



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



In the matter of:)	
)	
)	ISCR Case No. 22-02606
)	
Applicant for Security Clearance)	

Appearances

For Government: Jenny Bayer, Esq., Department Counsel
For Applicant: *Pro se*

09/05/2023

Decision

LAFAYE, Gatha, Administrative Judge:

This case involves security concerns raised under Guideline H (drug involvement and substance misuse). Eligibility for access to classified information is denied.

Statement of the Case

Applicant signed and submitted a security clearance application (SCA) on February 16, 2022. On January 24, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (CAS) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement and substance misuse). The CAS acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on June 8, 2017.

Applicant responded to the SOR on January 26, 2023, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on February 28, 2023, including Items 1 through 10. In

about March 2023, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on an unknown date, and submitted a three-page responsive document dated April 6, 2023. The Government did not object to the submission. Applicant's documentary submission is marked as Item AE-A, and admitted in evidence without objection. Likewise, the Government exhibits, previously marked as Items 1 through 10, are admitted in evidence without objection. This case was assigned to me on June 23, 2023.

Findings of Fact

Applicant is a 29-year-old engineer currently sponsored by a defense contractor. He graduated from high school in May 2012, and subsequently enrolled in a full-time university program of study in June 2012. He completed the program in May 2017, and was awarded a bachelor's degree. Applicant has never been married and does not have children.

From about January 2015 through about May 2017, Applicant participated in a special university work experience program for engineering majors. In this program, he was paid as an employee of the university, but physically worked part-time with a defense contractor. (Item 4 at 12; and Item 10 at 1) In February 2017, he completed his first SCA, sponsored by the same defense contractor. After graduation in May 2017, he was hired as a full-time employee of the same defense contractor. (Item 4 at 12, and Item 10 at 1) He began working as a mechanical engineering associate at that time. (Item AE-A at 1)

In his February 2017 SCA, Applicant disclosed he used marijuana from August 2012 through December 2016, describing his marijuana use as "sporadic" throughout college and occurring mostly during summer and winter breaks. (Item 4 at 26) He responded "no" to the question of whether he intended to continue using marijuana in the future, explaining:

It's [not] worth risking my future career to get high. None of my successful family members smoke marijuana; many of my not so successful family members do; makes the decision easy.

Applicant provided additional details regarding his marijuana use during his May 2018 interview with a DOD investigator. (Item 10 at 2) He disclosed he used marijuana for the first time in the spring of 2012. He smoked it socially with a friend who provided it in the form of a "bong." He continued to smoke marijuana through December 2016 with the same friend. They smoked it about once a month at his friend's house. He disclosed that using marijuana made him laugh and feel happy. He stated he stopped using marijuana because he desired to find a good job and to have a good career. He shared that he witnessed relatives unable to have good careers because of marijuana use. He stated he would not use marijuana in the future. (Item 10 at 2)

Applicant became eligible for access to classified information in July 2018, following the DOD CAS's favorable adjudication of his SCA. He was granted a DOD security clearance on July 14, 2018, and signed a DOD non-disclosure agreement on July 27, 2018. (Item 5) He disclosed he was submitted for a top-secret security clearance in February 2022. (Item AE-A at 1)

Applicant completed a second SCA in February 2022, sponsored by the same defense contractor. (AE-A at 1; and Item 9 at 5) He disclosed he used marijuana starting in August 2012 and continuing through July 2021. (Item 3 at 25 through 26). When asked whether he used marijuana while possessing a security clearance, he responded "yes." When asked whether he intended to use marijuana in the future, he responded "yes," and explained:

Possibly in social settings, but not worth the ordeal to purchase and consume at my home. If legalized it is much more likely.

In his March 2022 interview with a DOD investigator, Applicant disclosed he smoked marijuana in cigar form, from about August 2012 through about July 2021. While in college from August 2012 through May 2017, he stated he smoked marijuana with a friend socially about twice a month. After college from May 2017 through July 2021, he stated he smoked marijuana about twice a year. He also admitted he smoked marijuana while possessing a security clearance. He stated he smoked marijuana with a friend who supplied it, asserting he never purchased it.

Applicant has maintained close in-person contact with the same friend. He stated he stopped smoking marijuana because he could not smoke it legally, but he intends to use marijuana in the future because he enjoyed it. He stated he experienced no negative consequences as a result of using marijuana, and denied being dependent on it. He never tested positive for marijuana use; nor has he been ordered to attend drug-related classes. (Item 9 at 5-6)

In his January 2023 response to the SOR, Applicant, for the first time, asserted he used the Delta-8 THC products "beginning during the pandemic lockdown and periodically afterwards in social settings . . ." (Item 2. *See also* Items 2, and AE-A *compared to* Items 3, 4, 9, and 10) Delta-8 THC products are not considered federally illegal under the Controlled Substances Act if it is determined to contain less than 0.3% delta-9 THC, the psychoactive ingredient in marijuana. (Items 6 through 8) He previously stated in his 2018 and 2022 DOD interviews, that his friend or friends provided the marijuana he used, and that he never purchased it. (Items 9 and 10).

In April 2023, Applicant submitted a document in evidence in response to this FORM, Item AE-A. He stated he no longer intended to use marijuana in the future, and referenced comments he made in his response to the SOR. (Item AE-A at 2) He stated he is in a serious romantic relationship that he hopes will lead to marriage, and because of this, he wished to amend his claim that he would use marijuana in the future if it were

legalized. He stated he “does not plan to use marijuana illegally again since ceasing usage (in) prior to graduating college in 2017.” (Item AE-A at 2) He commented as follows:

[He] has not used Delta-8 THC products since July 2021 when he learned that this was a substance prohibited under DoD Guidelines. This fact was stated in [his] reply to the SOR but was seemingly misconstrued by the investigator. [He] only used Delta-8 THC a few times – maybe twice per month at most – from the summer of 2020 through July 2021.

