applicant: *Pro se*

05/13/2024

Decision

LAFAYE, Gatha, Administrative Judge:

Applicant provided sufficient evidence to mitigate 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 April 1, 2022. On February 23, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (CAS) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H. The CAS acted under Executive Order (EO) 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) effective within the DOD on June 8, 2017.

Applicant responded to the SOR on March 1, 2023, and requested a hearing before an administrative judge. The case was assigned to me on September 11, 2023. On February 13, 2024, the Defense Office of Hearings and Appeals (DOHA) issued a notice scheduling the hearing for March 14, 2023. The hearing was convened as

scheduled. Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. Applicant testified and immediately following the hearing, he provided information concerning his employer's drug policy, which I marked as Applicant's Exhibit (AE) A, and admitted in evidence without objection. DOHA received the hearing transcript (Tr.) on March 22, 2024.

Findings of Fact

In Applicant's response to the SOR, he admitted the allegation in SOR ¶ 1.a, but denied the allegation in SOR ¶ 1.b. Applicant's admissions are incorporated in my findings of fact.

Applicant is 38 years old. He graduated from high school in June 2003. He attended the same college from August 2003 through December 2009. He received his bachelor's degree in June 2007, and master's degree in June 2010. He is a licensed architect, having received his professional credentials in about 2022. He married in October 2025, and has two minor children, ages five and two years old. (GE 1, GE 2; Tr. at 16-19)

Since November 2021, Applicant has worked as a project architect for a defense contractor. He previously worked for two non-defense companies in private industry from about May 2012 until November 2021, before being hired into his current position. From August 2009 until May 2012, he worked as a project designer, also in private industry. (GE 1, GE 2; Tr. at 19-20)

In April 2022, Applicant completed his first SCA. In his SCA, he admitted he illegally used drugs or controlled substances from about April 1999 through July 2021. Specifically, he responded "yes" to questions in Section 23, Illegal Use of Drugs or Drug Activity, asking whether, in the last seven years, he had illegally used any drugs or controlled substances; and whether he intended to use this drug or controlled substance in the future. In the comments section of these questions, he stated his use occurred "once or twice annually with family members." In explaining his intent to continue using marijuana, he expressed that there was "growing legalization at the state level" and a "likelihood of federal legalization or decriminalization." (GE 1 at 39-40)

In his May 2022 DOD investigative interview, which he adopted in December 2022, Applicant confirmed that he started smoking marijuana in April 1999, at the age of 14 years. (GE 2 at 7-10) He initially used marijuana sporadically, but increased his use between 2003 and 2010, while attending college. (Tr. at 22-23) Marijuana was freely provided by either his family members or friends. (GE 2 at 8-10; Tr. at 22-23) He informed the DOD investigator that he had no plans to change his behavior regarding his marijuana use; but stated that it "may taper off naturally." (GE 2 at 10; Tr. at 27)

In 2010, after he completed his master's degree and moved out of a residence he shared with friends, Applicant stated his marijuana use went from frequent, to a few times a year during family gatherings. (Tr. at 22-23) He smoked marijuana with his father and

brother at his father's beach house, located in (State 1), during family gathering around the 4th of July and the Christmas holiday season. He last used marijuana at his family's beach house in July 2022. (GE 2 at 5; Tr. at 22-24, 29-30) He stated at the hearing that he knew at the time that using marijuana was federally illegal. (Tr. at 25)

Applicant smoked marijuana for recreational purposes. He described feeling relaxed after using marijuana, and compared it to drinking a beer or a glass of wine with family members. His brother brought the marijuana to their family gatherings. He stated he was unaware of how his brother acquired the marijuana, but he believed his brother was able to purchase it legally in his state of legal residence (State 2). (Tr. at 29, 32-33) Although he used marijuana in State 1, he stated he did not know whether laws in State 1 permitted the recreational use of marijuana. (Tr. at 24) His family's habits and behavior towards marijuana have not changed. (Tr. at 28-30) He was present during family gatherings after July 2022 when family members smoked marijuana, but stated he declined to join in. (Tr. at 28-30)

In his December 2022 response to interrogatories, for the third time, Applicant responded "yes" to the question of whether he intended to continue using marijuana in the future. (GE 2 at 5) He stated he did not have a definitive plan to stop using marijuana when he last used it in July 2022. He testified that he did not know or appreciate that using marijuana was "threshold" disqualifying for a security clearance. (Tr. at 24-25) During discussions with the company facility security officer (FSO) about his drug use, he stated the FSO simply advised him to be honest. The FSO did not tell him that marijuana use was grounds for disqualification. He did not specifically discuss his intent to continue using marijuana with the FSO. (Tr. 24-29).

