



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 21-02138
)	
Applicant for Security Clearance)	

Appearances

For Government: Raashid S. Williams, Esq., Department Counsel
 For Applicant: Aileen X. Kozlowski, Esq.
 05/27/2022

Decision

HESS, Stephanie C., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse). Applicant failed to mitigate the security concerns raised by his 2019 use of marijuana while holding a security clearance. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on March 12, 2021. On October 15, 2021, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline H (Drug Involvement and Substance Misuse). The DOD acted under Executive Order (E.O.) 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 DOD on June 8, 2017.

Applicant answered the SOR on October 18, 2021, and requested a decision on the record without a hearing. Department Counsel submitted the Government’s written case on January 19, 2022. On that same day, a complete copy of the file of relevant

material (FORM,) which included Government Exhibits (GX) 1 through 4, was sent to Applicant. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on January 25, 2022, and filed a timely response. The DOHA transmittal letter and receipt are appended to the record as Administrative Exhibit (Admin. Ex.) 1. The case was assigned to me on March 17, 2022.

Procedural Issue

The SOR contains a single allegation in which the timeframe of November to December 2020 is used as a timeframe in which Applicant used marijuana. In his answer to the SOR and subsequently in his response to the FORM, Applicant objects to the accuracy of the stated timeframe, and states that his marijuana use occurred between November and December 2019. The record evidence supports Applicant's 2019 timeframe.

Although the dates in the SOR were erroneous, Applicant structured his answer to the SOR and his response to the FORM using the November to December 2019 timeframe. An SOR is an example of notice pleading and, "So long as and SOR places an applicant on notice of the matters to be addressed in the DOHA proceeding, it satisfies the requirements of the directive." See, e.g., ISC are Case No. 14-05127 at 6 (App. Bd. Jun 24, 2016.) Applicant was on notice about the Government's concerns, and responded accordingly.

Findings of Fact

Under Guideline H, the SOR alleges that Applicant used marijuana with varying frequency from about November 2020 until about December 2020, while granted access to classified information. In his answer to the SOR, Applicant admitted using marijuana between November 2019 and December 2019, not in 2020. He further stated that he was not working in a cleared position and was not aware that he had an active security clearance. These issues will be more fully discussed below.

Applicant, 31, is a legislative analyst employed by a defense contractor since March 2021. He served honorably on active duty in the U.S. Air Force from July 2012 through July 2016. He received his bachelor's degree in 2019 and his master's degree in 2020. He is currently pursuing a graduate level certificate in legislative studies with an anticipated graduation date of August 2023. He was granted his first security clearance while on active duty in the military. He was re-investigated for a security clearance in approximately 2017/2018 while working for a Federal-contractor marketing agency. (GX 3; GX 4; Answer.)

On his March 2021 e-QIP, in response to Section 23 – Illegal Use of Drugs or Drug Activity, Applicant answered "yes" to having used illegal drugs in the past seven years. He listed his dates of use as November 2019 to December 2019, explaining "in late 2019/2020 I smoked weed. This renewed the fact that drugs are not for me." He further

stated, "I tried it once or twice and have not touched the drug since with no plans to." In providing an explanation for why he does or does not intend any future use, Applicant stated, "I don't like it. It was legal in the area I was in and even then I just do not like smoking. To be quite honest, the smell of smoke in general is what ruins it for me." (GX 3.)

The summary of Applicant's May 2021 personal subject interview (PSI) was submitted with the FORM as GX 4, to which Applicant did not object. In the PSI, Applicant stated that between November and December 2019, "he smoked THC/marijuana twice with friends when they were at a local pub. [Applicant] stated he took 1-2 puffs of one joint the two times he smoked." He further stated that he did not continue smoking marijuana because "it was not for him and he really did not enjoy it." He also stated that he had no future intention of marijuana use. (GX 4.)

In his answer to the SOR, Applicant stated, "I admit to a single infraction of Guideline H." He further explained:

The date of the infraction was between November and December 2019, during my time... working on my master's degree.... I did not have access to classified information when the infraction took place When the infraction happened, I was in an area that had decriminalized the federally banned substance and an opportunity presented itself to try this substance to which I obliged. After this, I made the decision to not continue usage. . . . this action is not reflective of my character . . . I hope the Administrative Judge looks upon this as an honest mistake and not a character defining moment.

