



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



In the matter of:)
)
) ISCR Case No. 23-02637
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

06/27/2024

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 denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on July 6, 2023. On January 17, 2024, the Department of Defense (DoD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. The Department of Defense 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 February 12, 2024, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written case on February 21, 2024. On February 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 acknowledged receipt of the FORM on March 1, 2024, and did not provide a response. The case was assigned to me on June 5, 2024.

The SOR and the Answer are the pleadings in the case. Applicant included a statement of abstinence with his Answer. FORM Items 2 and 3 and Applicant's statement of abstinence (AE A) are admitted into evidence without objection.

Findings of Fact

Applicant is a 28-year-old college graduate who is being sponsored for his first security clearance by a defense contractor. He certified his SCA in July of 2023 and he was interviewed by a government investigator in August of 2023 regarding his SCA. (Item 2; Item 3.)

SOR ¶¶ 1.a and 1.b: The SOR alleged that from September 2009 until at least March 2023, he used Tetrahydrocannabinol (THC) with varying frequency and that he had purchased THC during the same period from September 2009 until at least January 2023. In his Answer, Applicant admits he used marijuana with varying frequency from about 2009 to March 2023. He took issue with the portion of the SOR that stated "at least," which he felt inferred he may have continued using THC after March 2023. He emphasized he stopped using THC in March 2023. He stated he had continued to abstain for the past 11 months and that he did not use THC in such a way that it would have had a negative impact on his work performance, his professional or personal relationships, or his finances, nor resulted in intervention by law enforcement/public safety personnel. He acknowledged that in a few instances more than 10 years ago he had "exclusively purchased THC products online." He stated he was not in contact with anyone who sells THC products and that it had been more than a year since he purchased THC. He acknowledged that the use and purchase of THC is federally prohibited, regardless of state law, and he had "no desire nor intent to use THC in the future." (Answer; Item 2.) In his SCA he listed he started use of THC in middle school and listed various forms of THC he used up until he decided to quit and "turn a new leaf in [his] life" to improve his job prospects. (Item 2 at 28.)

SOR ¶¶ 1.c and 1.d: The SOR alleged that from July 2020 to about October 2020, he used psilocybin mushrooms with varying frequency and that he had purchased psilocybin mushrooms in July 2020. In his Answer, Applicant admits he used psilocybin mushrooms during a period in his life when he was suffering from anxiety and depression after his graduation from college and the onset of the COVID pandemic. He stated he learned of the potential benefits of micro-dosing psilocybin mushrooms "for mental well-being." He noted he had stopped more than three years ago because he did not notice any benefits and it was a onetime purchase online. He did not associate with anyone who would sell him psilocybin mushrooms. He stated his use did not impact on his work performance, his professional or personal relationships, his finances, nor resulted in intervention by law enforcement/public safety personnel. He acknowledged that the use and purchase of psilocybin mushrooms is federally prohibited, regardless of state law,

and he had “no desire nor intent to use them in the future.” (Answer.) In his SCA he noted psilocybin mushrooms are a “federally illegal substance and [he is] not willing to jeopardize [his] career path by using psilocybin [mushrooms] in the future. (Item 2 at 29.)

SOR ¶ 1.e: The SOR alleged that from March 2021 to about February 2023, he used a benzodiazepine, Etizolam, with varying frequency. Applicant admits the allegation and in his SCA stated he thought it was legal to purchase and possess Etizolam but not to consume it. (Item 2 at 29.) He provided a detailed explanation in his Answer what Etizolam is and why he thought what he had purchased was a Schedule IV controlled substance. He believed that during the time he used Etizolam it was legal to purchase and possess. He states he “mistakenly came to the conclusion that it was a less serious offense to use Etizolam. In hindsight, [he understands] that it was illegal to consume Etizolam.” (Answer) He emphasized that before using Etizolam he made an effort to research the drug so that he used it “in a responsible manner.” He notes he never took Etizolam more than 1-2 times per week, which totaled about 100 uses. He disposed of any remaining Etizolam in February 2023. (Item 2 at 29.) He states in his SCA and Answer he was never dependent on Etizolam because he was careful to limit his use, so he did not find it necessary to enroll in a drug treatment program. He notes it had been about one year since he stopped using Etizolam, and he has no desire nor intent to use it in the future. (Answer; Item 2 at 29; Item 3.)

SOR ¶ 1.f: In his Answer, Applicant admits he used Temazepam from about March 2020 to about September 2020 without a prescription. He explained he was given an expired prescription by his mother, and he used the Temazepam during the COVID pandemic to reduce his anxiety and deal with insomnia. (Answer; Item 2 at 31; Item 3.) He researched Temazepam before using it. He stated he used it 1-2 times weekly to avoid dependence and estimated he used it about 30 times. (Answer; Item 2 at 32.) Because he was careful with his use, he did not find it necessary to enroll in a drug treatment program. (Item 3.) He notes it had been about three years since he stopped using Temazepam, and he has no desire nor intent to use it in the future. He stated his use did not negatively impact his work performance, his professional or personal relationships, or his finances, nor resulted in intervention by law enforcement/public safety personnel. He acknowledged it is illegal to use a pharmaceutical drug without a prescription and he had “no desire nor intent to do so in the future.” (Answer; Item 2)

Applicant included with his Answer a signed statement declaring his intent to “abstain from any and all illegal drug involvement and misuse going forward.” He acknowledged that failure to uphold this agreement would result in the “revocation of his national security eligibility.” (AE A.) He added in his statement that he acknowledged violating Federal law by using the substances listed in the SOR and acknowledged that his actions were irresponsible and immature. (AE A.) His explanations in his Answer were consistent with his SCA and security clearance interview responses. (Item 2; Item 3.)

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 his Answer to the SOR and elsewhere in the record are sufficient to raise the following disqualifying conditions under AG ¶ 25:

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

(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 established. Applicant has established a 15-year history of illegally using and purchasing THC. His last THC use was in March 2023. He used and purchased psilocybin mushrooms but stopped after he determined they were not benefitting him. He admitted to purchasing and using Etizolam and taking Temazepam, a prescription drug, without a prescription. For both Etizolam and Temazepam, he researched the drugs before he made his choice to use them. He has stated an intent to abstain from all drug involvement and substance misuse and acknowledges that any future involvement or misuse is grounds for revocation of national security. However, his period of abstention, only since March 2023, is not long enough to overcome the security concerns raised by his 15 years of repeated THC abuse that is compounded by his actions with other admitted illegal drug use. While his statements are candid and sincere, there is insufficient evidence at this time, to conclude he has the ability and willingness to comply with laws, rules, and regulations.

AG ¶ 26(b) is not established. Applicant stated in his SCA and security clearance interview and in his Answer that he intends to abstain from all drug involvement and substance misuse. He notes he was dealing with anxiety and depression when he used psilocybin mushrooms and Temazepam. He researched and then used illegal drugs to treat his anxiety and depression. His use of THC spans 15 years and stopped in March 2023 when he began searching for a job. He used Etizolam until February 2023. His abstinence is recent. He has not had sufficient time to establish a pattern of abstinence.

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). Applicant's marijuana use is recent, and

he lied about the full extent of his drug involvement on his SCA. 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 Guideline H and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the concerns raised by his drug involvement.

Formal Findings

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

Paragraph 1, Guideline H: AGAINST APPLICANT

Subparagraphs 1.a-1.f: 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.

Charles C. Hale
Administrative Judge