



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 23-02421
)
 Applicant for Security Clearance)

Appearances

For Government: Lauren Ann Shure, Esq., Department Counsel,
and Tovah Minster, Esq., Department Counsel

For Applicant: Peter H. Noone, Esq.

08/27/2024

Decision

FOREMAN, LeRoy F., 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 February 9, 2023. On November 8, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) sent her a Statement of Reasons (SOR) alleging security concerns under Guideline H. 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 17, 2023, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on January 23, 2024, and the case was assigned to me on May 3, 2024. On May 28, 2024, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on June 25, 2024. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified, presented the testimony of three witnesses, and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. DOHA received the transcript (Tr.) on July 8, 2024.

Findings of Fact

In Applicant's answer to the SOR, she admitted the single allegation in SOR ¶ 1.a in part and denied it in part. Her admissions are incorporated in my findings of fact.

Applicant is a 22-year-old test and integration engineer employed in the laboratory of a defense contractor since September 2023. She was previously employed in the same laboratory as an intern from May to September 2023. She held an interim clearance while she was working as an intern. She has never married and has no children. She graduated from college in May 2023, summa cum laude, with a Bachelor of Science degree in electrical engineering.

The SOR alleges that Applicant used marijuana with varying frequency from October 2020 to June 2023. In her answer to the SOR, she admitted that she used marijuana on three occasions while in college, in October 2020, April 2021, and December 2021. Marijuana use is legal in the jurisdiction where she lives and where she attended college.

Applicant disclosed her use of marijuana in October 2020 and December 2021 in her SCA. She stated that she smoked marijuana once in October 2020. She stated that she did not intend to use it again because she did not like how it made her feel and she does not like inhaling anything. (GX 1 at 28-29)

At the hearing, Applicant testified that her use of marijuana in October 2020 occurred at a friend's house. Her friends were smoking marijuana, and she felt peer pressure to use it with them. She was in her second year of college at the time. (Tr. 35-36) She disclosed this use of marijuana in her SCA and during her security interview in July 2023. (GX 1 at 28-29; GX 2 at 6)

Applicant testified that she consumed a marijuana edible in April 2021. It was offered to her by a friend, and she consumed it to see if would be different from smoking marijuana. (Tr. 37-38) She consumed an edible again in December 2021, when it was offered to her by her brother. (Tr. 38)

When Applicant was interviewed by a security investigator on July 27, 2023, she volunteered the information about her use in June 2023. (GX 2 at 6) She testified that she

knew that the June 2023 incident was not reflected in her SCA and believed that she had to be candid about it, “because that’s important on those evaluations.” (Tr. 41) The June 2023 use of marijuana occasion occurred when she was traveling overseas during a post-graduation trip with two former classmates, when she shared a marijuana cigarette purchased by one of her companions in a country where sale, purchase, and use of marijuana was legal.

Applicant testified that she remembered attending her current employer’s meeting in March 2023 where she and other newly hired employees were briefed about the requirements for holding a security clearance. She could not remember the specific requirements that were discussed, but she remembered being informed that she was required to report foreign travel. She testified she did not think she fully understood that federal law regarding marijuana use would override state law. (Tr. 33-34)

On August 9, 2023, Applicant self-reported her June 2023 marijuana use to her security officer. According to the security officer’s report, she told him that this occasion was her first and only use of marijuana while employed at the laboratory. (GX 3)

In March 2024, Applicant voluntarily underwent a substance abuse evaluation by a licensed drug and alcohol psychotherapist. The psychotherapist noted that Applicant exhibited situational anxiety about her security clearance application, but she concluded that she did not meet the criteria for an alcohol or cannabis use disorder. (AX A)

Applicant’s roommate, who is a close friend, has known Applicant since they both were in their first year of college. She submitted a statement expressing confidence that Applicant has learned from her ill-advised use of marijuana and is dedicated to complying with the standards required for a security clearance. At the hearing, she testified that she considers Applicant to be “super honest,” and she has never observed her using any form of marijuana. She believes that Applicant is very confident, strong-willed, and not likely to succumb to peer pressure. (Tr. 48-52; AX C)

A principal member of the laboratory technical staff, who has worked for Applicant’s employer since 1989, interviewed Applicant when she applied for a summer student position in May 2022. He supervised her and had daily contact with her while she was a student and has continued to work with her now that she is a full-time employee. He considers Applicant to be trustworthy and a “great employee.” He is aware of her previous involvement with marijuana but has no concerns about her current suitability to hold a security clearance. (Tr. 64-66)

A coworker who supervised Applicant as an intern considers her to be responsive, honest, and reliable. He is confident that she will follow the rules for maintaining a security clearance. (Tr. 81-84)

Before the hearing, Applicant submitted a written statement of intent to refrain from using illegal drugs, including marijuana, consenting to random drug testing, and agreeing to automatic revocation of her security clearance for any future use of illegal drugs,

including marijuana. (AX B) At the hearing, she testified that marijuana was legal in the state where she went to college and in the state where she was employed after graduation. She testified that she did not fully understand that federal law would override the state law if she was working for a federal contractor. (Tr. 34) She realized the seriousness of her marijuana use after she was interviewed by a security investigator in July 2023. (Tr. 18)

Applicant was raised by a stable and close family. She described her relationship with her family as “awesome.” (Tr. 26) Her father worked for a defense contractor and held a security clearance for nearly 40 years. He is aware of the security concerns raised by her drug involvement. He has no doubt that she will learn from her ill-advised drug involvement. (Enclosure to SOR response)

A close family friend who has known Applicant for 22 years submitted a statement vouching for her good character. She describes Applicant as “trustworthy, ethical, honest, compassionate, hardworking, diligent, honorable, inclusive, empathetic, and straightforward. Another close family friend, who is an Air Force veteran and worked for 44 years in the defense industry, commended Applicant for her honesty in her SCA and vouched for her suitability for a security clearance. (Enclosures to SOR response)

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 “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” See ISCR Case No. 17-04166 at 3 (App. Bd. Mar. 21, 2019) It is “less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “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. 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 Abuse)

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.

On October 25, 2014, the Director of National Intelligence (the Security Executive Agent (SecEA)) issued DNI Memorandum ES 2014-00674, "*Adherence to Federal Laws Prohibiting Marijuana Use*," which states:

[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.

On December 21, 2021, the SecEA promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications. It states in pertinent part:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a "whole-person concept." This requires adjudicators to carefully weigh a number of variables in an individual's life to determine whether that individual's behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged 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 Standard Form 86 (SF-86), Questionnaire for National Security Positions.

Applicant's admissions and the evidence submitted at the hearing establish the following disqualifying conditions under this guideline.

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

AG ¶ 25(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; and

AG ¶ 26(a) is not established. Applicant's use of marijuana was recent, frequent, and did not occur under unusual circumstances.

AG ¶ 26(b) is established. Applicant has not disassociated with drug users, because her brother is a user. However, she is no longer in a college environment and understands that the federal workplace has different standards. It is not clear from the record whether her employer followed the guidance of the SecEA to "advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process." She has provided the statement of intent provided for in AG ¶ 16(b)(3).

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 was candid, sincere, and remorseful at the hearing. She recognizes that she has left the college environment and its behavioral norms. She is enthusiastic about her current employment and is committed to following the standards expected of persons entrusted with classified information. I have followed the SecEA's guidance that that "prior recreational marijuana use by an individual may be relevant to adjudications but not determinative." 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 her drug involvement.

Formal Findings

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

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraph 1.a:	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.

LeRoy F. Foreman
Administrative Judge