



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



In the matter of:

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ISCR Case No. 24-00503

Applicant for Security Clearance

Appearances

For Government: Dan O'Reilly, Esq., Department Counsel
For Applicant: *Pro se*

01/15/2025

Decision

BENSON, Pamela C., Administrative Judge:

Security concerns arising under Guideline H (drug involvement and substance misuse) are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On August 2, 2023, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SCA). On May 6, 2024, the Department of Defense (DOD) Consolidated Adjudication Services (CAS) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; 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 (Answer) and requested a hearing before an administrative judge. The case was assigned to me on August 21, 2024. On September 11, 2024, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing by video teleconference scheduled for October 3, 2024. The hearing was convened as arranged.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 and 2, and Applicant testified but did not offer any documents. There were no objections, and the proffered exhibits were admitted into evidence. The Government's August 12, 2024 disclosure letter was marked as Hearing Exhibit (HE) I and appended to the record. I held the record open until October 24, 2024, in the event either party wanted to supplement the record. DOHA received the transcript (Tr.) on October 10, 2024. Applicant timely submitted Applicant Exhibits (AE) A through K. There were no objections, and the proffered exhibits were admitted into evidence.

Findings of Fact

In Applicant's Answer, he admitted all of the SOR allegations. (¶¶ 1.a-1.e) He provided a statement that affirmed, "...although I cannot change my past use [of marijuana], I would be willing to sign a document stating I will no longer use this substance and adhere to the guidelines." His admissions are accepted as findings of fact. Additional findings follow.

Applicant is 37 years old. He was enrolled in some college classes, and he graduated from a three-month trade school in 2016. He is married with no children. He and his wife are currently going through divorce proceedings. He has been employed by a federal contractor since July 2023 as a software developer. His employer is sponsoring him for a DOD security clearance in order that he can perform specific duties. This is Applicant's first submission for a security clearance. (Tr. 13, 33)

Drug Involvement and Substance Misuse and Personal Conduct

SOR ¶ 1.a alleges Applicant used marijuana with varying frequency from about June 2008 to about April 2024. SOR ¶ 1.b alleges he purchased marijuana from about June 2008 to at least October 2023. Applicant estimated that he spent about \$400 to \$500 annually for marijuana that he would purchase from friends. He calculated that 20 percent of his marijuana use was for recreational purposes, and 80 percent of his use was to help him sleep. His use of marijuana varied, and at most he would smoke marijuana five times a week. He does not have a medical prescription to use marijuana, and his state of residence has not legalized the use of marijuana. (Tr. 19-25; GE 2)

Applicant completed an SCA on August 2, 2023. Under Section 23 – Illegal Use of Drugs or Drug Activity, he disclosed that he had used marijuana from June 2008 to May 2023, for recreational use and as a sleep aid when needed. His weekly use could range from 0 to 4 times per week. Applicant also listed that he intended to use marijuana in the future. (SOR ¶ 1.e) He was aware at the time he completed the SCA that marijuana use was prohibited by federal law and in his state of residence. Applicant continued to use marijuana after he completed the SCA and after he participated in a background interview in October 2023. (SOR ¶ 1.c) (GE 1, 2; Tr. 25-27)

Department Counsel asked Applicant if he intended to use marijuana in the future. Applicant stated,

It's, this is where this question kind of gets fuzzy for me, is, again, I'm not here to lie or be untruthful, it comes down to I guess different situations at the time. So, as of right now there is no intended future use to it while holding the security clearance, even if a security clearance was still denied ...so as far as right now goes the intended future use would be strictly situational based on several different factors. I'm not saying it would be an absolutely, as of right now there isn't that intent. It's just, I always read that question as, between now and the time you die will you ever use. I can't say no, but I can't say yes, there's probability. (Tr 26-27)

Applicant admitted in about 2014 he failed a pre-employment drug test after testing positive for marijuana. (SOR ¶ 1.d) He admitted this was the only time he failed a drug test. Although he regretted testing positive, he resumed his use of marijuana. Afterwards his believed his marijuana usage changed to using it more as a sleep aid rather than for recreational purposes. When he is aware that he will be undergoing a drug test, he is able to abstain from using it so he will not test positive. He was drug tested by his current employer, and after he was hired, he resumed his use of marijuana. The longest period Applicant abstained from using marijuana occurred in 2020 during the COVID-19 pandemic, when finding marijuana to purchase was difficult. He has never used any other illegal drug. (Tr. 27-29)