In his response to the FORM, Applicant's attorney stated that Applicant:

is an accomplished, intelligent person, but he is not an attorney, much less a government attorney with a focus on personnel security or the nuanced differences between decriminalized marijuana use and local jurisdictions and federal policy continue to prohibit it. . . . when he believed he was not in violation of any rule, he accepted marijuana from an acquaintance when it was offered, experimentally. The drug use did not continue; it occurred only once or twice.

Based on the entirety of the record, I find that the dates of Applicant's marijuana usage set forth in the SOR allegation are erroneous. Applicant's marijuana use occurred between November and December 2019.

The only record evidence regarding Applicant's security clearance history was provided by Applicant. On his e-QIP, he listed that he was granted a secret clearance by the Air Force while on active duty, but was not able to provide a date that the investigation was completed or when the clearance was granted. He also listed an investigation performed by the Department of the Navy which was completed in December 2017. He

did not know the date that access was granted. He listed his dates of employment with this Federal contractor as December 2017 to December 2018.

In his answer to the SOR, while asserting that he “did not have access to classified information when the infraction took place,” Applicant stated:

The current FSO Security Portal that I have access to states that DoDCAF granted my SECRET clearance in April 2019 to which I was sadly unaware. To my knowledge, upon my separation from the Military in 2016, my clearance was only sponsored temporarily by OPM during 2018 while I was employed for a Navy recruiting contract in Nashville, Tennessee. Outside of this timeframe, I was to believe that my clearance was listed as inactive or unsponsored. I did not have direct or indirect access to classified information for the years of 2018-2021. My access to information was renewed upon my employment in March 2021 which promoted this investigation.

In the FORM, the Government argues that Applicant was on notice, as a result of undergoing the security clearance process, that using illegal drugs while possessing a security clearance would raise a security concern. The Government goes on to argue that:

Despite this, he knowingly and intentionally chose to use illegal drugs. His decision to use illegal drugs (while possessing a security clearance), raises questions regarding Applicant’s decision-making, reliability and willingness to comply with laws and regulations that are paramount in protecting classified information.

In the Applicant’s response to the FORM, Applicant’s attorney disputes the statement that Applicant knowingly and intentionally used illegal drugs while holding a security clearance on two grounds. First, Applicant did not know he held a security clearance at the time and did not have access to classified information. Second, Applicant used marijuana in a jurisdiction where it was decriminalized and at the time of usage believed it to be legal.

According to <https://www.nysenate.gov>, on July 29, 2019, the Governor of New York signed into law the decriminalization of marijuana. The law decriminalized possession of small amounts of marijuana by removing criminal penalties for unlawful possession and by reducing the penalty to a violation punishable by a fine. On March 31, 2021, the Governor of New York signed into law the legalization of recreational marijuana for adults age 21 and older, permitting the use, smoking, ingesting, or other consumption of cannabis products and possession of up to 3 ounces or 24 grams of concentrated cannabis.

Applicant’s response to the FORM also cites the December 21, 2021, Memorandum for Distribution from the Director of National Intelligence, Avril D. Haines

(the Haines Memorandum) which provides clarifying guidance concerning marijuana for agencies involved in conducting security clearance and positions of trust adjudications. Specifically, the Haines Memorandum states, “Based on current federal law, I provide additional adjudicative guidance herein on three topics that have generated ongoing inquiries from federal agencies: 1) recency of recreational marijuana use....”

The memorandum states, “with regard to the first topic, agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative.” It then sets forth the factors to be considered when evaluating a person’s security worthiness under the “whole-person concept.” The memorandum further states that:

relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions. (AX G.)

I have considered the Haines Memorandum and Applicant’s attorney’s arguments based on her interpretations of the applicability of it to Applicant’s case.