Applicant stated his employer prohibited drug use on the company premises as a strict behavioral matter, and that he did not believe there was an employee drug testing program. He had never been subject to a drug test. Additionally, he has not participated in training for security clearance holders. (Tr. at 34)

Applicant's employer was acquired by another company. The transition occurred over a 12-month period during the pandemic. During this transition period, there was confusion concerning these policies; the drug use and testing policies of the original employer were unclear. Applicant provided excerpts of the new company's drug use and testing policies, which he stated are more understandable. The employer's drug use and testing program policies are consistent with federal requirements. (Tr. 34-37; AE A)

Applicant testified that after he received the SOR in February 2023, and a copy of DOD Directive 5220.6, he understood that his past use of marijuana, and his stated intent to use it in the future were disqualifying. He explained that, had he known, his response to the question concerning his intent to continue using marijuana in the future would have been "no" throughout the process.

I thought the nature of the use; whether or not it was compulsive, risky, or otherwise exploitable, was the determining factor in evaluating security risk.

Given the generally pervasive and permissive use of marijuana in society overall, I was unaware that *any* future use would be considered a potential security risk. Had I been aware, I would have honestly answered that I do not intend to continue using marijuana in the future. (Response to SOR at 3)

He went on to state that he has no difficulty complying with the requirement, and that on balance, his professional and personal development is far more important than the rare times he has used marijuana with family members. (Response to SOR at 3; Tr. at 25)

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 security concern for drug involvement and substance misuse is described 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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable include:

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

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

Applicant admitted he used marijuana from April 1999 to about July 2022. He also expressed his intent to continue using marijuana in the future on three separate

occasions: in his April 2022 SCA; his May 2022 investigative interview; and his December 2022 response to interrogatories. It was not until he received and subsequently responded to the SOR that he denied his intent to continue using marijuana in the future. AG ¶¶ 25(a) and 25(g) apply.

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 applicable. This is Applicant's first time going through the security clearance process. He admitted and testified credibly concerning his history of marijuana use starting at the age of 14; and how he was provided marijuana by his high school and college friends, and his family members during family gatherings at his father's beach house. He disclosed his past marijuana use to his former FSO, and requested guidance. He testified that his FSO did not explain the disqualifying nature of illegal drug use for anyone seeking access to classified information, past, present and future. He credibly testified he did not understand that using any federally illegal drug, including marijuana, which has been decriminalized in several states, is threshold disqualifying. In his quest to be honest and consistent with prior statements made throughout the security clearance process, he expressed his belief that he could continue as per usual, using marijuana a few times a year at his family gatherings. It was only after receiving the SOR that he understood using any federally illegal drug is disqualifying for security clearance holders. When he understood this, he made a full stop. He advised his family members he would no longer partake in using marijuana at family gatherings; and he declined to use it in subsequent gatherings. Applicant's testimony on this point was sincere, and credible. He last used marijuana in July 2022, nearly two years ago; and starting in 2010, he had already reduced his use to a few times a year. The behavior happened long ago, and

since 2010, was so infrequent that it does not cast doubt on his current reliability or trustworthiness.

AG ¶ 26(b) is not fully applicable. Appellant acknowledged his drug use, successfully refrained from using marijuana for almost two years, and has established a pattern of abstinence. However, he is unable to successfully disassociate from drug users and avoid the environment where drugs were used. Applicant's use of marijuana since 2010 had been exclusively with his father and a brother, at his father's beach house during biannual family gatherings. He attends these family gatherings, and his family members have continued their pattern of using marijuana during these occasions. Additionally, he has not completed a statement of intent acknowledging that any future drug involvement or misuse would be grounds for revocation of his national security eligibility. Nevertheless, he successfully mitigated drug involvements and substance misuse security concerns under AG ¶¶ 26(a), as described above.

Applicant's evidence is sufficient to overcome concerns and doubts about his judgment, reliability, and his willingness to comply with laws, rules, and regulations.

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). After weighing the disqualifying and mitigating conditions under Guideline H and evaluating all evidence in the whole-person context, I conclude Applicant successfully mitigated Guidelines H (drug involvement and substance misuse) security concerns.

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: FOR APPLICANT

Subparagraphs 1.a -1.b: For Applicant

Conclusion

It is clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Gatha LaFaye
Administrative Judge