



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



In the matter of:)
)
) ISCR Case No. 20-03836
)
)
Applicant for Security Clearance)

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: Lance Renfro, Esq.

October 8, 2021

Decision

GLENDON, John Bayard, Administrative Judge:

Applicant failed to mitigate security concerns regarding drug involvement. Based upon a review of the pleadings, the documentary evidence, and Applicant’s testimony, national security eligibility for access to classified information is denied.

Statement of the Case

On June 19, 2020, Applicant submitted a security clearance application (2020 SCA). On November 4, 2020, the Defense Counterintelligence and Security Agency, Consolidated Adjudications Facility (CAF), issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (Drug Involvement and Substance Misuse). The CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended (Exec. Or.); Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (Dec. 10, 2016), effective within the DoD on June 8, 2017.

Applicant responded to the SOR in writing and attached eight exhibits (Answer). He requested a hearing before an Administrative Judge of the Defense Office of Hearings and Appeals (DOHA). On June 29, 2021, the case was assigned to me. DOHA issued a notice of hearing on July 15, 2021, scheduling a video teleconference hearing on August 4, 2021.

I convened the hearing as scheduled. Department Counsel presented Government Exhibits (GE) 1 through 3, which were admitted without objection. The eight documents attached to Applicant's Answer were marked Applicant Exhibit (AE) A through H. Applicant offered four additional exhibits at the hearing, which were marked as AE I through L. His exhibits were also admitted without objection.

At the hearing, Department Counsel sought permission to submit one exhibit after the conclusion of the hearing. I granted her request, and she submitted one additional exhibit, GE 4, by email later the same day. Applicant's counsel initially objected to the admission of GE 4. On August 10, 2021, he withdrew his objection in a post-hearing pleading titled, "Post-Hearing Argument." I marked counsels' emails as Hearing Exhibit I and Applicant Counsel's Post-Hearing Argument as Hearing Exhibit II. DOHA received the hearing transcript (Tr.) on August 11, 2021. (Tr. at 10-12.)

Findings of Fact

Applicant's personal information is extracted from his 2020 SCA unless otherwise indicated by a parenthetical citation to the record. After a thorough and careful review of the pleadings, Applicant's testimony, and the documentary evidence in the record, I make the following findings of fact.

Applicant is 52 years old and has worked for U.S. defense contractors as an engineer since 2008. He enlisted in the U.S. Navy in 1987 and served until 1997, when he was honorably discharged. During his service, he earned several awards and commendations. He married in 1991 and divorced in 2017. He has no children. He graduated from high school in 1987 and has earned several certifications for computer technology. (Tr. at 14; 23; AE D AE J; AE K.)

SOR Allegation

Paragraph 1, Guideline H - The SOR alleges that Applicant used marijuana "with varying frequencies" during the period September 2016 to at least May 2020, including after being granted access to classified information in July 2018. In his Answer, he admitted the allegation and provided some mitigating facts and circumstances, which he repeated at the hearing.

Applicant was granted his first security clearance in 1991 when he was in the Navy. He has held a clearance continuously since February 2008 while working for U.S. Government contractors. His eligibility was last renewed in 2017, based upon a security clearance application he submitted in April 2017 (2017 SCA). In his 2017 SCA, he

disclosed that he smoked marijuana between September 2016 and January 2017. In response to a question about his frequency of use, he wrote "smoked Marijuana @ a party with friends." He responded in the negative to a question about his future intentions to use this drug in the future, and he wrote: "It does nothing for me. I actually get a headache the next morning from use . . . ha ha I like Beer better . . ." (Ellipsis and capitalization in the original.) (Tr. at 31; GE 4 at 32-33; AE G.)

In his 2020 SCA, he disclosed more recent uses of marijuana on the application in addition to the 2016-2017 uses. He disclosed that he used marijuana two times over a one-week period in May 2020. He provided the following additional comments:

During COVID-19 isolation, I Smoked some Marijuana to experiment during a depression time 2 months into quarantine. It really did not help so I stopped. (Capitalization in the original.)

