



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [REDACTED]) ISCR Case No. 19-02950
)
 Applicant for Security Clearance)

Appearances

For Government: Dan O’Reilly, Esq., Department Counsel
For Applicant: *Pro se*
11/16/2020

Decision

MARINE, Gina L., Administrative Judge:

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

Statement of the Case

Applicant submitted his security clearance application (SCA) on November 2, 2017. On February 28, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. The CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (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 31, 2020, and requested a decision based on the written record in lieu of a hearing. On May 8, 2020, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including pleadings and evidentiary documents identified as Items 1 through 5. 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 June 8, 2020, and timely submitted his response, to which the Government did not object.

Applicant did not object to any of the evidentiary documents included in the FORM. Items 1 and 2 contain the pleadings in the case. Items 3 through 5 are admitted into evidence. Applicant's FORM response included documents that are admitted into evidence as Applicant Exhibits (AE) A through C. I *sua sponte* took administrative notice of several matters, as discussed below, which I appended to the record as Hearing Exhibits (HE) I through III. The case was assigned to me on September 22, 2020.

Administrative Notice

In his FORM response, Applicant referenced guidance from the U.S. Food and Drug Administration (FDA), dated December 2018, concerning the Agriculture Improvement Act of 2018.

Because neither party submitted a copy of this guidance, I *sua sponte* appended the referenced guidance to the record as HE I. I also appended, as HE II and III, two related FDA documents for context. I *sua sponte* take administrative notice of the facts contained in HE I through III including the following:

1. Cannabis is a plant of the Cannabaceae family and contains more than eighty biologically active chemical compounds. The most commonly known compounds are delta-9-tetrahydrocannabinol (THC) and cannabidiol (CBD). Parts of the Cannabis sativa plant have been controlled under the Drug Enforcement Administration (DEA)'s Controlled Substances Act (CSA) since 1970 under the drug class "Marihuana" (commonly referred to as "marijuana").
2. The Agriculture Improvement Act of 2018 (AIA) (also known as the 2018 Farm Bill) was signed into law on December 20, 2018.
3. Among other things, the AIA removed hemp, defined as cannabis (*Cannabis sativa* L.) and derivatives of cannabis with extremely low concentrations of the psychoactive compound THC (no more than 0.3 percent THC on a dry weight basis), from the definition of marijuana in the CSA.
4. Cannabis plants and derivatives that contain no more than 0.3 percent THC on a dry weight basis are no longer controlled substances under federal law.
5. Prior to the enactment of the AIA, the CSA did not differentiate between marijuana and hemp, and all cannabis (with certain exceptions, e.g. sterilized seeds and mature stalks of the plant) was a Schedule I substance and therefore controlled by the DEA.

Findings of Fact

Applicant, age 42, divorced his wife of five years in 2010. He has two children, ages 15 and 20. He earned a bachelor's degree in 2001. He has been employed by a defense contractor as an engineer since 2010. This is his first application for a DOD security clearance. (Item 3)

Applicant used marijuana, with varying frequency, from 1994 through June 2017. He purchased marijuana for his use two times per year from 1996 through January 2016. He used hallucinogenic mushrooms on five to ten occasions between 1997 and June 2016. He used a topical ointment containing CBD derived from hemp on one occasion in May 2019. The record did not specify the THC content, if any, of the CBD ointment. Because this CBD use was not alleged in the SOR, I will consider it only to evaluate mitigation and the whole person concept. (Items 2, 3, 4, 5; FORM response)

Applicant did not report any CBD use in his November 2017 SCA or during his November 2018 security clearance interview (SI). The first time he mentioned it was in his November 2019 response to interrogatories (ROI). In reply to a question about using marijuana in the future, he responded "No" with the following explanation: "CBD helps anxiety, relaxation. If THC is legal [with respect to a DOD clearance] I would in the future. I don't use enough or depend on it that I need it. I don't miss it." The Government apparently construed this explanation as an "express intent to use CBD products," as alleged in SOR ¶ 1.d. In response to the alleged intent to use CBD in the future, Applicant wrote "I admit ignorance" and explained: "I was unaware that CBD from Hemp is still considered a controlled substance. I did use this on one occasion and did not like the sleepiness and have not used this since May 2019." In his FORM response (FR), he asserted that in the ROI he meant to say: "I would not use [CBD] in the future unless it was made legal with respect to DOD's clearance protocol." He maintained in his SOR answer (SA) and FR that he has only used CBD one time. Given the concerns about CBD use expressed by the Government in the SOR and FORM, Applicant considers CBD use to be incompatible with maintaining a security clearance. (Items 2, 4; FR)

Applicant described the circumstances of his drug use and his intent about using drugs in the future at various stages throughout the security clearance process: on his November 2017 SCA; during his November 2018 SI; in his November 2019 ROI; in his March 2020 SA; and in his August 2020 FR. His descriptions varied as noted in the bulleted paragraphs below. In his FR, he affirmed generally: "I have not and will not use these illegal substances ever again." (Items 2, 3, 4, 5)

Applicant described the circumstances of his marijuana use as follows:

- "pain relief, socially/recreationally used 1-5x month" (SCA)
- used one to three times per month by himself and one to three times per month at parties or social gatherings; used for relaxation and to socialize better with others (SI)
- "by myself, with friends or acquaintances, small groups, 1-2 inhales" (ROI)
- "I have used marijuana for pain relief and stress reduction when I was younger. This was for sports injuries and stress. My doctors have pointed

to the medicinal and therapeutic value. While using this drug, I used it sparingly, understood its effects, and only did it under safe circumstances.” (FR).

