



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



In the matter of:

Appearances

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

01/22/2025

Decision

Goldstein, Jennifer, Administrative Judge:

Applicant did not mitigate the security concerns under Guidelines H (Drug Involvement and Substance Misuse) and J (Criminal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

On September 13, 2024, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H and J. 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 September 17, 2024, and requested a decision on the written record in lieu of a hearing. The Government's written case was submitted on October 8, 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 17, 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 and cross alleged under the Guideline for Criminal Conduct, the SOR alleges that Applicant purchased and used marijuana from 2000 to 2023 (SOR ¶¶ 1.a-1.b, 2.a); purchased and used methamphetamine from 2009 to 2013 (SOR ¶¶ 1.c-1.d, 2.a); and purchased and used heroin from 2009 to 2013 (SOR ¶¶ 1.e-1.f, 2.a). He was also alleged to have been arrested on drug-related charges in April 2013, June 2013, August 2013, September 2013, November 2013, twice in April 2014, May 2014, twice in November 2014, September 2015, October 2015, and twice in August 2016. (SOR ¶¶ 1.g-1.t, 2.a). Applicant admitted all allegations. (GE 1, GE 2)

Applicant is 34 years old. He is unmarried and has no children. He is a high school graduate. He has worked as an electrical technician for a federal contractor since July 2023. (GE 3)

Applicant first tried marijuana when was he was 16 or 17 years old. In approximately 2009, he and a friend smoked a bowl of marijuana in his car while on a break from work. After he smoked the marijuana, his friend disclosed that the marijuana was laced with methamphetamine (meth). He became addicted to it. He chose to sell meth to support his addiction. He expanded his drug involvement to using and selling heroin. He would use meth daily and when he would get too high on meth, he would use heroin to feel better. From approximately 2009 to 2013, he sold meth and heroin on an "almost daily" basis. (GE 4)

Applicant's drug use and drug dealing has led to at least 14 arrests, as documented on his Federal Bureau of Investigations (FBI) record. Twelve of his arrests were for possession of a controlled substance and four of the arrests were for possession of a controlled substance for sale. Applicant does not recall each specific arrest, however, he admitted each allegation. In April 2014, he pled guilty to felony intent to distribute a controlled substance and was sentenced to serve one year in jail. He was released early due to good behavior on the condition he go to a residential rehabilitation facility. In August 2013 through March 2014, Applicant attended treatment residential rehabilitation offered by the Salvation Army. There he received "help and space" to quit using stimulants. While there, he attended Narcotics Anonymous and Alcoholics Anonymous. However, it appears that he was subsequently arrested and charged with possession of a controlled substance in October 2015, and with possession of a controlled substance for sale twice in August 2016. Outside of marijuana, he claims he has not used any other illegal substance since 2016. (GE 4, GE 5)

Applicant started using marijuana again in 2022 to help him sleep and for pain management. In September 2023, he stated to the investigator that he was willing to stop using marijuana if required, but that he intended to continue using marijuana on a nightly basis as long as nothing required him to stop using it. His answers to interrogatories indicate that he stopped using marijuana sometime in 2023 and when asked about intentions of future use, he wrote "N/A". He has never sold marijuana but has purchased it. He understands that marijuana is not legal under federal law. He also recognizes that his employer is a drug-free workplace. (GE 4)

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.

The following disqualifying conditions are relevant:

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.

AG ¶ 25(a) is established by Applicant's admissions regarding his long history of drug use. He used marijuana from about 2000 to at least September 2023. He also used meth and heroin from 2009 to at least 2013.

AG ¶ 25(c) is established by Applicant's admissions and the FBI records pertaining to his 14 arrests. He admitted that he purchased and sold meth and heroin from 2009 to 2013. He also illegally possessed marijuana. Four of his arrests were for

possession of a controlled substance for sale and twelve were for possession of a controlled substance.

The following mitigating conditions are potentially applicable:

AG ¶ 26(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;

AG ¶ 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:

- (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 eligibility.

AG ¶ 26(a) is not fully established. He failed to establish that recurrence is unlikely, given his long history with illegal substances. Despite residential drug treatment for meth and heroin, 14 arrests, and his felony conviction for intent to distribute a controlled substance, he continued to use and purchase marijuana. His drug use was as recent as September 2023. He did not provide evidence regarding what steps he has taken to legally address his insomnia or pain such as obtaining medication legally prescribed to him, physical therapy, or other pain management options. Applicant has not shown that his drug use is unlikely to recur.

AG ¶ 26(b) is not established. As discussed above, he has not provided evidence of actions taken to overcome his recent drug involvement and substance misuse. Given that the drugs he most recently used were for self-medication rather than socially, AG ¶ 26(b)(1) and (2) do not apply to his marijuana use and purchase. While he wrote "N/A" on his answer to interrogatories to indicate he had no future intent to use marijuana, he did not provide a signed statement of intent as described in AG ¶ 26(b)(3).

Guideline J, Criminal Conduct

The concern under this guideline is set out in AG ¶ 30: "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations."

The following disqualifying conditions are relevant:

AG ¶ 31(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;

AG ¶ 31(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted;

AG ¶¶ 31(a) and 31(b) are established. Applicant possessed and used controlled substances from about 2000 to at least September 2023 in violation of federal law. His drug use and intent to distribute drugs led to 14 arrests from 2013 to 2016. These allegations are substantiated by his admissions and the FBI records included in the government's evidence.

The following mitigating conditions are potentially relevant:

AG ¶ 32(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 32(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶¶ 32(a) and 32(d) are not established. Applicant has a long record of criminal conduct. While he has not been charged with criminal conduct since 2016, he knowingly used marijuana in violation of federal laws. Insufficient time has passed to establish rehabilitation.

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 J in my whole-person analysis and 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. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003).

"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*, 4999 U.S. 905 (1991). Applicant has not overcome this presumption. After weighing the disqualifying and mitigating conditions under Guidelines H and J and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his drug involvement and substance misuse and criminal conduct.

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): AGAINST APPLICANT

Subparagraphs 1.a-1.t: Against Applicant

Paragraph 2, Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 2.a: 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.

Jennifer Goldstein
Administrative Judge