DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 19-01983
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: *Pro se*
05/26/2020

_____

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 his security clearance application (SCA) on December 28, 2016. On November 4, 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 November 24, 2019, and requested a decision on the written record without a hearing. On December 26, 2019, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including documents identified as Items 1 through 4. 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 January 2, 2020,

and timely submitted his response, to which the Government did not object. Applicant did not object to any of the Items included in the FORM. Item 1 contains the pleadings in the case. Items 2 through 4 are admitted into evidence. I *sua sponte* took administrative notice of several documents, as discussed below, which I appended to the record as Hearing Exhibits (HE) I through VII. The case was assigned to me on February 24, 2020.

On March 9, 2020, I emailed the parties to reopen the record in order to afford Applicant the opportunity to clarify his statements about obtaining counsel to represent him in this matter. Applicant chose to proceed without counsel. I admitted one of the emails I received from Applicant while the record was reopened as Applicant Exhibit (AE) A, without objection by the Government. I marked the other emails exchanged, collectively, as HE VIII. I closed the record on April 24, 2020.

Administrative Notice

Relevant federal guidance – issued by: the Office of Personnel Management (OPM) in May 2015 (HE I); the Drug Enforcement Administration (DEA) in August 2016 (HE II) and April 2020 (HE III); the Office of the Attorney General (OAG) in January 2018 (HE IV); and the Office of the Assistant Secretary of Defense (OASD) in February 2018 (HE V) – make clear that: marijuana remains a Schedule I controlled substance under federal law; changes in the laws pertaining to marijuana by states, territories, and the District of Columbia do not alter the existing National Security Adjudicative Guidelines; and federal marijuana laws supersede state laws.

In October 2014, the Director of National Intelligence (DNI) advised that that "[a]n individual's disregard of federal law concerning the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations." (HE VI at 2)

In 2016, the state in which Applicant resides enacted a law allowing for recreational use of marijuana, including cultivating marijuana plants in one's home. (HE VII).

I *sua sponte* took administrative notice of the foregoing and the fact that use and possession of marijuana is a criminal violation of federal law. I appended the referenced guidance to the record as HE I through VII. Because these *sua sponte* actions did not affect either the relative positions of the parties or my decision, prior notice to the parties was not required.

Findings of Fact

Applicant, age 62, has been married to his second wife since 1991. He has one minor child and four adult children. He earned a bachelor's degree in 1979, a master's degree in 1982, and a doctorate degree in 1986. He has been employed by a defense contractor as a chief scientist since March 2016. (Item 2)

Applicant was previously granted a DOD security clearance in 1987, when he worked as a civilian employee of the U.S. military. He maintained that clearance until he separated from that employment in 1988. He submitted a SCA in December 2016,

sponsored by his current employer. The DOD CAF granted Applicant an interim security clearance in April 2017, pending its adjudication of the matter. That interim clearance was suspended in November 2019, on the same day the SOR was issued, because the DOD CAF was unable to find that it is clearly consistent with the national interest to grant Applicant's security clearance and recommended that the matter be submitted to an administrative judge for final adjudication. (Item 2 at 51; Item 4)

The SOR alleged Guideline H concerns involving Applicant's use of marijuana, including while he was in possession of the interim clearance granted in April 2017. It also alleged Guideline E concerns involving Applicant's deliberate failure to disclose his marijuana use on his 2016 SCA and during a 2018 security clearance interview. Applicant admitted three of the four Guideline H allegations and denied both Guideline E allegations. (Item 1)

Applicant began using marijuana in 1973 when he was in high school. He continued to use it until he was granted a security clearance in 1987. He resumed using marijuana in 1988 once he separated from the employment that required him to maintain that clearance. He continued to use it until February 2019. (Item 1; Item 3 at 4-8)

Applicant asserted that he stopped using marijuana in February 2019 because he applied for a security clearance. He understands that marijuana use is incompatible with maintaining a security clearance. He denied using marijuana at any time that he "knowingly" possessed a security clearance. He maintained that he has neither held an active security clearance nor been in a position where his "participation required any clearance" since 1988. Although he admitted that he "may" have used marijuana while his interim clearance was active, he could not recall any specific occurrence. He claimed that he did not know that he had been granted an interim clearance because he was never formally advised of such. However, he acknowledged that his supervisor "once" informally advised him in an "off-hand telephone comment" that an interim clearance had been conveyed to him. The timing of that phone call was not specified in the record. (Item 1; Item 3 at 4-8; FORM response)