In response to the question about his future intentions with respect to using this drug, Applicant again checked the box indicating he had no future intent to use marijuana, and he wrote: "I did not get the relief, am no longer depressed and for my current job clearance." (GE 1 at 34-35.)

Applicant has been interviewed two times regarding his marijuana use in connection with his two most recent security clearance applications, first in January 2018 and then in July 2020. As of January 2018, Applicant admitted using marijuana approximately three times between September 2016 and January 2017. He explained to the investigator that he first used marijuana in 2016 by himself in his father's back yard while he was caring for his father who was ill. He told the investigator that he had no intention to use marijuana again because he did not enjoy the drug and he had too much to lose working as a contractor for the U.S. Government. (GE 2 at 1, 4-5; GE 3 at 1, 4-5.)

In his July 2020 interview, he told the investigator that he used marijuana again in May 2020 during the early part of the COVID-19 pandemic when state law required him to shelter in place. He diagnosed himself as feeling depressed. He bought the marijuana and a CBD chocolate edible from a marijuana dispensary that legally sold marijuana products under the law of his state. He ate the edible at home alone. He also discussed with the investigator his prior use of marijuana starting in September 2016, when he was taking care of his terminally ill father. He also mentioned his use at a New Year's Eve party. (GE 3 at 1, 4-5.)

Applicant testified that his past use of marijuana was during periods of stress when he was feeling depressed by his life's circumstances, which included the loss of his long-term marriage and the deaths of his mother in early 2016 and then his father in later 2016. He also lost his brother, who was homeless and died in an accident, leaving Applicant with only one family member, his sister. (Tr. at 18-21, 27.)

In anticipation of a future hearing regarding his clearance eligibility, Applicant sought drug counseling at the request of his attorney. He testified that he learned from

this one-time counseling experience in March 2021 that there was a relationship between his drug use and his psychological state. This is a connection he already understood, however. He wrote in his June 2020 SCA that his use of marijuana two times in March 2020 was due to feeling depressed. He no longer believes that he is suffering from any psychological issues. (Tr. at 18-21; GE 1 at 34-35; AE C.)

Applicant's testimony about the number of times he has used marijuana or another THC product was inconsistent. He testified on direct examination that he only used marijuana on three occasions. The first time was in March 2016, and the most recent time was March 2020. On cross-examination, it became apparent that he had used marijuana on more than three occasions. Applicant admitted that he used marijuana on two occasions in September 2016. Also, Department Counsel pointed out that in Applicant's 2018 background interview, he admitted using marijuana on three occasions between September 2016 and January 2017, the third time being at a New Year's Eve party with friends. He then testified that he used marijuana once again in March 2020. He had written in his 2020 SCA that he last used marijuana twice in May 2020. At the hearing, he clarified that the number of uses in 2020 was indeed twice. In 2020, he made a marijuana joint using rolling paper he obtained from a neighbor. He lives in a condominium where it is common for his neighbors to smoke marijuana. He partially smoked the marijuana by himself on a couple of occasions. He also testified that he consumed the chocolate CBD edible. (Tr. at 27-28, 41-52, 59-62, 64-66; GE 2 at 4-5; GE 3 at 4-5.)

Applicant had some confusion about the date of the New Year's Eve party incident. He attempted to change the date of his sole use of marijuana with friends from New Year's Eve December 31, 2016, to December 31, 2017. That testimony, however, was inconsistent with his disclosure in his April 2017 SCA, in which he dated the New Year's Eve party as occurring about three months earlier, *i.e.*, on December 31, 2016-January 1, 2017. It could not have occurred one year later because that would have been after he disclosed marijuana use over New Year's Eve 2016-2017 on his April 2017 SCA, a document he prepared only months later. In his attorney's Post-Hearing Arguments, the attorney clarified that upon reflection after the hearing, Applicant realized that he had used marijuana at New Year's Eve parties in both years. (Tr. at 27-28, 41- 45; GE 3 at 4-5; Hearing Exhibit II.)

