



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



In the matter of:)
)
) ISCR Case No. 22-01779
)
Applicant for Security Clearance)

Appearances

For Government: Troy L. Nussbaum, Esq., Department Counsel
For Applicant: *Pro se*

03/04/2024

Decision

LAFAYE, Gatha, Administrative Judge:

Applicant failed to provide sufficient evidence to mitigate security concerns raised under Guidelines H (drug involvement and substance misuse) and E (personal conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant signed and submitted a security clearance application (SCA) on March 2, 2022. On November 17, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (CAS) issued a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. 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 and requested a hearing before an administrative judge. The case was assigned to me on July 11, 2023. On November 15, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice scheduling the hearing

for December 7, 2023. On November 17, 2023, the Government amended the SOR, which was updated and resubmitted to the Applicant on November 29, 2023. Applicant responded to the SOR amendment on the same date, and requested to proceed with the hearing as scheduled. The hearing was convened on December 7, 2023, as scheduled. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified and at the end of the hearing, I left the record open until January 3, 2024, to allow him additional time to submit documentary evidence. Applicant did not submit any documentary evidence. DOHA received the hearing transcript (Tr.) on December 18, 2023.

Findings of Fact

In Applicant's response to the SOR, he admitted allegations in SOR ¶¶ 1.a through 1.c; including the amendment to SOR ¶ 1.b. He denied allegations in SOR ¶¶ 2.a through 2.c. Applicant's admissions are incorporated in my findings of fact.

Applicant is 46 years old. He was born and raised in State 1, and resided there from his birth until he moved away for college in 1996. In December 2001, he was awarded a bachelor's degree in engineering. Applicant returned to State 1 after college, and resided there until he moved to State 2, his current state of legal residence, in June 2016. He has never been married and has no children. (GE 1, GE 3; Tr. 12, 30-35)

Since June 2016, Applicant has worked as a program engineer for a defense contractor. He previously worked as mechanical engineer for a different defense contractor from March 2005 through May 2016. (GE 1, GE 3; Tr. 12, 30-35)

Applicant testified he has completed a total of three SCAs since he began working with defense contractors: in 2002, 2012, and 2022. He has held a secret security clearance since 2002. In March 2004, he signed a DOD nondisclosure agreement. During his testimony, he acknowledged participating in regular security clearance briefings, and training required to maintain his secret security clearance. He stated he is seeking a top-secret security clearance to enhance his professional opportunities as a program engineer. He testified he routinely participates in classified meetings as part of his job responsibilities since at least 2016, and he verified he works in a sensitive position. (GE 1 – GE 4; Tr. 24-35, 62)

Under Guideline H, the SOR alleged Applicant purchased and used marijuana with varying frequency from January 2016 through October 2022 (SOR ¶ 1.a); after being granted access to classified information or while holding a sensitive position (SOR ¶ 1.b); and that he intended to use marijuana in the future (SOR ¶1.c).

In his March 2022 SCA, Applicant denied he illegally used or purchased any drugs or controlled substances in his March 2022 SCA (SOR ¶¶ 2.a - 2.c). Specifically, he answered "no" in response to three questions in Section 23, Illegal Use of Drugs or Drug Activity, which asked whether, in the last seven years, he had: (1) illegally used any drugs or controlled substances; (2) illegally purchased, received, handled, etc., any drug or

controlled substance, and; (3) whether he had ever illegally used or otherwise been illegally involved with drugs while possessing a security clearance. (GE 1 pp. 31-32)

During his April 2022 investigative interview, Applicant, after being administered an oath, was asked whether he had used any illegal drugs in the past seven years, to which he responded “yes.” He first disclosed he purchased and used “chocolate edible” marijuana in January 2022 while vacationing in a South American country. He stated he consumed one marijuana edible per day over the course of five days during the trip. Next, he disclosed he smoked marijuana in March 2021 after the funeral of a beloved relative. He stated other persons provided him with the marijuana on that occasion; he did not purchase it himself. (GE 3 pp.3, 5-6; Tr. 36-39)

