



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



In the matter of:)
)
-----) ISCR Case No. 23-01904
)
Applicant for Security Clearance)

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: *Pro se*

07/23/2024

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, and exhibits, Applicant did not mitigate drug concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

Statement of the Case

On August 30, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) issued a statement of reasons (SOR) to Applicant detailing reasons why under the drug involvement and substance misuse guideline the DCSA CAS could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, Department of Defense (DoD) Directive 5220.6 (January 2, 1992) (Directive); and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

Applicant responded to the SOR on April September 10, 2023, and requested a hearing. The case was assigned to me on April 1, 2024. A hearing was scheduled for July 27, 2024, and heard on the scheduled date. At the hearing, the Government's case consisted of two exhibits (GEs 1-2). Applicant relied on one witness (himself) and no exhibits. The transcript (Tr.) was received on July 11, 2024.

Procedural Issues

Before the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with character references and performance evaluations. For good cause demonstrated, Applicant was granted 14 days to supplement the record. Department Counsel was afforded two days to respond. Within the permitted time, Applicant submitted three character references and a performance evaluation. Applicant's submissions were admitted without objection as AEs A-D.

At Applicant's request, a portion of his summary of his May 2023 personal subject interview (PSI) (GE 2) was deleted and replaced. Replacing the words "five times a week" in the third paragraph of GE 2 were the following words: "in my early 20s I used marijuana at most five times a week, but more regularly I would use it one to two times a week socially with friends." (Tr. 28-29)

Summary of Pleadings

Under Guideline H, Applicant allegedly used marijuana with varying frequency from about June 1997 to about February 2023.

In his response to the SOR, Applicant admitted the allegations with explanations. He claimed the majority of his marijuana use occurred between 1997 and 2012. He further claimed he abstained from marijuana use from 2012 until 2018 while teaching. He claimed he resumed his marijuana use between 2018 and 2023 and abstained briefly between July 2020 and February 2021. And, he claimed he only used the drug on three or four occasions between July 2021 and February 2023 before ceasing his marijuana use altogether.

Findings of Fact

Applicant is a 43-year-old employee of a defense contractor who seeks a security clearance. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in May 2022 and has one stepchild (age 10) from this marriage. (GE 1) He earned an associate's degree in May 2010 and a bachelor's degree in May 2012. (GE 1) He reported no military service.

Since April 2023, Applicant has been employed by his current employer as a senior automation systems engineer. (GEs 1-2) Between January 2021 and April 2023, he owned and operated a construction firm. Previously, he worked for other employers in various job capacities. He reported brief unemployment between January 2020 and May 2020. (GEs 1-2) Applicant has never held a security clearance.

Applicant's drug history

Applicant was introduced to marijuana in 1997 while in high school. (GE 2) During his post-high school college years (2006-2012) he used marijuana no more than five times a week, but more regularly one to two times a week socially with friends. (GE 2; Tr. 28-29) Applicant did not have much money in those days and obtained his marijuana mostly from friends at their houses. (GE 2; Tr. 33-34)

Once he began teaching in 2012 and advocating abstinence to his students, Applicant reduced his marijuana use to once every three months or so socially with friends. (GE 2; Tr. 19, 29-31) After marijuana became legal in his state of residence in 2021, Applicant resumed his marijuana use and continued to use marijuana and purchase enough of the substance (roughly six to eight times over a two-year period between January and the Fall of 2022). (GE 2; Tr. 37-40, 43-45) Although he purchased marijuana edibles in February 2023, he never ate any of them before disposing of them. (GE 2; Tr. 40-41) Applicant credibly assured that he has never used marijuana since the Fall of 2022 nor ate or possessed federally-controlled marijuana products since February 2023. (GEs 1-2; Tr. 37-41)

Endorsements and performance evaluations

Applicant is well-regarded by his program manager and co-workers. (AEs B-D) They consider him a reliable and trusted engineer technician, who responsibly manages, coordinates and synchronizes projects across functional teams. Uniformly, they credit Applicant with being professional, trustworthy, hardworking, and steadfast in executing his duties. None of his references, however, expressed any knowledge or awareness of his past use of marijuana products. (AEs B-D) Applicant's program manager credited Applicant with meeting all of his performance requirements and consistently exemplifying the values and leadership behaviors stressed by his employer. (AE A) His supervisor characterized Applicant as a go-to project manager.

Policies

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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. Eligibility for access to classified information may only be granted "upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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, these guidelines are applied 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, reliable information about the person, past and present, favorable and unfavorable.

The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These AG guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. The AG guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any. These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Drug Involvement and Substance Abuse

The Concern: The illegal use of controlled substances, to include the misuse of 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.

Burdens of Proof

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 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 "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Security concerns are raised over Applicant's recurrent use of federally-controlled marijuana over a number years. Applicant's admissions of his involvement with marijuana warrant the application of two disqualifying conditions (DCs) of the AGs for drug involvement and substance misuse to Applicant's situation. DC ¶¶ 25(a), "any substance misuse" and 25(c), "illegal possession of a controlled substance, including

cultivation, processing, manufacture, purchase, sale, or distribution; or possession of Illegal drugs or drug paraphernalia,." apply to Applicant's situation.

To his credit, Applicant has committed to abandoning all use and involvement with marijuana and has remained abstinent from marijuana use and possession of marijuana products for, respectively, almost two years for marijuana use and 18 months for the possession of marijuana products. Currently, he exhibits no visible signs or indications of succumbing to any risks or pressures he might encounter to return to illegal drug use and involvement in the foreseeable future.

Based on Applicant's credible explanations of the historical time line of his recurrent marijuana use and possession of marijuana products, he may avail himself of the full benefit of MC ¶ 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."

To be sure, Applicant's history of involvement with marijuana use and marijuana products has been a recurrent one that dates back to 1997 and only ended, respectively, in the Fall of 2022 for his marijuana use and in February 2023 for his consumption of marijuana products. Equally true is his infrequent use of marijuana and possession of marijuana products in recent years. Applicant's use of marijuana was never frequent after 2012 and was never used by him while holding a security clearance. He has been upfront and candid about his marijuana use and involvement during every phase of DoD's investigation.

Whole-person assessment

From a whole-person perspective, Applicant has established enough independent probative evidence of his overall, trustworthiness, reliability, and good judgment required of those who seek eligibility to hold a security clearance or sensitive position. At this time, he has added enough positive reinforcements and time in abstinence from active use and involvement with of illegal drugs to facilitate safe predictions he is at no risk of recurrence.

Considering the record as a whole, and granting due weight to his positive commitments to abstinence, there is sufficient probative evidence of sustainable mitigation in the record to make safe, predictable judgments about Applicant's ability to avoid illegal drugs in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant's drug activities over an extended number of years with close to two years of sustained abstinence, he mitigates security concerns with respect to the allegations covered by SOR ¶ 1.a.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person, I conclude drug involvement and substance misuse security concerns are mitigated. Eligibility for access to classified information is granted.

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:

GUIDELINE H (DRUG INVOLVEMENT): FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Roger C. Wesley
Administrative Judge