



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



In the matter of:)
)
) ISCR Case No. 23-02592
)
Applicant for Security Clearance)

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

12/03/2024

Decision

HALE, Charles C., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement and Substance Misuse) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 26, 2023. On May 14, 2024, the Department of Defense (DoD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. 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 submitted his Answer to the SOR on June 4, 2024, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written file of relevant material (FORM) on June 13, 2024. On June 14,

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 July 16, 2024, and did not provide a response. The case was assigned to me on October 25, 2024.

The SOR and the Answer are the pleadings in the case. FORM Items 2 through 6 and the character statement submitted with Applicant's Answer are admitted into evidence without objection. The character statement will be marked as Applicant Exhibit (AE) A.

Findings of Fact

In Applicant's Answer to the SOR, he admitted using marijuana. SOR ¶ 1.a. He admitted falsifying his answers on his SCA. SOR ¶¶ 2.a-2.b. 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 28 years old. He holds a bachelor's degree and a master's degree, which he earned in 2018 and 2021 respectively. He has worked for his sponsor since August 2021 and was granted a security clearance in December 2021. His sponsor's workplace is a drug-free workplace. He is single and has no children. (Item 2; Item 3; Item 5; Item 6.)

SOR ¶ 1.a: From about November 2021 until about March 2022, you used and purchased marijuana with varying frequency while holding a sensitive position, i.e., one in which you held a security clearance. Applicant admitted in his Answer that he had used medical marijuana during the period in question. He told the investigator during his security clearance interview he obtained a medical marijuana card from his doctor to address depression and anorexia. He estimated he used it approximately 80 times. (Item 4; Item 6.)

SOR ¶ 2.a: Falsified material facts on an SCA dated June 26, 2023, pertaining to "Section 23-Illegal Use of Drugs or Drug Activity" when you stated "No" to whether you had illegally used drugs or controlled substances in the last seven years and deliberately failed to disclose the information set forth in subparagraph 1.a. above. Applicant admitted in his Answer that he failed to disclose on his SCA that he had used marijuana as set forth in SOR ¶ 1.a. In March 2022, during a conversation with his sister, who was also a Federal contractor, he learned that medical marijuana was not legal to use while holding a security clearance. He did not disclose it to his employer or security office because he feared losing his job. (Item 4 at 19) He told the investigator he did not know marijuana was illegal under Federal law. Upon learning this fact, he told the investigator he immediately stopped. He thought because he had a medical marijuana card and that it was legal in the state where he obtained it, he was not violating the law. (Item 3; Item 4 at 19.)

SOR ¶ 2.b: Falsified material facts on an SCA dated June 26, 2023, pertaining to “Section 23-Illegal Use of Drugs or Drug Activity” While Possessing a Security Clearance Have you EVER illegally used or otherwise been illegally involved with a drug or controlled substance while possessing a security clearance other than previously listed. You stated “No” thereby deliberately failed to disclose the information set forth in subparagraph 1.a. above. Applicant completed his first SCA on August 11, 2021. He did not admit he used and purchased marijuana with varying frequency while holding a sensitive position from November 2021 until March 2022 until after completing his June 2023 SCA when he disclosed these facts during his August 2023 security clearance interview. He had been aware he had been illegally involved with marijuana since March 2022, when his sister informed him. (Item 2; Item 3; Item 4.)

The president of Applicant’s company wrote a strong character letter on his behalf. He described Applicant as a trusted and valued employee, who consistently exceeded their customer’s needs and expectations. He noted Applicant understood the serious nature of his omission and noted that he was a person who made a mistake and not an overt or malicious intent to deceive anyone. (AE 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*, 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 SCA and Answer are sufficient to raise the following disqualifying conditions under AG ¶ 25:

- (a) any substance misuse (see above definition);

(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

The following mitigating conditions under AG ¶ 26 are potentially applicable:

(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.

AG ¶¶ 26(a) and 26(b) are established. Applicant admitted using marijuana, which he obtained by use of a medical marijuana card provided by a doctor. He immediately stopped using marijuana over two years ago when he learned he was in violation of Federal law. His drug use is mitigated by time.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant's intentional failure to disclose his marijuana use in his SCA while holding a security clearance raises the following disqualifying condition, under AG ¶ 16:

(a): deliberate omission, concealment, or falsification of relevant facts from

any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

The following mitigating conditions, under AG ¶ 17, are potentially relevant:

(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

AG ¶¶ 17(a) and 17(c) are not established for SOR ¶¶ 2.a and 2.b. Applicant had been aware for more than year that he had illegally used marijuana while holding a sensitive position, one in which he held a security clearance based on his 2021 SCA. He admitted he deliberately lied on his 2023 SCA because he feared losing his position. Applicant's false statements on his 2023 SCA concerning his drug use and drug use while holding a security clearance are not "minor," because such statements strike at the heart of the security clearance process. See ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011). An applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the industrial security program. See ISCR Case No. 01-03132 at 3 (App. Bd. Aug. 8, 2002). While Applicant voluntarily disclosed his drug use to the investigator, his false statements are recent and calculated to give him the most favorable profile for his security clearance application.

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 Guidelines H and E in my whole-person analysis and have 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. I considered the favorable character letter submitted by the president of his company and that he disclosed his use voluntarily to the investigator. However, insufficient time has passed since he lied on his SCA to overcome the extent and seriousness of his conduct. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003).

After weighing the disqualifying and mitigating conditions under Guidelines H and E, 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 under Guideline E.

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
Paragraph 2: Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.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.

Charles C. Hale
Administrative Judge