



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



In the matter of:)
)
) ISCR Case No. 24-00133
)
Applicant for Security Clearance)

Appearances

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

10/18/2024

Decision

HALE, Charles C., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement and Substance Misuse). Applicant did not provide sufficient evidence to mitigate the Guideline H concern. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on February 27, 2023. On March 7, 2024, the Department of Defense (DoD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DoD 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 Security Executive Agent Directive 4, National Security Adjudicative Guidelines (AG) (December 10, 2016).

Applicant answered the SOR and requested a decision on the written record without a hearing. Department Counsel submitted the Government’s written case on June 11, 2024. Applicant responded to the FORM on August 19, 2024. With his Response, he

included pictures and diagnosis for his health conditions. The case was assigned to me on October 9, 2024.

The SOR and the Answer (FORM Item 1) and the Response are the pleadings in the case. FORM Item 2, the SCA, and FORM Item 3, Government interrogatories, completed by Applicant on February 27, 2024, are admitted into evidence without objection.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations outlined in SOR ¶¶ 1.a through 1.f. (Answer, Response.) His admissions are incorporated in my findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is a 34-year-old research engineer. He has worked for his current employer since February 2023. He graduated valedictorian of his high school and went to college, where he earned a degree in physics while a member of a collegiate sports team. He earned his PhD in 2020. He is seeking his first security clearance. While in graduate school in 2017 he married and has no children. (Answer; Item 2.)

Guideline H

Applicant admits the use of four different drugs between 2011 and April 2023; that he purchased these drugs; and that he was charged with drug possession. (SOR ¶¶ 1.a through 1.f). Applicant admitted he used marijuana from November 2011 until April 2023 and purchased it from 2011 until 2020 (SOR ¶¶ 1.a and 1.b). He certified his SCA on February 27, 2023. He admitted he was charged with possession of marijuana in May of 2013 (SOR ¶ 1.f) and completed probation, education, and community service as part of having the offense dismissed. Then he started graduate school and lived with a roommate who used marijuana more than he did, which contributed to his more frequent use. This was during the time he was dealing with anxiety and depression that he had developed as an aftermath to his "intense college experience," playing football while completing physics coursework and a near-death experience in the car accident.

In 2014 or 2015, Applicant started therapy for anxiety and attention-deficit/hyperactivity disorder (ADHD), and in 2019 he was prescribed an antidepressant (Zoloft) and ADHD medication (Adderall and Vyvanse). Since using these medications, his mental and emotional state has stabilized and been peaceful. He states his marijuana usage became significantly more infrequent to "approximately 3-4 times a year until around 2018" and since then it was only a handful of times with his last use between 2019 and 2020. He acknowledges he told the investigator during his security clearance interview he had used a delta-8 gummy (tetrahydrocannabinol (THC) edible) to help him sleep in 2023. He stated he realized that given his new job and future security requirements he should probably abstain from delta-8 as well since he did not know its

legal status at the federal level. He affirms in his Answer he has “abstained from all cannabis use, including legal variations.” (Answer.)

In his Response he stated the SOR ¶ 1.a was incorrect because:

The one incident in April 2023 was not marijuana, it was a hemp product, primarily CBD with less than 3% THC, as explained in my Enhanced Subject Interview and my response to the SOR. This product is legal at both state and federal levels and is not THC.

The Government had specifically noted the post-SCA certification use in its recitation of the facts in the FORM. In his Response, Applicant acknowledged use of these products was a “gray area” and that he should “not even get involved in the gray area like hemp derivatives.” He has avoided these products since and restates his last marijuana use was in July 2022. I have not considered Applicant’s admission to CBD use. (Response; Item 2.) He indicated in his response to Government interrogatories he would use marijuana if it was legal federally. (Item 3.)

Applicant admitted that from February 2012 until July 2022, he used various hallucinogenic drugs, LSD, hallucinogenic mushrooms, and DMT (dimethyltryptamine), and purchased these drugs from 2012 until in 2020 (SOR ¶¶ 1.c and 1.d). In his Answer, he states this “behavior was infrequent, and generally at low, controlled doses.” He argues this use was “experimental” and not habitual. He states he “tried LSD once,” “mushrooms, 3 times,” and “used DMT another 3-4 times.” (Answer.)

Applicant cites that the person who generally facilitated Applicant’s drug use was a cousin with whom he grew up. Once in college they followed different paths. His cousin died of an opioid overdose in March 2021. This tragedy “punctuated” that period of his life. He argues, “I’ve grown into a moral, responsible, balanced man that has succeeded at every step of my career and takes great care to be present in my family’s lives.” (Answer.)

In his Response, Applicant reaffirms he has no plans to use these substances again. He notes he accomplished a lot without a diagnosis for his anxiety or ADHD or any outside help. He acknowledges his anxiety or ADHD diagnoses are not an excuse but provide an understanding for why he acted as he did in his 20s. He states, “Since being treated for my anxiety and ADHD I’m more reliable and consistent in all aspects of my life.” He and his wife are expecting their first child in 2025, and he recognizes he must be a careful and responsible person in general to take charge of raising a child. He notes the risks of incapacitation from drug use are too great. (Response.) The pictures and treatment information reflect his statements about a supportive family and his treatment for anxiety and ADHD. (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*, 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 and the record establish the following disqualifying conditions under this guideline, as detailed in 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.

Applicant admitted using at least four different controlled substances between 2011 and September 2022 (SOR ¶¶1.a-1.e) and purchasing these controlled substances until 2020. He admitted he was charged with marijuana possession in 2013. AG ¶¶ 25(a) and 25(c) apply.

The following mitigating conditions are potentially applicable as detailed in 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

(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's drug misuse was frequent, longstanding, and recent, and it did not occur under circumstances unlikely to recur. He admittedly used marijuana from 2011 until July 2022, and he used LSD, hallucinogenic mushrooms, and DMT on various occasions from February 2012 until July 2022. He admitted purchasing these drugs from 2012 until in 2020. His drug misuse casts doubt on his current reliability, trustworthiness, and good judgment.

AG ¶ 26(b) is not established. Applicant admitted his drug use, and he has recently changed his behavior. He no longer resides with a heavy marijuana user, and the person who was a primary enabler of his drug use died from a drug overdose in 2021. He has abstained from knowing illegal drug use since 2022. He intends to abstain from marijuana as long as it is illegal under federal law. He appears to have gotten his life on track and has his priorities straight. However, insufficient time has passed to mitigate his lengthy history of substance abuse involving a variety of illegal drugs. The security concern regarding his drug involvement is not mitigated.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense 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 has made significant strides

in overcoming his drug issues, which is reflected by the absence of recent law enforcement incidents, earning his doctorate degree, seeking treatment for his mental health concerns, and getting married and starting a family. However, insufficient time has passed since his last drug use. 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 conduct.

Formal Findings

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

Paragraph 1: Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant except for the language “least April 2023,” which is found for Applicant
Subparagraphs 1.b-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