Applicant stated in his response to the form that he voluntarily disclosed his marijuana use to the Government despite “there being no legal ramifications or record of it.” He provided the results of two negative drug tests dated July 15, 2020, and January 27, 2022. (AX F.) He also provided a statement of intent not to use any illegal controlled substance in the future and stipulated to his willingness to undergo random drug testing and to have his security clearance immediately revoked in the event of any future positive drug test. (AX H.) Applicant stated in his response to the FORM that he regrets his marijuana use and no longer associates with the acquaintance with whom he smoked marijuana in 2019.

Applicant’s three character references, a friend and former roommate who has known Applicant for nine years, a friend of nine years with whom Applicant served in the Air Force and lived in the same dormitory, and another friend of seven years with whom Applicant also served in the Air Force, were aware of the issues raised in the SOR. Collectively, they find Applicant to be reliable and trustworthy with a strong work ethic, and unequivocally recommend him for a security clearance. (AX E.)

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant’s 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.” See 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. 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. 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; see AG ¶ 2(b).

Guideline H, Drug Involvement and Substance Misuse

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

The illegal use of controlled substances . . . 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.

Applicant’s admissions, corroborated by the record evidence, require consideration the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse; and

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position.

The following mitigating conditions may also apply:

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 admits to using marijuana between November and December 2019. In his response to the FORM, Applicant's position as to why the Government should not be concerned about his marijuana use is fourfold. First, it was in 2019, more than two years ago. Second, it was only once or twice. Third, although he did in fact have a security clearance, he was unaware of it. And, finally, it was "legal" in the jurisdiction where he smoked.

By November 2019, Applicant was a 29-year-old graduate student who had served on active duty in the Air Force and had undergone two background investigations for security clearances. In completing his e-QIPs, he answered multiple questions regarding illegal drug use, to include marijuana. He was put on notice that the Government is concerned about any illegal drug use. There are no bright line rules for determining when conduct is recent. The determination must be based on a careful evaluation of the totality of the evidence. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). Given Applicant's age, education, and knowledge of the security clearance process, his marijuana use in late 2019 was recent.

On his March 2021 e-QIP, Applicant listed his marijuana use as one or two times in late 2019/2020. During his May 2021 PSI, Applicant told the investigator that he smoked marijuana twice with friends between November and December 2019 and that on each of the two times that he smoked marijuana, he took 1 to 2 puffs of a joint. In his answer to the SOR, Applicant admits to "a single infraction of Guideline H." He also referred to his marijuana use as "the infraction" two times, as "this action" and as "an honest mistake and not a character defining moment." However, in his response to the FORM, Applicant admits that he used marijuana one or two times. He also stated that he no longer associated with the "acquaintance" with whom he had used marijuana. From a frequency of use perspective, there is no discernable difference between one or two times and Applicant's use was infrequent, however Applicant was not consistent with the number of times he used, a detail that should be clear if it occurred one time, thus raising concerns about his truthfulness. From a credibility perspective, the inconsistency of Applicant's statements regarding his recent use of marijuana raises concerns about his current reliability, trustworthiness, and judgment.

Applicant held a security clearance at the time of his marijuana use. Illegal drug use while holding a security clearance raises a significant security concern about a person's reliability, trustworthiness, and judgment as well as his or her willingness to comply with rules and regulations. Applicant has consistently stated that he was not aware that he held a clearance at the time of his marijuana use and was not working in a position where he had access to classified or sensitive information. On its face, a strict application of disqualifying condition AG ¶ 25(f) to a person who was unaware that he or she held a clearance would not promote the basic purposes of the industrial security program of fairness and due process. "Moreover, provisions of the directive should not be interpreted and construed in a manner that will result in anomalous or absurd results." See ISCR Case No. 99-0452 (March 21, 2000) at pp. 5-6.

However, Appellant had been through two background investigations, and estimated his most recent investigation as occurring in December 2017 to work in a cleared position for the Navy. He was on notice about the Government's concerns about marijuana use and knew or should have known that marijuana use remained illegal under Federal law. His uses of marijuana in late 2019 reflect a lack of good judgment that continues to raise concerns about Applicant's security worthiness.