On his December 2016 SCA, Applicant answered "No" to each question about illegal drug use, and did not otherwise report any illegal drug use therein. He certified that the statements made in his SCA were "true, complete, and correct to the best of [his] knowledge and belief and [were] made in good faith." He was interviewed twice in connection with his SCA – in October 2018 and February 2019. The investigator who interviewed him summarized the statements that Applicant made during those interviews. In September 2019, Applicant affirmed the accuracy of the facts about his marijuana use in those summaries. (Items 2, 3)

During the first interview, Applicant volunteered that he had unsuccessfully attempted to grow three marijuana plants in his home in March 2017. He stated that this activity was legal in his home state. He advised that he did not intend to grow marijuana in the future. During the interview, he neither admitted to nor disclosed any marijuana use. (Item 2 at 49-50; Item 3 at 14)

During the second interview, Applicant admitted to using marijuana from 1973 through February 2019 (one week prior to the second interview). He maintained that he had never used marijuana while possessing a security clearance. He claimed that he did not list his marijuana use on his SCA "due to his mistake." There was no explanation as to why he did not disclose his marijuana use during the first interview. He revealed that his wife uses marijuana. He admitted his intent to use marijuana in the future because it is "enjoyable," but maintained that he would never use it while he was in possession of a security clearance. During the interview, he acknowledged that marijuana use was considered illegal under federal laws. (Item 3 at 18-19)

At various times during the security clearance investigative process, Applicant proffered inconsistent statements about the frequency of his marijuana use. During the second interview, he stated that he used marijuana at home "about one time per week." In his SOR answer, he stated that he used it "not more than one to two times per month" from 1973 through 1987, and "not more than one to three times a year" from 1988 through 2019. In his FORM response, he denied that he ever used marijuana once a week and asserted that any statement he made to the contrary resulted from him inaccurately estimating his use due to the vagueness of the questions he was asked. He averred that between 1973 and February 2019, he used marijuana "less than once every two months." He acknowledged that his marijuana use was most frequent during his college years, but asserted that he has "seldom" used it in the years since 1988, to the point where he was "hard-pressed" to recall any specific instances. He also maintained that there have been "decades" between 1973 and 2019 when he "neither encountered nor used marijuana." (Item 1; Item 3 at 18; FORM response)

Applicant readdressed his intent to use marijuana in the future in both his SOR answer and FORM response. In his SOR answer, he stated the following: "I have stated neither the intent nor the preclusion. I do not intend, though it may occur. It certainly will not occur if I am carrying a clearance." In his FORM response, he denied expressing any intent to use marijuana in the future. He acknowledged: "I may use marijuana in the future, just as I may eat catfish, sometime in the future," which he argued does not constitute an intent to use marijuana in the future.

In his SOR answer, with respect to why he failed to report his marijuana use on his SCA, Applicant asserted: "Because private marijuana use was legalized [in the state in which he resided] in December 2016, I believed my response to the question was correct, and not 'falsified.' Furthermore, I cannot identify a specific date or event in the seven years prior to [the date that he certified his SCA] that I used an illegal drug or controlled substance." He denied that he lied during his first interview. He asserted: "I have been honest in my written statements, and I have been honest and transparent with the investigator. The admission that I planted three seeds illustrates that fact."

At the conclusion of his SOR answer, he stated the following:

> I am disappointed and humbled that my access to classified information has not been found to be consistent with the national interest. I believe that my 10 years of service to the federal government strongly demonstrates the

converse. Nevertheless I accept the finding, but wish the associated record to be accurate. Were I granted a clearance, there would be no marijuana use.

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.

