



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 24-01210

Appearances

For Government: William Miller, Esq., Department Counsel
For Applicant: *Pro se*

02/10/2025

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 August 13, 2024, the Defense Counterintelligence Security Agency (DCSA) Consolidated Adjudications Services (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 August 15, 2024, and requested his case be decided on the written record. The case was assigned to me on December 23, 2024. Applicant received the File of Relevant Material (FORM) on October 1, 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 supplement the record or respond to the Government's FORM. The Government's exhibits (Items 1-7) were admitted without objection

Summary of Pleadings

Under Guideline H, Applicant allegedly (a) used THC with varying frequency from about December 2022 to about February 2023 and (b) used THC with varying frequency from about December 2022 to about February 2023, while employed in a sensitive position (i.e., one requiring a security clearance). Allegedly, his THC use raises security concerns about his ability or willingness to comply with laws, rules, and regulations

In Applicant's response to the SOR, he admitted each of the allegations covered by SOR ¶¶ 1.a-1.b with explanations and clarifications. He claimed he has no desire to continue using or experimenting with THC in the future while holding a security clearance. He claimed, too, that his use was experimental in nature and does not represent his holistic capability at the current time and in the future to properly handle classified information at the highest level. For clarification, he acknowledged that THC use is grounds for revocation of national security eligibility and claimed his intention to abstain permanently.

Findings of Fact

Applicant is a 25-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. (Items 3 and 6) Between August 2017 and May 2021, he attended college classes and earned a bachelor's degree (in May 2020) and a master's degree (in July 2021). (Item 3) He reported no military service.

Since August 2021, Applicant has worked for his current sponsoring employer. as a software engineer. (Item 4) Previously, he worked for other employers in various jobs. (Item 3) He has held an interim security clearance since March 2023. (Items 6-7)

Applicant's drug history

Between December 2022 and February 2023, Applicant experimented with marijuana on two occasions while employed in a sensitive position that required a

security clearance. (Items 3-5) He acknowledged his awareness of the federal ban on the use of marijuana and other illegal drugs. (Applicant's response and Items 2-4) Subsequent to completing his second electronic questionnaires for investigations process (e-QIP) in February 2023 (Item 3), Applicant signed a classified information non-disclosure agreement (also in February 2023). (Item 7) The Defense Information System for Security (DISS), in turn, confirmed Applicant's eligibility to access classified information in March 2023. (Item 6)

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.518, 531, *supra*. "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. 518, 531; *supra*; see AG ¶ 2(b).

Analysis

Security concerns are raised over Applicant's use of federally banned marijuana while holding a sensitive position that entitled him to hold a security clearance. Considered together, Applicant's involvement (even if only for curiosity) with illegal drugs raises security concerns over whether his use of marijuana while holding a sensitive position reflected actions incompatible with the good judgment, reliability, and trustworthiness requirements for gaining access to classified information.

Applicant's admissions to using illegal drugs 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 while granted access to classified information or holding a sensitive position."

While Applicant, to his credit, ceased using marijuana after completing his second e-QIP in February 2023, he was placed on notice of the federal ban on using marijuana and other legal substances as early as May 2022 when he completed his initial e-QIP. Between May 2022 and March 2023, when DISS confirmed his eligibility to access classified information, Applicant occupied a sensitive position as a software engineer for his employer. See ISCR Case No. 24-00256 at 4 and n.3 (App. Bd. Jan 24, 2024).

Without more time of sustained abstinence from the use of marijuana, none of the mitigating conditions covered by Guideline H are available to Applicant at this time. Illegal drug use while holding a sensitive position that requires a security clearance without a substantial and corroborated period of sustained abstinence is 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 limited period of cessation of his illegal drug involvement makes it too soon to absolve him of risks of recurrence. 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*.

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 federally controlled marijuana to facilitate safe, risk-free predictions. 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. Overall, he does not mitigate security concerns with respect to the allegations covered by SOR ¶¶ 1.a-1.f.

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

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