



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 23-02320
)
 Applicant for Security Clearance)

Appearances

For Government: Cassie L. Ford, Esq., Department Counsel
For Applicant: *Pro se*

09/25/2024

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 denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 22, 2023. On January 5, 2024, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) sent him 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 January 12, 2024, and requested a decision on the written record in lieu of a hearing. Department Counsel submitted the Government's

written case on June 4, 2024. On June 5, 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.

Applicant received the FORM on June 12, 2024. His response was received on July 2, 2024, and was admitted in evidence as Applicant's Exhibit (AX) A, without objection. The case was assigned to me on September 24, 2024.

The FORM consists of six items. Items 1 through 3 are the pleadings and transmittal documents in the case. Items 4 through 6 are the evidence supporting the allegations in the SOR. Items 4 through 6 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 24-year-old system engineer employed by a defense contractor since November 2022. He received a bachelor's degree in May 2022. He has no military service. He has never held a security clearance. He is not married and has no children.

When Applicant submitted his SCA, he disclosed that he used marijuana "socially, on weekends, averaging twice a week during college." He stated that the frequency of his use decreased after he graduated from college, since he used it only in time of stress. He stated that he intended to continue using it for stress relief. (FORM Item 5 at 28-29) He repeated his intention to continue using it in his response to the SOR, during his interview with a security investigator in June 2023, and in response to DOHA interrogatories in December 2023. (FORM Item 4; FORM Item 6 at 4 and 9). During his interview with the security investigator, he acknowledged that he knew that marijuana use was illegal under federal law, but he believed that possession and use of small quantities was legal under state law. (FORM Item 6 at 4)

When Applicant responded to the FORM, he stated that after learning that his application for a security clearance was initially denied, he "began to internally reflect on [his] actions and choices," and he decided that his professional development was "far more important than using marijuana." He stated that he no longer uses marijuana and no longer associates with marijuana users. He declared:

Having been clean from marijuana, I can say that I was denying my addiction, and misusing it for my stress and problems never allowed me to tackle their source; I was using marijuana to sweep my issues under a rug. I plan to leave my substance abuse behind me and continue my professional growth fully knowing that relapsing would cause mistrust, compromise my integrity, and revoke my eligibility for national security (sic). I have always valued being someone who was trustworthy and responsible,

and with my continued sobriety I can commit to those values with full confidence in myself and to others I surround myself with.”

(AX A)

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 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.

SOR ¶ 1.a alleges that Applicant “used marijuana with varying frequency from about September 2020 to at least October 2023.” SOR ¶ 1.b alleges that in his response to interrogatories in December 2023, he expressed an intent to continue to use marijuana in the future. He admitted both allegations in his answer to the SOR. (FORM Item 4) His admissions establish the following disqualifying conditions under this guideline:

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.

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;

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(d): satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

AG ¶ 26(a) is not established. Applicant's illegal drug use was recent, frequent, and did not occur under circumstances making it unlikely to recur.

AG ¶ 26(b) is not fully established. Applicant has acknowledged his drug involvement. He is no longer in college and he has disassociated from his previous drug-using associates. His statement in his response to the FORM satisfies AG ¶ 26(b)(3). However, he has not yet established a pattern of abstinence. He has repeatedly declared his intention to continue using marijuana, most recently in his December 2023 responses to DOHA interrogatories. He admits that he did not begin his abstinence until his "initial denial for a security clearance," apparently referring to his receipt of the SOR in January 2024. Applicants who begin to address their security-significant conduct only after learning that their personal interests are at stake may be lacking in the judgment and reliability required of persons entrusted with classified information. ISCR Case No. 16-01211 (App. Bd. May 30, 2018).

AG ¶ 26(d) is not established. Applicant submitted no evidence that he participated in a prescribed drug treatment program.

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). 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 security concerns raised by his drug involvement. He may well be able to qualify for a security clearance in the future if he adheres to his recently stated intention to refrain from further drug involvement, but he has not yet reached that point. See Directive E3.1.37 through E3.1.38 (reconsideration after one year).

Formal Findings

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

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	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