Applicant described his intent about using marijuana in the future as follows:

- checked “no” in reply to question of whether intends to use in future and explained: “not addicted, don’t need it” (SCA)
- does not need to use marijuana because his career is more important to him and has given him the motivation to stop using it; plans to use it in the future if it becomes a legal substance (SI)
- checked “no” in reply to question about whether he intended to use marijuana in the future and explained: “CBD helps anxiety, relaxation. If THC is legal [with respect to a DOD clearance] I would in the future. I don’t use enough or depend on it that I need it. I don’t miss it.” (ROI)
- “I understand the consequences and I understood them when I signed the [SCA]. I have not used [marijuana] recently and will not use again.” (FR)

Applicant described the circumstances of his marijuana purchases as follows:

- “mental health, relaxation, social use” (SCA)
- usually purchased while attending music festivals and shows, purchased for his own personal use to help with relaxation (SI)

Applicant described his intent about purchasing marijuana in the future as follows:

- checked “no” in reply to question of whether intends to purchase in future (SCA)
- no intent to purchase in the future because his job responsibilities are more important to him; he simply does not need it (SI)

Applicant described the circumstances of his mushrooms use as follows:

- “social group use, 5-10x lifetime” (SCA)
- used at parties during college the first four or five times; could not recall the details of the other times that he used them, except that his last use occurred while attending a concert (SI)
- used to enhance his perception at a party or concert (SI) (in his FR, he denied ever stating this and said that the statement was not true)
- “5x-10x lifetime, mostly college, small trusted groups . . . with acquaintances . . . no visuals/psychoactive experience;” amount taken during June 2016 concert: “a minimal amount;” “1 stem, 1 cap” (ROI)

Applicant described his intent about using mushrooms in the future as follows:

- checked “no” in reply to question of whether intends to use in future and explained: “not addicted, don’t need to do it, clearance depends upon it” (SCA)
- does not plan to use in the future as his career is more important and he is capable of staying away from it (SI)

- answered “no” to question about using mushrooms in the future; “I meditate and use other forms of natural mindfulness for connecting with my beliefs and relating to others.” (ROI)

Applicant described the circumstances of his CBD use as follows:

- “I did use [CBD] on one occasion and did not like the sleepiness” (SA)
- “CBD helps anxiety, relaxation.” (ROI)
- “legal substance used for medicinal purposes” (FR)

Applicant described his intent about using CBD in the future as follows:

- used one time; has not used since May 2019 (no specific statement about intent for future use) (SA)
- referenced prior statement (presumably clarifying his 2019 ROI) that he would not use CBD “in the future unless it was made legal with respect to DOD’s protocol” (FR)
- “I will not use CBD again.” (FR)

Applicant was required to list three people “who know [him] well” on his 2017 SCA. He described one such individual as a friend and work associate (Friend X). From March 2016 through November 2018, Applicant worked part-time for a company owned by Friend X. Applicant and Friend X used marijuana together on at least one occasion in June 2017, which was Applicant’s last use. He and Friend X used mushrooms together on at least one occasion. (Item 3 at 15; Items 4, 5)

During his 2018 SI, Applicant declared that nearly all of his close friends and associates, including Friend X, used marijuana. In reply to a question in his 2019 ROI about whether he continued to associate with individuals who use any illegal drugs, Applicant checked “yes” and did not elaborate any further. In his 2020 SA, he stated “I do not regard my friends as bad influences as they have been understanding and supportive of my desires to obtain [*sic*] clearance.” In his 2020 FR, Applicant asserted that he does not associate “with individuals who use marijuana regularly” or “with anyone who has a drug use problem.” He further stated that:

The people I associate with have children, pay taxes, [*sic*] never been arrested, and vote and participate in their communities. As an adult, I have changed aspects of my life with respect to my selection of events I participate in and whom I go to places with, but I will never be ashamed of the people I associate with . . . I do not and will not be around people or events where substance abuse occurs.

Applicant presented reference letters from four individuals who praised his work performance, character, and trustworthiness. Of the four, one is a family friend who serves as a U.S. court of appeals judge; two serve as local county commissioners (one is also a work colleague, and the other knows him through his volunteer work); and one is the director of the government agency whose contract Applicant supports (who is also a friend). None of these letters indicated that the individuals were aware of either Applicant’s drug use or the SOR allegations. (AE A through C).

Applicant is active in his community. He organizes and supports United Way fundraisers and runs an adult basketball league. He holds his own youth charity event every summer. He is an active volunteer with his local rotary club. He helps with the rotary's various events, including those supporting veterans and its annual charity regatta. Applicant asserted that he has the "utmost love and respect for our Nation and its secrets." (Item 2; AE A through C).