Applicant stated,

As soon as I got the interrogations [in April 2024], not only have I immediately quit [marijuana], I disposed of everything of relevance for it, anything that was left over I wrapped it in a box, gave it to a friend, said if you want it it's yours, don't care. . . I'm done with it for now. (Tr. 38)

Character Evidence

Applicant provided ten reference letters attesting to his character. The general and repetitive theme of these letters used illustrative words such as reliable, genuine, intelligent, and trustworthy to describe Applicant. Many references considered him to be an asset to any employer. Applicant also provided an October 2024 letter of intent to abstain from using marijuana while possessing an active security clearance, and he acknowledged that any future involvement or misuse is grounds for revocation of national security eligibility. (AE A-K)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant's 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, *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 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. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence 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. 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 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

Drug Involvement and Substance Misuse

AG ¶ 24 provides the security concern arising from drug involvement and substance misuse stating:

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.

AG ¶ 25 provides conditions that could raise a security concern and may be disqualifying in this case:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such use.

The record establishes AG ¶¶ 25(a), 25(b), 25(c), and 25(g).

AG ¶ 26 lists the following potential conditions that could mitigate security concerns:

- (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;
- (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; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

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. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2, [App. A] ¶ 2(b).

Applicant first used marijuana nearly 17 years ago, and he stopped his use of marijuana less than one year ago. He knew his marijuana possession and use was prohibited by federal and state law. To his credit, he was candid about his marijuana use, and during the hearing he admitted that he could not state with complete certainty that he will not use marijuana in the future. After the hearing, he provided a signed statement of intent to abstain from all drug involvement and substance misuse while holding an active security clearance, and he acknowledged that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant intentionally abstained from using marijuana to pass his pre-employment drug test. He resumed his marijuana use after he was hired by his current employer. Applicant continued to use marijuana after he submitted the August 2023 SCA, and after he participated in a background interview in October 2023. His decision to repeatedly possess and use marijuana is an indication he lacks the qualities expected of those individuals with access to national secrets. I am not convinced his marijuana possession and use "happened under such circumstances that it is unlikely to recur [and] does not cast doubt on [his] current reliability, trustworthiness, [and] good judgment." I am uncertain about his history and future marijuana use. Guideline H security concerns are not mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The 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.

Under AG ¶ 2(c), “[t]he ultimate determination” of whether to grant a security clearance “must be an overall commonsense judgment based upon careful consideration of the guidelines” and the whole-person concept. My comments under Guideline H are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant candidly discussed his history of involvement with marijuana on his SCA, during his background interview, in his SOR response, and at his hearing. He promised not to use marijuana in the future.

The DOHA Appeal Board held in ISCR Case No. 21-02534 at 4, (App. Bd. Feb. 13, 2023) “[A]fter applying for a security clearance and being adequately placed on notice that such conduct was inconsistent with holding a security clearance, an applicant who continues to use marijuana demonstrates a disregard for security clearance eligibility standards, and such behavior raises substantial questions about the applicant's judgment, reliability, and willingness to comply with laws, rules, and regulations.” In this case, Applicant continued to use marijuana after passing a pre-employment drug test, after submitting his August 2023 SCA, and after his October 2023 background interview. He was aware that marijuana use was prohibited by federal and state law. He did not stop his use of marijuana until April 2024, once he responded to DOHA interrogatories.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. I find in favor of Applicant for SOR ¶ 1.c because the conduct is already alleged in SOR ¶ 1.a, and I consider it a duplicate allegation. Overall, Applicant failed to mitigate drug involvement and substance misuse security concerns.

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: AGAINST APPLICANT

Subparagraphs 1.a, 1.b, 1.d, and 1.e: Against Applicant

Subparagraph 1.c: For Applicant

Conclusion

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

Pamela C. Benson
Administrative Judge