



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



In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 19-00117
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Nicole A. Smith, Esq., Department Counsel  
 For Applicant: *Pro se*  
 06/28/2019

**Decision**

MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on February 22, 2018. On February 15, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The DOD CAF acted 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 answered the SOR on March 21, 2019, and requested a decision on the record without a hearing. On April 16, 2019, the Government sent a complete copy of its written case, a file of relevant material (FORM) including documents identified as Items 1 through 4, to Applicant. He was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government’s evidence. He received the FORM on April 25, 2019, and did not respond.

Items 1 and 2 are the pleadings in the case. Items 3 and 4 are admitted into evidence. The case was assigned to me on June 21, 2019.

### **Findings of Fact**

Unless otherwise indicated by citation to another part of the record, I have extracted these findings of fact from Applicant's SOR answer (Item 2) and his SCA (Item 3).

Applicant, age 36, is divorced and has no children. He was married from July 2015 through March 2017. He received a bachelor's degree in 2010. He has been employed as a project manager by a federal contractor since 2011. This is his first application for a security clearance.

The SOR alleged Applicant's marijuana use "with varying frequency" from approximately November 2003 through April 2018, and his subsequent lack of candor about that use in response to DOHA Interrogatories. In his SOR answer, Applicant admitted the alleged marijuana use but denied any intentional dishonesty about his use.

In his February 2018 SCA, Applicant certified the following facts concerning his marijuana use: (1) First use was approximately November 2003; (2) Most recent use was March 2016; (3) As to the frequency of use, he stated "Honestly, not sure. I have tried it maybe 5-10 times in about 15 years. Definitely only thrice since Fall of 2006;" and (4) Applicant declared that he had no intent to use in the future, with the following explanation: "Too scared that I am still allergic to it and I do not enjoy the experience." (Item 3 at 29-31).

During a February 2018 subject interview (SI) with a DOD authorized investigator, Applicant disclosed the following facts concerning his marijuana use: (1) Used one time at a beach house with friends in April 2018 after completion of the SCA; (2) April 2018 use occurred because Applicant "was curious of the effects and wanted to see if it would make [him] sick or not;" (3) Motivation of April 2018 use was "curiosity;" and (4) Applicant socialized or associated with individuals who use drugs illegally "two or three times a year." (Item 4 at 7-8).

The investigator's written summary of the SI (SI Summary) does not explicitly state that Applicant discussed any other marijuana use. Before the facts and circumstances of the April 2018 use, the SI Summary's "Drug Involvement" section opened with the following sentence: "Subject has developed drug involvement with marijuana." In the SI Summary's "Additional Information" section included the following sentence: "All other information discussed with Subject, to include coverage of the adjudicative guidelines, was consistent with the security questionnaire."

In February 2019, DOHA propounded upon Applicant questions (Interrogatories) concerning his drug involvement that were prompted by information obtained by a DOD authorized investigator during the investigations process, including the SI. Applicant certified the accuracy, without amendment, of that portion of the SI Summary concerning

his marijuana use. He answered “yes” to the question of whether he had “EVER used illegally any drugs or controlled substances” and provided the following handwritten facts about that use: (1) Used marijuana one time in March 2016 and one time in April 2018; (2) April 2018 use was “as described” in the SI; (3) March 2016 use was during a bachelor party where he “tried [it] once from a friend with no results;” and (4) Did not intend to use marijuana in the future. (Item 4 at 4).

In his March 2019 SOR answer, Applicant stated the following: “I fear that it was my drive to be as precise, accurate, and as literal as possible that has led us to this point.” He asserted that he has not used marijuana since April 2018 and, since that time, has “either cut back completely or drastically decreased” his interactions with individuals involved with drug use. He also included a signed statement of intent to abstain from all drug involvement and substance misuse, including an acknowledgment that “any future involvement or misuse is grounds for revocation of national security eligibility.”

With respect to the Interrogatory response at issue in the SOR, Applicant claimed the following: (1) He tried to be “as accurate and literal as possible to avoid further SORs, confusion, and issues;” (2) His response was “accurate per [his] interpretation of the question;” (3) He interpreted the question to ask whether he was “breaking any U.S. laws;” (4) He did not include the uses prior to April 2018 because they “had occurred overseas and not on U.S. soil;” (5) He was not “trying to be dishonest or deceitful” through his omission of uses prior to April 2018; (6) He knew that investigators had access to his SCA which included the prior uses so it would make “no sense for [him] to contradict [himself] intentionally or in a falsifying manner;” (7) His intent is “genuine and honest” and he is “not trying to hide anything;” and (8) This is “simply a case of a misunderstanding while trying to provide the most accurate and literal responses that I can.”

In his SOR answer, Applicant described his importance to the project that requires him to maintain a security clearance. He stated that it would be “a great honor and privilege” to be granted a security clearance so that he would be able to follow through on his commitment to that project.

## **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.” (*Egan* 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.” (EO 10865 § 2).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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.” (EO 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. (*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. (ISCR Case No. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993)). 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. (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; AG ¶ 2(b)).

## **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."

Applicant's marijuana use establishes the following disqualifying condition under this guideline: AG ¶ 25(a): any substance misuse (see above definition).

Neither of the following potentially applicable mitigating conditions under this guideline are established:

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; and

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.

Applicant recently used marijuana, at age 35 and after he completed his SCA (wherein he declared an intent not to resume the marijuana use that reportedly ended in March 2016). A sufficient pattern of abstinence has not been established nor can I unequivocally conclude that Applicant's marijuana use is not likely to recur. The signed statement of intent that Applicant provided in his SOR answer cannot alone mitigate these concerns. I have significant doubt about his current reliability, trustworthiness, and good judgment.

### **Guideline E (Personal Conduct)**

The concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Applicant's marijuana use and his lack of candor about it in his responses to DOHA's Interrogatories renders the general concerns involving questionable judgment and unwillingness to comply with rules and regulations potentially applicable. His lack of candor also renders the following specific disqualifying condition under this guideline potentially applicable:

AG ¶ 16(a): deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove a deliberate falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. (ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)). An applicant's level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. (ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010)).

Applicant's various explanations and excuses for failing to report the entire history of his marijuana use in his responses to DOHA Interrogatories undermines his credibility. Although I cannot conclude based on the existing record that he intentionally omitted information about his marijuana use during his SI, Applicant has quibbled over details about his marijuana use at other stages of the security investigations process in an apparent attempt to justify his lack of candor about information that is particularly material and relevant to the investigatory process. That quibbling further damaged his credibility. Applicant is college educated, has been married, and has worked for a federal contractor for over seven years. I find substantial evidence of an intent on the part of the Applicant to omit security-significant facts from his responses to DOHA Interrogatories. Therefore, AG ¶ 16(a) is established.

The security clearance investigation is not a forum for an applicant to split hairs or parse the truth narrowly. The Federal Government has a compelling

interest in protecting and safeguarding classified information. That compelling interest includes the government's legitimate interest in being able to make sound decisions (based on complete and accurate information) about who will be granted access to classified information. An applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the industrial security program. (ISCR Case No. 01-03132 at 3 (App. Bd. Aug. 8, 2002).

Neither of the potentially applicable mitigating conditions under this guideline applies:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment).

Incorporating my comments under Guideline H and in this Guideline above, I conclude that Applicant's marijuana use and his subsequent lack of candor about it continues to cast doubt on his good judgment and willingness to comply with rules and regulations.

### **Whole-Person Concept**

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person. 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 E in my whole-person analysis, and I have considered the factors AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in

