



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



In the matter of:)
)
-----) ISCR Case No. 22-01176
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: *Pro se*

08/16/2023

Decision

WESLEY, ROGER C. Administrative Judge

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

Statement of the Case

On July 11, 2022, 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 guideline 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 25, 2022 and requested a hearing. The case was assigned to me on April 6, 2023. A hearing was scheduled for June 6, 2023, and heard on the date as scheduled. At the hearing, the Government's case consisted of six exhibits (GEs 1-6). Applicant relied on one witness (himself) and six exhibits (AEs A-F). The transcript (Tr.) was received on June 14, 2023.

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 AE P.

Summary of Pleadings

Under Guideline H, Applicant allegedly (a) used marijuana from about April 2021 through June 2021; (b) tested positive for marijuana in about June 2021 during a routine drug screening; and (c) used marijuana and tested positive for the substance after being granted access to classified information in about 2020.

Under Guideline F, Applicant allegedly accumulated two delinquent debts exceeding \$13,000. Allegedly, these debts have not been resolved and remain outstanding.

In Applicant's response to the SOR, he admitted testing positive for marijuana in June 2021 while holding a security clearance. However, he denied his using marijuana prior to his positive test. He added explanations and clarifications. He claimed he used a CBD product sold in local stores to facilitate relief from his aches and pains associated with his disabilities. He acknowledged his mistake to place his trust in a product he did not know anything about and claimed he has since ceased using THC-enhanced drugs.

Addressing this delinquent debt allegations, Applicant claimed that he is paying his listed delinquent accounts that became delinquent during a period of post-military retirement financial difficulties. He further claimed he was taking responsibility for his delinquent accounts, and he added that he is currently paying off his two delinquent debts.

Findings of Fact

Applicant is a 54-year-old employee of 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 May 2001 and divorced in May 2006. (GE 1) He remarried in July 2006 and divorced in April 2008. (GE 1) He has no children from either marriage. Applicant remarried for the third time in July 2008 and divorced in February 2017. (GE 1; Tr. 23) He has one child (age 14) from his latest marriage.

Applicant has taken classes from a local university since 2019, about has not earned a degree or diploma. (GE 1) He enlisted in in the Army in March 1996 and served almost 20 years of active duty before receiving an Army medical discharge in July 2016 with a cited 345% disability. (GEs 1-2; Tr. 23, 28)

Since September 2021, Applicant has been employed by his current defense contractor as a field service representative. (GE 1) Previously, he worked for other employers in various jobs. (GE 1) He reported unemployment between August 2016 and September 2019. (GEs 1-3) Applicant held a security clearance throughout his Army enlistment, as well as with his previous employer before his termination in June 2021 for cited reasons of testing positive for marijuana. (GEs 1-2; Tr. 23) Applicant continues to receive military disability pay and medical care from the Veterans Administration (VA) to “improve my way of life.” (Tr. 23) He is currently sponsored by his employer for a security clearance. (GE 1; Tr. 29)

Applicant’s drug history

During a routine, randomized drug screening in June 2021, Applicant tested positive for marijuana. (GE 5) Although the amount of THC in his system was not recorded, enough THC was found to confirm a positive test for marijuana. As the result of his positive drug test, he was terminated from his employment. (GEs 1 and 6; Tr. 36) Once Applicant learned of his positive drug test, he disposed of all of his cannabidiol (CBD oil). (Tr. 36) Prior to appearing for his scheduled randomized drug test in June 2021, Applicant failed to notify either the Government or his employer that he was ingesting CBD oil. (Tr. 28-30) Further, he did not list his taking CBD oil in the security clearance application he completed for his current employer. (Tr. 30)

Applicant denied using marijuana prior to his positive drug test and claimed he had tried a new product (CBD) oil recommended to him by a friend that he purchased in a local store to help him achieve some relief from the aches and pains associated with his disabilities. (Applicant’s Response; Tr. 23-24) He claimed he did not know the CBD oil was enhanced with THC, the main component of marijuana. And, for this reason he did not list his use of CBD oil in his electronic questionnaire for investigations processing (e-QIP) he completed for his current employer. Nor did he notify his current employer that he used CBD oil and was fired from his employer at the time as the result of his positive drug test. (GE 1; Tr. 30-31) Asked why he did not disclose his positive drug test to his current employer, Applicant responded that “he didn’t think it was “going to be a big issue because he not smoked marijuana prior to his positive drug test. (Tr. 27)

Applicant acknowledged his mistake of using pre-test CBD oil without providing any documented evidence of pre-test CBD oil in his system and its potential for producing positive test results for marijuana. (Applicant's response; Tr. 24, 30-31) He based his entire denial of marijuana in his system when tested on his verbal assurances that he has never used marijuana and has since ceased using any form of CBD oil. (Applicant's Response, Tr. 24) Asked about documented proof of his taking CBD oil laced with THC, Applicant could not provide any product labels, correspondence, or other proof to verify his use of CBD oil prior to testing positive for marijuana in his system. (Tr. 30) Nor could he furnish any documentation of his claimed pre-test notification to his employer at the time of his pre-test use of CBD oil in 2016. (Tr. 30-31) Whether the VA would have prescribed CBD oil to Applicant is unclear and really dependent upon the levels of THP in the product to be prescribed.

