



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



In the matter of:)
)
) ISCR Case No. 23-01942
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskell, Esq., Department Counsel
For Applicant: *Pro Se*

03/21/2024

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 concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

Statement of the Case

On September 15, 2023, the Defense Counterintelligence Security Agency (DCSA) Consolidated Adjudication Service (CAS) issued a statement of reasons (SOR) to Applicant detailing reasons why under the drug involvement and substance misuse guideline the DSCA 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 21, 2023, and requested his case be decided on the written record. The case was assigned to me on March 5, 2024. Applicant received the File of Relevant Material (FORM) on November 14, 2023, and was instructed to file any objections to the FORM or supply additional information for consideration within 30 days of receipt. Applicant did not submit any supplemental information.

Summary of Pleadings

Under Guideline H, Applicant allegedly (a) used marijuana with varying frequency from about June 2017 to about March 2022 and (b) used marijuana in March 2022 while granted access to classified information.

In Applicant's response to the SOR, he admitted each of the allegations covered by SOR ¶¶ 1.a and 1.b with explanations and clarifications. He claimed he did not use marijuana more than twice (infrequently) while holding a security clearance. He claimed he was only 22 years old at the time, in school, and not working full time. And he claimed remorse over his use of marijuana and committed to abstinence in the future.

Findings of Fact

Applicant is a 24-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) He attended state college classes between June 2017 and September 2023 and summer college classes between June 2019 and July 2019, without earning a degree or diploma. He reported no military service. (Item 3)

Since January 2023, Applicant has worked for his current defense contractor as an associate systems engineer. (Item 3) Previously, he worked for other employers in various jobs. He reported brief periods of unemployment in 2021. (Item 3) Applicant has held a security clearance since June 2021. (Item 3)

Applicant's drug history

Applicant used marijuana with varying frequency in social situations with friends in college from June 2017 to March 2022. (Items 3-6) He used marijuana for relaxation and recreation twice a week, mostly with his girlfriend and her father. (Items 3 and 6) He acknowledged using marijuana on one occasion in March 2022 while holding a security clearance. (Item 6) Applicant assured that he has not used marijuana since his last use in March 2022. (Item 2) And, he recommitted to utilizing any means to demonstrate his willingness "to follow laws, rules, and regulations (i.e., random drug tests, additional background checks, etc.)" governing the use of illegal drugs. (Item 2) Applicant's abstinence assurances in his SOR response essentially confirmed what he previously told

interviewing investigators from the Office of Personnel Management (OPM) in July 2021, and again in April 2022, respectively, when he was asked whether or not he had any future intentions to use illegal drugs. (Items 4 and 6)

While Applicant's renewed commitments to abstinence are encouraging, commitments made to avoid illegal drugs while holding a security clearance cannot be discounted or relaxed absent either exigent circumstances or credible independent evidence, which are not present in Applicant's case. After using marijuana with varying frequency over a five-year span of time, with a last known usage in March 2022, with written notice as early as June 2021 that illegal drug use was incompatible with access to classified information, Applicant continued his use of marijuana for another year (i.e., to March 2022).

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.

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 acts. 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 while granted access to classified information. Considered together, Applicant's involvement with illegal drugs raises security concerns over whether his lengthy history of using marijuana and more recent March 2022 use of the drug 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 marijuana while holding a security clearance raises 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."

To his credit, Applicant has committed to abandoning involvement with marijuana and all illegal drugs. For over 18 months, he is credited with remaining abstinent from illegal drugs and exhibits no visible signs or indications of succumbing to any risks or pressures he might encounter to return to illegal drug use in the foreseeable future. Applicant's assurances of sustained abstinence from illegal drugs (inclusive of marijuana) and avoidance of associations with friends with whom he shared illegal drugs are encouraging. And, his efforts warrant limited application of two mitigating conditions (MCs) of the drug involvement guideline: MC ¶¶ 26(a), "the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment"; and 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 . . .
(2) changing or avoiding the environment where drugs were used . . .

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

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 judgment reservations 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).

Among Applicant's commitments when approved for a security clearance is his promise to avoid involvement with illegal drugs. It is this commitment to abstinence from the use of illegal drugs that Applicant breached when he resumed his marijuana use in March 2022. Applicant's use of marijuana after committing to abstinence in 2021 violated his abstinence commitments and raises continuing concerns about his trustworthiness, reliability, and judgment.

Whole-person assessment

From a whole-person perspective, Applicant has failed to establish enough independent probative evidence of his overall trustworthiness, reliability, and good judgment required of those who seek eligibility to hold a security clearance or sensitive position. He lacks enough positive reinforcements and time in abstinence from active use of illegal drugs and associations with persons who use them to facilitate safe predictions he 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 activities, he does not mitigate security concerns with respect to the allegations covered by SOR ¶¶ 1.a-1.b.

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 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

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