For SOR ¶ 1.a, Applicant admitted to using marijuana, from August 2012 to July 2021, but qualified his admission, stating “... usage after roughly 2014 (beginning around the middle of 2020) would be limited to the federally legal Delta-8 THC [marijuana] products.” (Item 2) As stated above, this is the first time Applicant has claimed to use Delta-8 THC products. (See Items 2, 3, 4,9, 10, and AE-A)

For SOR ¶¶ 1.b and 1.c, Applicant denied the allegations, reiterating he used federally legal “Delta-8 THC products” beginning during the pandemic, and socially afterwards.

For SOR ¶ 1.d, Applicant denied his intention to use marijuana in the future. He sought to clarify previous statements he made, emphasizing that he would use marijuana in the future “if legal,” stating he had no current plans to use marijuana in the immediate future. (Item 2) Applicant previously disclosed his intention to use marijuana in the future in his February 2022 SCA, and his March 2022 interview with a DOD investigator. (Items 4 and 9)

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.” EO 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.

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

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. 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 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.” *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988); see AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement and Substance Misuse

¶ 24: The security concern for drug involvement and substance misuse is set forth in AG

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 guidelines note several conditional that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

AG ¶ 25(a): any substance misuse (see above definition);

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

AG ¶ 25(g): expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used marijuana on multiple occasions from August 2012 through July 2021. He most recently disclosed he smoked marijuana during this period in his 2022 SCA and 2022 DOD interview. In these documents, he also expressed his intention to continue using marijuana in this future; or at a minimum, he failed to clearly and convincingly commit to discontinuing using marijuana. AG ¶¶ 25(a) and 25(g) are applicable.

In his January 2023 response to the SOR, Applicant, for the first time, asserted he used Delta-8 THC products “beginning during the pandemic lockdown and periodically afterwards in social settings” Delta-8 THC products are not considered federally illegal under the Controlled Substances Act if it is determined to contain less than 0.3% delta-9 THC. Applicant’s assertion he used federally legal Delta-8 THC products, instead of standard marijuana products, is not believable. He presented no documentary proof to support his claim. He repeatedly stated in his 2018 and 2022 interviews with DOD investigators, that his friends provided marijuana “bongs” or cigars they smoked together socially; and that he never purchased marijuana. Had he used Delta-8 THC, he would have stated so, at a minimum, in his 2022 SCA and during his 2022 interview with a DOD investigator.

Even assuming Applicant used Delta-8 THC products, there is a lack of clarity concerning the claimed period of use, and periods when he admitted use, but did not claim to have used Delta-8 THC products instead. For example, for SOR ¶ 1.a, Applicant admitted he used marijuana from August 2012 to July 2021, but qualified his admission, stating “. . . usage after roughly 2014 (beginning around the middle of 2020) would be limited to the federally legal Delta-8 THC.” It is unclear if he claimed to have used Delta-8 THC products starting in 2014 or mid-2020.

There is a similar lack of clarity concerning Applicant’s claimed period of use created by comments in his April 2023 response to the FORM. He stated he “does not plan to use marijuana illegally again since ceasing usage (in) prior to graduating college in 2017;” and that he had not used Delta-8 THC products “since July 2021 when he

learned that this was a substance prohibited under DOD Guidelines,” stating he only used Delta-8 THC products “a few times – maybe twice per month at most – from the summer of 2020 through July 2021.”

Based on the above, it is unclear whether Applicant’s claimed period of Delta-8 THC use is from summer 2020 through July 2021. If so, he still admittedly used standard marijuana from August 2012 to about mid-2020, after stating in his February 2017 SCA and May 2018 interview, that he stopped using marijuana in December 2016, because he desired to find a good job and to have a good career. He also stated he would refrain from using marijuana in the future.

Unlike the above, AG ¶ 25(f) is not applicable. Neither SOR ¶ 1.b nor SOR ¶ 1.c allege distinctive disqualifying conditions that address the conduct described in AG ¶ 25(f). Specifically, SOR ¶ 1.b. alleges disqualifying conduct already included within the scope of AG ¶ 25(a), namely, conduct already alleged for SOR ¶ 1.a. Likewise, language used for SOR ¶ 1.c does not allege Applicant used marijuana “**while granted access to classified information**,” as required, to address disqualifying conduct under AG ¶ 25(f). Instead, it alleges Applicant used marijuana “**after granted a security clearance in July 2018**.” Both allegations in SOR ¶¶ 1.b and 1.c amount to aggravating factors for conduct already identified and alleged in SOR ¶ 1.a. The Appeal Board has held that when the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant’s favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005). For this reason, SOR ¶¶ 1.b and 1.c are resolved in Applicant’s favor.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

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; and

AG ¶ 26(d): satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of the above mitigating conditions apply to the facts of this case. Applicant's drug involvement is recent and frequent, and his assertion he used Delta-8 THC products instead of standard marijuana is not believable, given his admitted history of smoking marijuana socially and enjoying it from 2012 through July 2021, and his statements he never purchased marijuana during the entirety of this period.

Whole-Person Concept

Under the whole-person concept, the 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. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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. I have incorporated my comments under Guideline H in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the drug involvement security concerns.

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:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b and 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant

Conclusion

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.

Gatha LaFaye
Administrative Judge