While THC is a chemical element typically found in both CBD-sourced hemp plants and marijuana plants, Applicant could furnish no evidence the oil used was proven to contain THC at levels that could be mistaken for marijuana in a randomized drug test. (Tr. 32-35). Although traces of THC have been found in studies of CBD oil, research supporting the drug's benefits in treating these conditions is still limited. See *Mayo Foundation for Medical Education and Research (2023)*

When the concentration of THC in tested urine exceeds 50 ng/mL, most tests will yield a positive result according to data compiled by the Centers for Disease Control and Prevention. See <https://www.cdc.gov>. Currently, the THC content in tested marijuana typically exceeds 13 per cent. See <https://www.urm.rochester.edu>. By contrast, THC levels in CBD oils are advertised to contain no THC and typically contain no THC, or very small traces (no more than 0.3 percent). See *L. Hellicar, Does cannabidiol (CBDZ) Contain THC?* in <https://www.medicalnewstoday.com/articles/does-cbd-have-thc>. Still, studies caution that in some lower-grade CBD products (depending on the source of the marketed CBD oil), tested CBD products can contain sufficiently high levels of THC to result in a positive marijuana test under random drug testing programs. See *id.*

Asked to identify the specific CBD oil product he was taking, Applicant could not (a) identify the type of CBD product he used, (b) document the labels of the product, or (c) supply any other evidence to refute the positive results for marijuana reported in the test results of his June 2021 test (Tr. 32) Because of the risk that CBD products can potentially contain varying amounts of THC that exceed the federally and state-mandated maximum THC percent levels for public marketing (i.e., 0.3 per cent), individuals are generally advised to check the labels of the CDC products they purchase in retail stores licensed to sell CBD products. See *Mayo Foundation for Medical Education and Research, supra.* (GE 5)

Based on the evidence produced, interpretation of the test results associated with Applicant's June 2021 positive drug test leaves only two plausible explanations: Either the marijuana tested was marijuana as reported that exceeds recognized cut-off levels for marijuana or related products (inclusive of CBD oil), or the product tested contained THC amounts that exceeded accepted federal and state approval levels of

THC content (i.e., 0.3 per cent). (GE 5) Potentially other explanations are neither plausible nor credible without more information from Applicant on the identity and sources of the CBD oil he claims to have used prior to his June 2021 positive drug test for marijuana

Applicant's finances

Between 2011 and 2016, Applicant opened two consumer accounts exceeding \$13,000 in the aggregate. (GEs 2-4; Tr. 25) Credit reports document that he defaulted in his monthly payments on these two accounts in June 2022. He attributed these debts to his difficulties in finding employment following his Army discharge in 2016. (GE 2) Applicant enrolled in a debt relief program in 2020 and has since paid in full the two accounts covered in the SOR (AEs C-F; Tr. 25) He is current with his other accounts and has no outstanding delinquent debts.

Endorsements

Applicant is well-regarded by his program and project managers. (AEs A-B) Both attested to his dedication, sound judgment, leadership qualities, and overall good character. However, neither of these managers professed to have any knowledge of the facts and circumstances surrounding Applicant's positive test for marijuana in June 2021, or of his claimed use of CBD oil. (AEs A-B)

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.

Financial Considerations

The Concern: Failure or inability to live within one's means, satisfy debts and meet financial obligations may indicate poor self-control, lack of

judgment, or unwillingness to abide by rules or regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal acts or otherwise questionable acts to generate funds AG ¶ 18.

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 randomized positive test for marijuana in June 2021. His reported positive drug test raises 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 initially raised over Applicant's accumulation of delinquent debts

Drug involvement concerns

Applicant's randomized positive test for marijuana in 2021 warrants the application of three disqualifying conditions (DCs) of the AGs for drug involvement. Applicable DCs are DC ¶¶ 25(a), "any substance misuse"; 25(b) "testing positive for an illegal drug"; and 25(c), "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase sale, or distribution; or possession of drug paraphernalia."