In his answer to the SOR, Applicant stated that "when the infraction happened, I was in an area that had decriminalized the federally banned substance and an opportunity presented itself to try this substance to which I obliged." In Applicant's response to the FORM, it is noted that Applicant, while intelligent, is not an attorney, and specifically not a Government attorney "with a focus on personnel security or the nuanced differences between decriminalized marijuana use in local jurisdictions and federal policy continuing to prohibit it." Applicant is a legislative analyst with a master's degree who is currently pursuing a post-graduate certificate in legislative studies. While Applicant may not have recognized the distinction between "decriminalized" and "legal," he knew or should have known that marijuana use remains illegal under Federal law.

Mitigating Condition AG ¶ 26(b) requires Applicant to acknowledge his drug use. While Applicant does admit that he used marijuana in 2019, and claims to regret it, he continues to minimize the significance of his marijuana use, change his story about the number of times that he used marijuana and with whom, and justify his illegal conduct by saying that he believed his usage to be legal. This overall failure to accept responsibility for his conduct negates any mitigating impact and AG ¶ 26(b) does not apply.

In his response to the FORM, Applicant stated that he no longer associates with the acquaintance with whom he used marijuana one or two times. However, in his PSI, Applicant stated that he used marijuana twice with friends. The inconsistencies in his statements make it impossible for me to conclude that Applicant no longer associates with the people with whom he used marijuana. AG ¶ 26(b)(1) does not apply.

While Applicant has stated that he has no intention of any future use of marijuana and has signed a sworn statement to that effect, the application of AG ¶ 26(b)(3) necessarily requires me to rely on Applicant's credibility. However, based on the record as a whole, I do not find him to be credible.

In considering the totality of the evidence, I conclude that Applicant's recent marijuana use, combined with his inconsistent statements regarding his use, casts doubt on his current reliability, trustworthiness, and good judgment. Applicant has not met his burden of persuasion and has not mitigated the Guideline H concerns.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant 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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d).

I have incorporated my comments under Guidelines H in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but I have also considered the following:

The Haines Memorandum addresses the significance of a person's recreational marijuana use prior to the initiation of the security clearance vetting process, stating that such use may be relevant to a security clearance adjudication but not determinative. It reiterates the application of a whole-person analysis, highlighting consideration of the frequency of use and whether the individual can demonstrate that future use is unlikely. The Haines Memorandum also emphasizes that marijuana use is still a violation of Federal law and illegal drug use, including marijuana, while holding a security clearance remains prohibited.

As a DOHA Administrative Judge, I necessarily consider the applicability of the whole-person factors in every decision that I issue. In this case, the clarifications in the Haines Memorandum do not have an impact on the final determination. First, the Haines Memorandum discusses the security significance of a person's recreational marijuana use prior to submitting a security clearance application. An example of this would be a person's recreational marijuana use while in college. Clearly, the frequency of use and whether or not that person intended to use marijuana in the future would be significant factors in making a security worthiness determination. Here, Applicant previously held a security clearance while on active duty in the Air Force, and in fact, he held one at the time of his marijuana use in 2019.

Applicant was 29 years old at the time of the marijuana use and well educated. He knew or should have known that his marijuana use was in violation of Federal law, regardless of the state's law. While the two times that Applicant used marijuana constitute infrequent use, the conduct occurred recently. Applicant's inconsistent statements regarding his marijuana usage and his ongoing minimization of the security significance of his conduct leave me with doubts about his reliability, trustworthiness, and judgment.

Additionally, Applicant pointed out in his response to the FORM that he voluntarily disclosed his marijuana use to the Government, despite there being no record of it. The security clearance process, beginning with the certification on the security clearance application's signature block, requires applicants to be completely forthcoming with all information requested from them by the Government. Failure to voluntarily provide accurate information can have dire consequences, to include denial or revocation of a person's security clearance, prosecution, and removal from Federal service. Applicant is not credited for volunteering derogatory information about himself, as required.

After weighing the disqualifying and mitigating conditions under Guideline H and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his conduct. Accordingly, I conclude he 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

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Stephanie C. Hess
Administrative Judge