



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 24-00966

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

12/23/2024

Decision

WESLEY, ROGER C. Administrative Judge

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

Statement of the Case

On August 8, 2024, the Defense Counterintelligence Security Agency (DCSA) Consolidated Adjudications Service (CAS) issued a statement of reasons (SOR) to Applicant detailing reasons why under the drug involvement and substance misuse and personal conduct guidelines 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 September 3, 2024, and requested her case be decided on the written record. The case was assigned to me on November 8, 2024. Applicant received the File of Relevant Material (FORM) on September 14, 2024, and was instructed to file any objections to the FORM or supply additional information for consideration within 30 days of receipt. Applicant did not file objections to the FORM or supply new information.

Summary of Pleadings

Under Guideline H, Applicant allegedly (a) used marijuana from about 2020 to the present and (b) used marijuana after being granted a security clearance in July 2023. Allegedly, Applicant used marijuana with varying frequency.

Under Guideline E, Applicant allegedly falsified her electronic questionnaires for investigations processing (e-QIP) she executed in June 2023 by omitting her use of marijuana while possessing a security clearance. Allegedly, she used marijuana as described more fully under Guideline H.

In Applicant's response to the SOR, she admitted each of the allegations covered by SOR ¶¶ 1.a and 1.b and 2.a with explanations and clarifications. She claimed she was not aware that marijuana was federally illegal until she was so informed by a background investigator. She claimed, too, that she was neither drug-tested nor advised to cease the use of medical marijuana .

Applicant further claimed in more detail that she was undergoing treatment at the time for chronic pain caused by Systemic Lupus Erythra Matosus (SLE) and had been prescribed medical marijuana as a part of her treatment plan. And, she claimed she fully understood the seriousness of the matter and is committed to adhering to the guideline and regulations in the future.

Findings of Fact

Applicant is a 32-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 never married and has no children. (Item 3) She earned a high school diploma in August 2011 and attended dental assistant training school in 2012, and again in 2021 without earning a diploma or certificate. (Items 3 and 5) Applicant attended a bartending school in 2015 without earning a diploma or certificate. (Item 3)

Applicant reported no military service. Since August 2015, she has been self-employed as a part-time consultant to a law firm. (Item 3) Contemporaneously with her consulting arrangement, she briefly worked for a non-defense firm as a leasing consultant in March 2023. (Item 3) Previously, she worked for other defense and non-

defense employers in various jobs. She has held an interim security clearance since May 2023. (Item 5)

Applicant's drug history

Applicant used marijuana with varying frequency (sometimes daily) to at least July 2024. In February 2021, she was prescribed medical marijuana to manage her chronic pain. (Item 5) After learning in June 2023 that marijuana was federally illegal, she continued to use the drug until at least July 2024. (Item 4) In her personal subject interview (PSI), she expressed her willingness to cease using marijuana were it necessary as a condition to her obtaining her security clearance.

Applicant's e-QIP omissions

Asked to complete an e-QIP in June 2023, Applicant omitted her past use of marijuana within the previous seven years (Item 2) While admitting her omissions in her response to the SOR, she attributed her omissions to a mistaken understanding of whether marijuana was federally illegal and subject to required reporting in her e-QIP. (Applicant's response to SOR and (Item 5)

When asked about any prior drug use in her ensuing PSI, Applicant volunteered her marijuana use without any prompting from the interviewing OPM investigator. (Item 5) Considering her explanations of her e-QIP omissions of her marijuana and ensuing voluntary, good-faith disclosure of her past marijuana use in her PSI, inferences are warranted that her-e-QIP omissions were based on a mistaken misunderstanding and were not the result of any intentional omission of her past marijuana use.

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

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.

Personal Conduct

The Concern: Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, and trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes . . . AG ¶ 15.

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 recent use of marijuana and while granted access to classified information. Considered together, Applicant's involvement with illegal drugs while having access to classified information raises security concerns

over whether her use of illegal drugs reflect actions incompatible with the good judgment, reliability, and trustworthiness requirements for gaining access to classified information.

