



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



In the matter of:)	
)	
)	ISCR Case No. 23-01795
)	
Applicant for Security Clearance)	

Appearances

For Government: Cynthia Ruckno, Esq., Department Counsel
For Applicant: *Pro se*

01/23/2025

Decision

Goldstein, Jennifer, Administrative Judge:

Applicant mitigated the security concerns under Guidelines H (Drug Involvement and Substance Misuse). Eligibility for access to classified information is granted.

Statement of the Case

On September 20, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H. The action was taken under Executive Order (EO) 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 adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant responded to the SOR on October 23, 2023, and requested a decision on the written record in lieu of a hearing. The Government’s written case was submitted on September 25, 2024. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the

FORM on October 25, 2024, and he did not respond. The case was assigned to me on January 8, 2025. The Government exhibits included in the FORM are admitted in evidence, as Government exhibits (GE) 1 through 5.

Findings of Fact

Under the Guideline for Drug Involvement and Substance Misuse, the SOR alleges that Applicant used marijuana from November 2016 to about July 2022. (SOR ¶ 1.a) Applicant admitted this allegation. (GE 1-3)

Applicant is 34 years old. He earned a bachelor's degree in May 2012. He is unmarried and has no children. He resides with his girlfriend. He has been employed as a software engineer for a federal contractor since October 2022. (GE 4)

On December 26, 2022, Applicant completed a security clearance application (SCA), in which he disclosed that he had used marijuana between November 2016 and July 2022. He explained that he tried it soon after it became legal in his state. He initially used it recreationally on a monthly basis. After a year or two, he increased the frequency of his marijuana use to each weekend. In 2020, with the COVID lockdowns, he started to use it on a daily basis. He obtained it from state-licensed dispensaries. In early 2022, he moved in with his girlfriend and his frequency decreased to weekly use. Shortly after the move, he decided to search for a new job and knew his marijuana use could be problematic for employers. He also was experiencing health issues related to his marijuana use. In March 2022, he was diagnosed with cyclical vomiting related to his marijuana use. He last purchased marijuana on June 13, 2022, and stopped using marijuana completely after July 17, 2022. (GE 3, GE 4)

Applicant continues to associate with friends that use marijuana, including his girlfriend who smokes it two or three times per month at their home. However, he does not intend to purchase or use illegal drugs in the future. He indicated that he hopes to start a family and leave marijuana behind. He noted that even if marijuana becomes de-scheduled or legal under federal law, he will have other considerations than just whether it is legal to assess before he would use it. (GE 3-5)

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.

Marijuana is a Schedule I controlled substance under Federal law pursuant to Title 21, Section 812 of the United States Code. Schedule I drugs are those which have a high potential for abuse; have no currently accepted medical use in treatment in the United States; and lack accepted safety for use of the drug under medical supervision. Section 844 under Title 21 of the United States Code makes it unlawful for any person to knowingly or intentionally possess a controlled substance not obtained pursuant to a valid prescription.

I have considered the disqualifying conditions for drug involvement and substance misuse under AG ¶ 25, and the following are potentially applicable: AG ¶ 25(a) (any substance misuse (see above definition)); and AG ¶ 25(c) (illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia). Applicant's use and purchase of marijuana from November 2016 to July 2022 establishes AG ¶¶ 25(a) and 25(c).

I have considered the mitigating conditions under AG ¶ 26. The following is 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.

Applicant's illegal marijuana use occurred from November 2016 to July 2022. He used it heavily for those six years. He has now matured and no longer enjoys the side-effects of marijuana. It makes him vomit. He has abstained from marijuana use since July 2022, despite continuing to associate with marijuana users. He indicated his intent to abstain from the use of illegal substances in the future and demonstrated his commitment to that by abstaining for over two years. Given his honesty with the government in reporting his marijuana use, I find his stated intent to abstain credible. Applicant sufficiently established that future use of illegal drugs is unlikely, and his past

use does not cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶ 26(a) applies.

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). Once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance." ISCR Case No. 09-01652 at 3 (App. Bd. Aug. 8, 2011), *citing Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Applicant has overcome this presumption by abstaining from the use of marijuana since July 2022. His decision to quit using marijuana was based on his health and his future goals. It shows maturity. I also note that he did not use marijuana until his state legalized it. 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 mitigated the security concerns raised by his drug involvement and substance misuse.

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:

Paragraph 1, Guideline H (Drugs/Misuse): FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

Jennifer Goldstein
Administrative Judge