Legally, licensed sales of hemp-derived CBD oil is not prohibited under either the Farm Bill of Applicant's state of residence or under the federal law enacted in December 2018 (Public Law 115-334), provided that the hemp-related CBD product contains less than 0.3 per cent of THC content. Important to keep in mind is the generally recognized fact that broad spectrum CBD oil can be expected to contain almost no THC, while full spectrum CBD products can obtain up to 0.3 per cent of the ingredient. In either situation, for Applicant to produce positive test results for marijuana for what Applicant insists was CBD oil he ingested, reliable findings of CBD oil with THC levels below the 0.3 per cent THC levels allowed the accepted minimum allowable in his system (and not marijuana) would be needed.

Plausible explanations for the positive test results for marijuana in June 2021 are quite limited based on the evidence in the record. One possibility is Applicant's purchase of poor-quality CBD oil from an unlicensed retailer of CBD produced from a hemp plant by an unlicensed farm source containing THC content in excess of 0.3 percent. The other possibility is Applicant's purchasing marijuana from the same or other illegal source that exceeded the recognized 50 ng/mL grace amount. Either occurring event places Applicant in violation of federal and state criminal laws controlling the use of THC-laced products in CBD and marijuana in Applicant's state of residence.

To his credit, Applicant has committed to abandoning all involvement with CBD and any other substances that could potentially place him at risk to testing positive for marijuana. His assurances of sustained avoidance of CBD oil and any other products that could contain THC warrant partial application of one mitigating condition (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."

Still, with the positive drug test for marijuana coming only two years prior to his hearing, coupled with his inability to document the type of CBD oil he claims to have used prior to his positive drug test, it is too soon to absolve Applicant of risks of

recurrence. Without more time to establish a probative pattern of sustained abstinence from the use of CBD oil and any other products that could potentially contain the principal marijuana ingredient (THC), none of the remaining mitigating conditions are fully available to Applicant at this time.

With only two-plus years of elapsed time since his 2021 positive drug test, more time with more corroborating evidentiary sources to support his continued abstinence from CDC oil products and other marijuana products that contain levels of THC beyond discounted traces. More evidence of sustained abstinence is needed from Applicant to facilitate safe predictions that he is no longer a recurrence risk.

Financial concerns

Security concerns are raised over Applicant's reported accumulation of two delinquent debts exceeding \$13,000. These debt delinquencies warrant the application of two of the disqualifying conditions (DC) of the financial consideration guidelines: DC ¶¶ 19(a), "inability to satisfy debts"; and 19(c), "a history of not meeting financial obligations." Each of these DCs apply to Applicant's situation.

Financial stability in a person cleared to protect classified information is required precisely to inspire trust and confidence in the holder of a security clearance that entitles the person to access classified information. While the principal concern of a security clearance holder's demonstrated difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in cases involving delinquent debts.

Historically, the timing of addressing and resolving debt delinquencies are critical to an assessment of an applicant's trustworthiness, reliability, and good judgment in following rules and guidelines necessary for those seeking access to classified information or to holding a sensitive position. See ISCR Case No. 14-06808 at 3 (App. Bd. Nov. 23, 2016); ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015).

Applicant's cited difficulties in finding employment following his Army discharge in 2016 warrant the application of several mitigating conditions. Applicable mitigating conditions (MC) include MC ¶¶ 20(b), "the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances," and 20(d), "the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts."

In evaluating Guideline F cases, the Appeal Board has stressed the importance of a "meaningful track record" that includes evidence of actual debt reduction through the voluntary payment of accrued debts. See ISCR Case No. 19-02593 at 4-5 (App. Bd. Oct. 18, 2021); ISCR Case No. 19-01599 at 3 (App. Bd. Jan. 20, 2020). Based on the evidence presented, Applicant demonstrated a sufficient tangible track record of actual debt reduction to satisfy Appeal Board guidance associated with the good-faith payment requirements of MC ¶ 20(d) and reasonable action under MC ¶. 20(b).

Whole-person assessment

Whole-person assessment of Applicant's clearance eligibility requires consideration of whether his finances are fully compatible with minimum standards for holding a clearance. Taking into account Applicant's credited defense contributions and his positive drug test for marijuana in 2021, he has not shown enough time in sustained abstinence from marijuana-related products to overcome the Government's concerns about his positive drug test for marijuana in June 2021 and the risks of recurrence that inhere in a positive drug test. More time is needed for Applicant to establish a sustainable record of abstinence of involvement in federally controlled illegal drugs to mitigate the Government's drug concerns.

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 that drug involvement concerns are not mitigated. Whereas, financial consideration concerns are 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
Subparagraphs 1.a-1.c:	Against Applicant
GUIDELINE F (FINANCIAL CONSIDERATIONS):	FOR APPLICANT
Subparagraphs 2.a-2.b:	For 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