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 use of marijuana and mushrooms establish two disqualifying conditions (DC) under this guideline:

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.

Given the facts alleged in SOR ¶ 1.d, the following additional DC warrants some discussion: AG ¶ 25(g) (expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse). It is uncontroverted that Applicant used CBD derived from hemp in May 2019. In his November 2019 ROI, Applicant did not expressly state that he either used CBD or would use CBD in the future. A reasonable inference of an intent to use CBD in the future could be drawn from his description of the substance as legal substance for medicinal purposes in his 2020 FR. Guidance about the 2008 Farm Bill indicates that a CBD product may not contain enough THC to render it a controlled substance.

The language Applicant used in his 2019 ROI (“CBD helps anxiety, relaxation. If THC is legal [with respect to a DOD clearance] I would in the future. I don’t use enough or depend on it that I need it. I don’t miss it.”) expresses an intent to use marijuana (not CBD) in the future. However, that is not what was alleged in SOR ¶ 1.d so I cannot conclude that AG 25(g) was established. Accordingly, I find SOR ¶ 1.d in Applicant’s favor. Nevertheless, any equivocal statements in the record concerning Applicant’s future marijuana use, including any CBD product containing amounts of THC that render it a controlled substance, remain relevant to my mitigation and whole person analysis of the overall Guideline H concern.

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 23 years. He purchased marijuana for his use twice a year for 20 of those years. Even on the lower end of his estimated frequency (once per month), he would have used it at least 276 times. He purchased it 40 times. Although his marijuana use began at age 16, he continued to use it as a mature adult for recreational purposes.

Applicant consistently affirmed that he has no intent to purchase marijuana in the future. However, he provided conflicting statements about his intent to use marijuana in the future. He asserted in his FR that he had no such intent, but that statement falls short of a commitment to abstain in light of the record as a whole. At three different points during the security clearance process prior to his FR, Applicant declared that he would use marijuana in the future if it became legal or would not impact his security clearance. He referenced his career as a motivating factor to abstain from marijuana. However, he has been employed by the same defense contractor since 2010 and did not stop using marijuana until four months prior to completing his 2017 SCA. He did not sign a statement of intent. While Applicant may no longer participate in events where he is exposed to drug use or associate with persons that are using drugs in his presence, the record did not establish that he no longer associates with drug-using friends. One of his security clearance references was a friend with whom he used drugs on more than one occasion.

Applicant failed to appropriately take responsibility for his illegal marijuana use. Apprehension about the ability to gain and maintain a security clearance appears to underlie his current abstinence from marijuana, rather than its illegality. Of particular concern is the characterization of his marijuana use as medicinal, for the first time, in his FR. That equivocation not only undermines his credibility, but also the sincerity of his commitment to abstain. Moreover, it was misplaced since medicinal marijuana use remains prohibited by federal law and incompatible with maintaining a security clearance.

Applicant's use of mushrooms was relatively infrequent compared to his marijuana use. Moreover, he consistently expressed an intent not to use it in the future. However, it remains security significant since it further underscores his inability to comply with laws over a significant span of time. He used it recreationally at least five to ten times during a 19-year period, most recently at age 38. His denial of ever having made a statement that he had previously affirmed about his mushroom use (that he used it "to enhance his perception at a party or concert") further calls into question his reliability and trustworthiness.

According to the record before me, Applicant used a CBD product one time in May 2019 for unspecified "medicinal purposes." The fact that his CBD use occurred after he submitted his SCA would bear more significance if it contained THC in an amount that rendered it a controlled substance. However, the THC amount was neither alleged nor specified in the record, and Applicant considered the CBD product to be legal based on his research prior to use. Regardless of whether he used CBD that was a controlled substance, the ongoing security significance involves his failure to clearly articulate that he would never use illegal CBD again. Although he neither clearly admitted to using CBD nor addressed his intent for using illegal CBD in the future in his 2019 ROI, he later referred to the statement in his FR as if he had stated that his future CBD use would depend on whether it was prohibited by "DOD clearance protocol." Then, later in the same FR, he stated that he "will not use CBD again."

Applicant's extended history of using and purchasing marijuana alone renders him ineligible to possess a security clearance. However, his mushroom use and the ongoing concerns with his candor about the nature of his drug use underscore a pattern of questionable judgment that further calls into question his ability or willingness to comply with laws, rules, and regulations. It has been more than three years since he bought or used marijuana or mushrooms. However, he failed to meet his burden to establish mitigation sufficient to overcome his failure to clearly and convincingly commit to abstinence. I am unable to conclude that Applicant's drug involvement is unlikely to recur and have significant doubts about his current reliability, trustworthiness, and good 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 Guideline H in my whole-person analysis, and I have considered the above factors. Applicant's character, work performance, and community involvement were highly praised by several individuals who took the time to write letters on his behalf. However, I was unable to conclude that any of them were aware of either Applicant's history of drug involvement or the SOR allegations. After weighing the disqualifying and mitigating conditions under Guideline H, 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 drug involvement. 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.c:	Against Applicant
Subparagraph 1.d:	For 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