Applicant testified that he has no future intent to use marijuana. He also provided a written statement confirming that intention and consenting to the automatic revocation of his clearance in the event of a violation of his statement. Applicant also testified that he no longer associates with the individuals he had used marijuana with in the past. As noted, he has twice represented in his clearance applications that he has no intention of using marijuana again. Also, he advised the investigator in 2018 of this same intention, only to smoke marijuana twice in May 2020 and to eat a CBD edible the same week. (Tr. at 29, 52-55; GE 1 at 34-45; GE 3 at 32; GE 4 at 32; AE A.)

Whole-Person Evidence

Applicant presented a significant amount of character evidence, starting with his military career, as discussed above. He also provided evidence of his volunteer work, which was impressive. Two co-workers provided reference letters. Both were aware of the SOR allegation. They praise Applicant's knowledge, dedication, skills, and work ethic. They believe him to be reliable and trustworthy. (Tr. at 24-65; AE E; AE F.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Adverse clearance determinations must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines

presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern under this guideline is set out in AG ¶ 24 as follows:

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 Government's evidence established the following conditions under AG ¶ 25 that could be disqualifying:

- (a): any substance misuse (see above definition);
- (f): any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g): expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

As for AG ¶ 25(g), the record evidence does not clearly and convincingly establish that Applicant is committed to discontinuing his use of marijuana and/or THC/CBD products. His last use in May 2020 precedes his written statement of intent by less than

one year. Moreover, he did not honor his past statements that he had no future intent to use illegal drugs.

The guideline in AG ¶ 26 contains four conditions that could mitigate security concerns arising from drug involvement. Two of these mitigating conditions have possible applicability to the facts of this case:

(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

(b): the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used;
and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

AG ¶ 26(a) is not established. Applicant's marijuana use in 2020, after having his security clearance renewed in 2018, is too recent and casts doubt on Applicant's current reliability, trustworthiness and judgment. The information provided by his attorney that Applicant had used marijuana at two New Year's Eve parties is not material in light of Applicant's more recent use of marijuana in 2020. The record evidence establishes that Applicant used marijuana on and off since 2016 to deal with stress and difficult times in his life. It cannot be concluded that his use of marijuana was infrequent and happened under such circumstances that it is unlikely to recur. Future stressful circumstances or periods of depression are quite possible, and Applicant may try to self-medicate with illegal drugs in the future.

AG ¶ 26(b) is only partially established. Applicant has acknowledged his drug involvement. He has only abstained from using marijuana, however, since May 2020, a little over one year ago. He claims he has disassociated himself from drug-using associates, yet in May 2020 he was able to obtain a rolling paper from a neighbor who is a frequent marijuana user to make a joint for himself. He also acknowledged that he lives in a condominium building where many of his neighbors use marijuana, which is legal to purchase under the laws of the state in which he resides. Applicant has presented a formal statement denying any future intent to use marijuana. He has repeatedly advised the U.S. Government, however, that he does not intend to use marijuana in the future only to continue to use it. He has shown in the past no serious commitment to honor those statements of intent, nor has he shown a sufficient track record of abstinence since May 2020.

Whole-Person Analysis

Under AG ¶ 2(c), the ultimate determination of whether to grant or continue eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances and applying the following adjudicative factors in 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 applied the adjudicative factors in AG ¶ 2(d). Additional comments are warranted. I have considered Applicant's honorable military service in the Navy and the service he has provided our military for many years as a contractor. But I have also considered his age and maturity. He is not a young man who does not know better. He appreciates the Federal Government's law regarding marijuana as an illegal drug and still used it knowing he was violating the law. He also knew that he was putting his job and career at risk by using marijuana while holding a security clearance. His evidence in mitigation falls short of mitigating the security concerns raised by his actions over the past five years.

Overall, the record evidence as described above leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the applicable disqualifying and mitigating conditions and evaluating all of the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his drug involvement.

Formal Findings

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interests of the United States to grant Applicant national security eligibility for a security clearance. Eligibility for access to classified information is denied.

John Bayard Glendon
Administrative Judge