Drug involvement concerns

Applicant's admissions to using illegal drugs (inclusive of instances of marijuana use while having access to classified information) raise security concerns over judgment and risks of recurrence. On the strength of the evidence presented, three disqualifying conditions (DCs) of the AGs for drug involvement apply to Applicant's situation: DC ¶¶ 25(a), "any substance misuse"; 25(c), "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of illegal drugs or drug paraphernalia"; and 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position."

Disqualifying drug use is particularly serious when it continues to occur while holding a security clearance (even an interim clearance). See ISCR Case No. 06-18270 at 3 (App. Bd. Nov. 7, 2007) (drug use in violation of an employer's drug policy) Applicant's continued use of marijuana even after completing her e-QIP and becoming aware of a federal ban on marijuana use (even for medicinal purposes) is considered reckless and incompatible with an applicant's claim of intended future avoidance of marijuana use. See ISCR Case No. 19-00540 at 2 (App. Bd. Dec. 13, 2019).

In Applicant's case, her expressed intent to cease her marijuana use in the future is not only recent, but it is accompanied by a condition that any intended cessation of marijuana use is a requirement of security clearance eligibility. So, not only is Applicant's promise to cease her marijuana use a conditional one, but it is a commitment that is undercut by her still recent use of federally illegal marijuana. See ISCR Case No. 11-04395 (App. Bd. Oct. 5, 2012).

Without more time in sustained abstinence from marijuana and a firmer commitment to sustained abstinence of use of the drug, none of the mitigating conditions are available to Applicant at this time. A recurring cycle of illegal drug use following a grant of access to classified information (as in Applicant's case) is more predictive of the future and incompatible with the application of any of the mitigating conditions covered by guideline H. See, e.g., ISCR Case No. 11-00193 (App. Bd. Jan. 24, 2013).

Applicant's recent use of marijuana while granted access to classified information makes it too soon to absolve her of risks of recurrence. Without more time and evidence from corroborating sources to establish a probative pattern of sustained unconditional abstinence from the use of federally illegal drugs by Applicant, none of the mitigating conditions are fully available to her.

While this is not a close case, even close cases must be resolved in the favor of the national security where doubt exists. See *Dept. of Navy v. Egan*, *supra*. Quite apart from any reservations about judgment the Government may have for the clearance

holder employed by a defense contractor, the Government has the right to expect the keeping of promises and commitments from the trust relationship it has with the clearance holder. See *Snepp v. United States*, 444 U.S. 507, 511n.6 (1980).

Personal conduct concerns

Personal conduct concerns attributable to Applicant's omissions of her use of marijuana (some while having access to classified information) are unsubstantiated. Applicant's assurances that her omissions of her past use of medicinal marijuana (legal in her state) are both plausible and credible and are accepted.

Applicant's ensuing PSI acknowledgments of her past marijuana use (promptly furnished in good-faith without confrontation) reinforce her claims of misunderstanding of the question covered by Section 23 of her e-QIP inquiring about past use of controlled substances within the previous seven years.

Whole-person assessment

From a whole-person perspective, Applicant has failed to establish enough independent probative evidence of her overall trustworthiness, reliability, and good judgment required of those who seek eligibility to hold a security clearance or sensitive position. She lacks enough positive reinforcements and time in abstinence from active use of federally controlled marijuana to facilitate safe predictions she is at no risk of recurrence.

Considering the record as a whole at this time, there is insufficient evidence of sustainable mitigation in the record to make safe predictable judgments about Applicant's trusted ability to avoid illegal drugs in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant's recent drug use, she does not mitigate security concerns with respect to the allegations covered by SOR ¶¶ 1.a-1.b and 2.b. Favorable conclusions are warranted with respect to SOR ¶ 2.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 personal conduct security concerns are not mitigated. Eligibility for access to classified information is denied.

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):	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Subparagraph 2.a:

For Applicant

Subparagraph 2.b:

Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Roger C. Wesley
Administrative Judge