The facts and circumstances of Applicant's marijuana use establish three disqualifying conditions under this guideline:

> AG ¶ 25(a): any substance misuse (see above definition);
>
> AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
>
> AG ¶ 25 (g): expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The SOR alleged facts that rendered the following additional disqualifying condition potentially applicable: AG ¶ 25 (f) any illegal drug use while granted access to classified information or holding a sensitive position. Even if Applicant had not been working in a position that required him to have a security clearance, his interim clearance granted him access to classified information. Although he could not recall a specific instance of marijuana use during the time when his interim clearance was active, his admitted "one to three times a year" or "less than once every two months" use of marijuana would have occurred on at least one occasion between April 2017 and November 2019. Thus, I find that there is sufficient evidence to establish AG ¶ 25(f).

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's marijuana use spanned 46 years, beginning in 1973 and continuing until one week before his second security clearance interview in February 2019. During that time, according to Applicant, there were significant periods when he did not use marijuana. Given his lack of candor throughout the process, I question the frequency of the marijuana use that he self-reported. Nevertheless, in the context of evaluating his security clearance worthiness, the frequency of his use is less important than the timing of his use. Of particular significance is his continued use of marijuana after he submitted his 2016 SCA and after he underwent his first security clearance interview in 2018. While that alone could render Applicant ineligible to possess a security clearance, his lack of candor about his marijuana use underscores a pattern of questionable judgment that further calls into question his ability or willingness to comply with laws, rules, and regulations.

Even if Applicant was not formally made aware that he had been granted an interim clearance, he had actual notice of it after the conversation he had with his supervisor. Because the record did not specify when that conversation took place, arguably, it could have happened after he stopped using marijuana in February 2019. Regardless, based on the plain language of AG ¶ 25(f), Applicant's use of marijuana while having the access to classified information that his interim clearance afforded him remains an unmitigated concern whether or not he had formal or actual notice of his access.

Applicant has not established a sufficient pattern of abstinence in light of the recency and circumstances of his marijuana use. His wife continues to use marijuana. The fact that Applicant's home state has allowed recreational use of marijuana since 2016 does not alter the federal prohibition or existing national security guidelines concerning marijuana use. Not only has Applicant used marijuana in contravention of federal law, but he also violated state law for a significant period. Applicant acknowledged that marijuana use is illegal under federal laws and incompatible with maintaining a security clearance. However, he not only indicated that he might use marijuana in the future at times when he is not in possession of a security clearance, but he failed to clearly and convincingly

commit to abstinence. I am unable to conclude that Applicant's marijuana use is unlikely to recur and have significant doubts 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 failure to be honest about it during multiple stages of the security clearance investigative process establish the above-stated general concern and the following specific disqualifying conditions under this guideline:

> 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; and
>
> AG ¶ 16(b): deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

When a falsification allegation is controverted, the Government has the burden of proving it. An omission, standing alone, does not prove 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 education and 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 has a lengthy history of marijuana use, including during the seven years reportable on his SCA. I did not find credible Applicant's explanations and excuses for his failure to report any of his drug use on his SCA or during his first security clearance interview. At every stage of the process, Applicant quibbled over details about the facts and circumstances of his marijuana use. That quibbling not only damaged his credibility but also suggested that he was aware of the potentially negative impact his marijuana use could have on his security clearance. I find substantial evidence of an intent on the part of Applicant to omit and conceal materially relevant information from his SCA and to the investigator during his first interview. Therefore, AG ¶ 16(a) is established.

None of the following potentially relevant mitigating conditions under this guideline are established:

> AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
>
> 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; and
>
> AG ¶ 17 (d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

An applicant's completion of a security questionnaire is the initial step in requesting a security clearance and the investigative process is contingent upon the honesty of the applicant. Beginning with an applicant's responses in the application,

> 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))

Applicant's marijuana use and failure to be candid about it on his SCA and during his first security clearance interview evinces a pattern of poor judgment that also reveals an inability and unwillingness to comply with laws, rules, and regulations. His deliberate lack of candor is particularly egregious given his background and experience. Applicant failed to demonstrate a sufficient pattern of responsible behavior for me to conclude that his questionable judgment is behind him. I have serious doubts about Applicant's current reliability, trustworthiness, and judgment.

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 adjudicative guidelines, each of which is to be evaluated in the context of the whole person. In evaluating the relevance of an individual's conduct, 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 the context of the whole person, I conclude that Applicant has not mitigated the security concerns raised by his marijuana use and his lack of candor about it during the security clearance investigative process. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

Formal findings 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.d:	Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraphs 2.a – 2.b: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge