



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



In the matter of:)
)
-----) ISCR Case No. 19-01476
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: F. Kevin Bond, Esq.

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, and exhibits, Applicant did not mitigate drug and personal conduct concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

Statement of the Case

On July 26, 2019, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the drug involvement and substance misuse and personal conduct guidelines the DoD could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, DoD Directive 5220.6 (January 2, 1992) (Directive); and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

Applicant responded to the SOR on August 15, 2019, and requested a hearing. The case was assigned to me on February 25, 2022. A hearing was scheduled for April 14, 2022, and heard on the date as scheduled. At the hearing, the Government's case consisted of three exhibits (GEs 1-3). Applicant relied on two witnesses (including himself) and 15 exhibits (AEs A-O). The transcript (Tr.) was received on April 27, 2022.

Procedural Issues

Before the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with additional awards. For good cause shown, he was granted seven days to supplement the record. Department Counsel was afforded two days to respond. Within the time permitted, Applicant supplemented the record with achievement awards he received between 2007 and 2012. Applicant's submission was admitted without objections as Applicant's AE P.

Summary of Pleadings

Under Guideline H, Applicant allegedly used marijuana from approximately 1991 to November 2018, after being granted a security clearance in December 2011. Allegedly, he used the substance in varying frequency.

Under Guideline E, Applicant allegedly falsified his electronic questionnaires for investigations processing (e-QIP) of December 2011 by omitting his marijuana use within the previous seven years. And, allegedly, he falsified his e-QIP of December 2017 by omitting his marijuana use while possessing a security clearance.

In Applicant's response to the SOR, Applicant admitted all of the allegations pertaining to prior marijuana use with explanations. He claimed he has not used marijuana since November 2018. He also claimed to take his job as a systems engineer and his possession of a security clearance very seriously and will continue to hold this duty with the utmost respect and loyalty to the United States.

Applicant further claimed to have incorrectly omitted his use of marijuana in both e-QIPs he completed. He attached negative test results from a September 2019 non-randomized drug test, an assessment performed by a licensed substance abuse counselor, and the summarized opinions of eight character witnesses who support his clearance application.

Addressing the falsification allegations covered by SOR ¶¶ 2.a-2.b, Applicant admitted his alleged omissions with qualifications. He claimed his omissions were mistaken errors on his part.

Findings of Fact

Applicant is a 47-year-old systems engineer for a defense contractor who seeks a security clearance. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in September 2004 and has three children from this marriage. (GEs 1-2; Tr. 26) He earned a bachelor's degree in electrical engineering from a recognized university in May 2000. (GE 1-3) He reported no military service.

Since March 2006, Applicant has been employed by his current defense contractor as a systems engineer. (GEs 1-3) Contemporaneously with his current employment, he was self-employed between May 2008 and April 2014 as an owner (along with his wife) of an e-commerce web-site. (GEs 1-3) He reported unemployment between November 2005 and March 2006. (GEs 1-3) Between 2002 and 2004 he held an interim security clearance. (GE 3; Tr. 20) Since December 2011, he has held a security clearance. (GE 3)

Applicant's drug history

Applicant was introduced to marijuana in 1991 while in high school. (GE 3; Tr. 32) Between 1991 and 1993, he used marijuana once a month. (GE 3; Tr. 32) In college, he increased the frequency of his marijuana use to three times a month. (Tr. 32) Once removed from social society in college, he ceased using marijuana for a number of years. (GE 3; Tr. 33) Between 2001 and 2006, he did not use marijuana at all. He resumed his use of marijuana in 2007, and between 2007 and 2018, he used marijuana one to two times a month. (GE 3; Tr. 32)

After being granted a security clearance in December 2011, Applicant continued using marijuana once to twice a month for anxiety reduction and for relieving upset stomach symptoms. (GE 3; Tr. 32) For Applicant, marijuana had a calming effect on his mental state and helped him stay focused and motivated. (GE 3) Typically, he smoked marijuana with his spouse or friend. (GE 3) Claiming no outside pressure to use the substance, he assured that he used marijuana by choice. (GE 3) Believing his use of marijuana did not cause or contribute to any problems at work or at home, he felt no need to seek drug counseling or treatment. (GE 3) Altogether, Applicant used marijuana between 350 and 500 times over a 25-year period spanning 1994 and 2018. (Tr. 41-43) At all times since being granted a security clearance in December 2011, he was aware that his use of marijuana violated DoD security regulations. (Tr. 45-46)

Following a conversation with his wife in November 2018 about his use of marijuana that his oldest son overheard and became upset, Applicant made the voluntary decision to cease his marijuana use altogether for the safety of his children. (GE 3; Tr. 26, 46-47) Although he continues to associate with friends who use marijuana, he has not used the substance since his last reported use in November 2018. (Tr. 26-28)

Between September 2019 and April 2022, Applicant voluntarily submitted to a series of non-randomized drug tests. (AEs H-N) Each of the tests produced negative results for illegal drugs (inclusive of marijuana). (AEs H-N; Tr. 25-26)

In September 2019, Applicant self-referred himself to a substance abuse counseling service in his local community. Acknowledging his past denials of his substance abuse history in his background applications for a security clearance, he fully disclosed his substance abuse history (inclusive of his use of marijuana) to the licensed substance abuse counselor who interviewed him. After taking background information from Applicant, the counselor determined that Applicant does not meet DSM-5 (*Diagnostic and Statistical Manual of Mental Disorders-V* (5th ed. 2013) criteria for substance use disorder. (AE O) Because he did not find Applicant to need participation in substance abuse treatment or education services. (AE O) The counselor entered his formal diagnostic impression as follows: Behavioral: no diagnosis; Medical: no diagnosis; and Psychological: no diagnosis.

Applicant's e-QIP omissions

Asked to complete an e-QIP in December 2011, Applicant denied ever using or purchasing illegal drugs (inclusive of marijuana) within the previous seven years. (GE 1) Applicant's omissions of his marijuana use were made knowingly and willfully and reflected a lack of candor.

In an updated e-QIP Applicant completed in December 2017, he again denied his use of marijuana within the previous seven years. (GE 2) Like his previous e-QIP denials, Applicant's omissions of his past marijuana use were made knowingly and willfully and reflected a lack of candor.

In a follow-up personal subject interview (PSI) with an investigator of the Office of Personnel Management (OPM) in December 2018, Applicant was asked if within the last seven years he had any involvement with illegal drugs (inclusive of marijuana). (GE 3) When initially asked this question, he told the investigator he had not. (GE 3) Before completing his PSI, he had a change of heart and voluntarily opened up about his past drug use and fully accounted for his past marijuana use without any prodding from the investigator. (GE 3) Applicant made this decision to voluntarily disclose his past marijuana use "to be truthful and come clean about his marijuana." (GE 3; Tr. 29-30, 47-48) He confirmed to the investigating agent that both his wife and friend were aware of his past marijuana use. He acknowledged in his hearing testimony that he could have come clean about his past marijuana use much earlier when he completed his e-QIPs, but did not. (Tr. 49-50)

Endorsements and Awards

Applicant is well-regarded by his supervisors, coworkers, friends, spouse, and father-in-law who vouched for his overall honesty, integrity, and trustworthiness. (Applicant's response and AEs A-G) Coworkers past and present who have worked with Applicant and known him for many years stress their impressions of his honesty, integrity, and professionalism. (A-C; Tr. 62-68) However, none of these coworkers professed to have detailed knowledge of all of the facts and circumstances surrounding all of Applicant's marijuana use and or repetitive omissions of the same in his e-QIPs and initial denials.

One friend of Applicant's with some knowledge of his past marijuana use and disclosure failures cited Applicant's self-reporting of his past marijuana use as a testament to his overall honesty and integrity. (AE D) Another friend who has known Applicant since their college years together described him as an exceptional person and friend in their community of friends. He characterized Applicant as a person who is loyal, trustworthy, professional, reliable, and fun. (AE E)

Applicant's spouse and father-in-law, in their vouching for Applicant's good character and trustworthiness, highlighted Applicant's honesty and integrity to a fault. (AEs F-E) Both acknowledged Applicant's mistakes and asked that they be assessed in a whole-person contest that accords proper credit to his contributions to their family. (AEs F-G).

Applicant is credited with making strong contributions to his employer. His recognized efforts merited consistent gold achievement awards between 2007 and 2012. (AE P) His credits included his employer's recognition of his engineering roles in restructuring his company's operations testing processes that helped his company achieve important testing milestones in production verification.

Policies

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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. Eligibility for access to classified information may only be granted "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 meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, reliable information about the person, past and present, favorable and unfavorable.

The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These AG guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. The AG guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Drug Involvement

The Concern: The illegal use of controlled substances, to include the misuse of 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.

Personal Conduct

The Concern: Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, and 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 . . . AG ¶ 15.

Burdens of Proof

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 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 “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. See *also* Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Security concerns are raised over Applicant’s multiple uses of marijuana in varying frequencies over a 27-year period (beginning in high school), and continuing (2011-2018) after he was granted a security clearance in December 2011. Considered together, Applicant’s involvement with illegal drugs raise security concerns over whether Applicant’s actions reflect pattern marijuana use incompatible with the judgment, reliability, and trustworthiness requirements for gaining access to classified information.

Additional security concerns are raised over Applicant’s deliberate omissions of his marijuana use in the e-QIPs he completed in 2011 and 2017. His e-QIP omissions were ultimately corrected in an ensuing PSI.

Drug involvement concerns

Applicant's admissions to using marijuana raise security concerns over risks of recurrence as well as judgment issues. On the strength of the evidence presented, three disqualifying conditions (DCs) of the AGs for drug involvement apply to Applicant's situation: DC ¶¶ 25(a), "any substance misuse"; 25(c), "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of illegal drugs or drug paraphernalia"; and 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position."

To his credit, Applicant has committed to abandoning all involvement with marijuana. For over three years, he has remained abstinent from illegal drugs (inclusive of marijuana) and exhibits no visible signs or indications of succumbing to any risks or pressures he might encounter to return to illegal drug use in the foreseeable future.

Regularly tested (non-randomized) for illegal drug use (inclusive of marijuana) between 2019 and 2022, he has consistently produced negative testing results. Applicant's 2019 voluntary counseling session with a licensed substance abuse counselor concluded with no positive diagnosis for a substance abuse disorder or professionally recommended need for further counseling.

Moreover, Applicant exhibited candor about his past involvement with marijuana once he made the belated decision to open up with the OPM investigator who interviewed him in 2018. Overall, he has shown marked improvement in his judgment and maturity level in the three-plus years he has avoided marijuana use.

Applicant's assurances of sustained abstinence from illegal drugs (inclusive of marijuana) are encouraging. And, his efforts warrant partial application of two mitigating conditions (MCs) of the drug involvement guideline: MC ¶¶ 26(a), "the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment"; and 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 . . . , (2) changing or avoiding the environment where drugs were used"

Still, with the combination of extensive quantities of marijuana Applicant was exposed to over his 27 years of use and his persistent withholding of information about his involvement with the drug, it is still too soon to absolve Applicant of risks of recurrence. Without more time to establish a probative pattern of sustained abstinence from the use of illegal drugs, none of the mitigating conditions are fully available to Applicant at this time. With only three-plus years of demonstrated abstinence from marijuana usage, more time with more corroborating evidentiary sources to support his continued abstinence are needed to facilitate safe predictions that he is no longer a recurrence risk.

Personal conduct concerns

Security concerns are also directed at Applicant's falsifications of his e-QIPs he completed in 2011 and 2017, respectively, when he failed to disclose his past marijuana use when asked by the pertinent questions in the respective applications of any past marijuana use within the previous seven years. Promptly disclosing his past marijuana use was material to the duty imposed on him in both instances to facilitate the Government's efficient use of its resources to fulfill its background investigation responsibilities. Trust and candor are core criteria for establishing eligibility to hold a security clearance.

While Applicant qualified the falsification allegations in the SOR (claiming his omissions to be mistakes), both his e-QIP omissions support drawn inferences of material falsification. In turn, his collective responses to the drug-related questions in the e-QIPs he completed warrant the application of DC ¶ 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."

In a follow-up PSI in December 2018, Applicant initially denied any prior marijuana use when responding to questions about any prior illegal drug involvement by the interviewing OPM investigator. Only after having a change of heart about disclosing his prior marijuana involvement towards the end of his PSI did he elect to volunteer with a full accounting of his marijuana use history. Applicant's initial denials of past marijuana use in his PSI warrant the application of DC ¶ 16 (b),

"deliberately providing false or misleading information, or concealing 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."

Having worked through two prior e-QIPs (one in 2011 and another in 2017) with his withholding his extensive history of marijuana use and sticking to his story when responding initially to drug-related questions posed by the OPM investigator, Applicant cannot fairly or reasonably meet the prompt disclosure requirements of MC ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts."

In a previous Appeal Board case with similar facts, the Appeal Board held that an applicant who failed to fully disclose her illegal drug use history in two previously completed security clearance applications and opened up voluntarily late in an ensuing interview subsequently conducted by an agent of the Defense Investigative Service (DIS) five months later, failed to satisfy the prompt prong of the potentially available mitigating condition. See DISCR Case No. 93-1390 at 5 (App. Bd. Jan. 27, 1995)

In the face of proven acts of falsification by Applicant over a seven-year period spanning two e-QIPs and an initial PSI before opening up about his marijuana use, his disclosures, although voluntary when offered, come too late to meet the mitigating requirements of MC ¶ 17(a). His laudatory endorsements from coworkers, friends, and family members, while commendable, are not enough to counter his material omissions of his past marijuana use.

While this is not a close case, even close cases must be resolved in the favor of the national security. See *Dept. of Navy v. Egan, supra*. Quite apart from any candor expectation the Government may have for the clearance holder employed by a defense contractor, the Government has the right to expect honesty and candor from the trust relationship it has with the clearance holder. See *Snepp v. United States*, 444 U.S. 507, 511n.6 (1980)

Whole-person assessment

From a whole-person perspective, Applicant has failed to establish enough independent probative evidence of his overall honesty, trustworthiness, maturity and good judgment required of those who seek eligibility to hold a security clearance or sensitive position. He lacks enough positive reinforcements and time in abstinence from active use of illegal drugs to facilitate safe predictions he is at no risk of recurrence.

Considering the record as a whole at this time, and granting due weight to the positive steps Applicant has taken to sustain his commitments to abstinence, there is insufficient probative evidence of sustainable mitigation in the record to make safe predictable judgments about Applicant's ability to avoid illegal drugs in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant's drug activities over a 27-year period with only three-plus years of sustained abstinence, he does not mitigate security concerns with respect to the allegations covered by SOR ¶¶1.a and 2.a-2-b.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person, I conclude drug involvement and personal conduct security concerns are not mitigated. Eligibility for access to classified information is denied.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

GUIDELINE H (DRUG INVOLVEMENT):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
GUIDELINE E (PERSONAL CONDUCT):	AGAINST APPLICANT

Subparagraphs 2.a-2.b:

Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Roger C. Wesley
Administrative Judge