Applicant then summarized his pattern of marijuana use to the investigator, stating he used marijuana recreationally about twice a year since 2016, typically on special occasions like birthdays or big events. He described feeling relaxed, and less anxious or socially awkward after consuming marijuana. When the investigator asked why he did not disclose his marijuana use in his SCA, he stated he “just forgot about it.” When the investigator asked about his future intent concerning marijuana use, he stated he would still use it, but would reserve his use to when he was in a safe environment. He further stated he would not let marijuana compromise the quality of his job; and that he would not become dependent upon it. Applicant confirmed to the investigator that he knew marijuana was federally illegal, as discussed infra. (GE 3 pp. 5-6; Tr. 36-39, 55-60)

In his November 2022 response to government interrogatories, Applicant provided more details about his marijuana involvement. He disclosed the exact date, place, and occasion he first used marijuana: on January 23, 2016, in State 1, to celebrate his birthday. He last used marijuana on October 29, 2022, in State 2, to celebrate Halloween weekend events. He stated he purchased marijuana edibles a few times a year from a local smoke shop near his residence in State 2. He last purchased marijuana on October 28, 2022, the day before his Halloween weekend events. During his testimony, he described his marijuana use as sporadic and stated he probably used it less than 25 total times during the six-year period. He reiterated that he used marijuana in “safe” environments like his home, with a brother, cousins, or others he trusted. (GE 3 pp. 5-14; Tr. 39- 47) When asked when, if ever, he had decided to stop using marijuana, he responded:

I suspend use of (marijuana) during work hours or when I don't feel safe. Last use was Halloween weekend (10/29/2022). Can and will stop if required to maintain clearance and/or perform work duties responsibly. (GE 3 at 10)

When asked the reason he decided to use marijuana in January 2016 in the first place, Applicant stated:

The national conversation around THC and marijuana, especially in (State 1), had come to a place where a lot of the stigma had been dying down. It was easily accessible, and when I say easily accessible, I don't mean that I bought it. I mean that people around me would use it. And I made a decision, on my birthday, safe in my home, with people I trusted that, okay, I guess, I'll give this a shot. ... It had been decriminalized in (State 1). (Tr. 36-37)

Applicant also testified that COVID-19 presented lots of stressors and challenges for him. He eventually became the caretaker of his mother who has dementia, and who currently resides with him. He stated that, although he was in counseling while living in another state, he had not been successful at finding a counselor in his current state of residence, primarily, because he wanted a counselor to work with him in-person vice online. (Tr. 72-74)

Applicant testified he was well-educated on the federal illegality of marijuana in the United States. When asked whether he ever had any reason to believe marijuana was ever federally legalized, he responded:

I had reason to believe that it wasn't as severe. And when I say reason to believe, it doesn't mean I was right, it just means that this was the impression that I was getting from the climate of the country that, in other words, it would be possible to assess one's capability to hold a clearance and be a responsible, contributing member to this United States society, even if they've used marijuana. (Tr. 49-50)

At the hearing, Applicant testified the investigator asked whether he knew marijuana was still classified as a Schedule I drug, to which he responded, "I do." He stated his conversation with the investigator ended on that point, and that, looking back, he wished the investigator had told him to stop using marijuana. He explained his belief that the investigator's verification of his knowledge about the federal illegality of marijuana to him meant that, if he was being responsible while using marijuana, this was okay. Applicant was aware of his employer's drug policy prohibiting the use of illegal drugs, and stated he was subject to random drug urinalysis testing as a condition of employment. When asked if he was concerned about being randomly drug tested, he said "no" he was not concerned. (Tr. 55-60)

The language at the beginning of Section 23, Illegal Use of Drugs or Drug Activity, instructs applicants on the scope and context of questions asked in the section. It reads in pertinent part: "The following questions pertain to the illegal use of drugs or controlled substances or drug or controlled substance activities in accordance with Federal laws, *even though permissible under state laws (emphasis added)*." Applicant testified he overlooked this language when he completed his SCA. He stated he denied allegations in SOR ¶¶ 2.a – 2.c because he did not believe his use and purchase of marijuana on various occasion were illegal at the time he completed his SCA. He asserted such activities had been decriminalized in State 1 and State 2 at the time he used and purchased marijuana. However, Applicant did not provide a copy of, nor did he reference,

the laws in State 1 and State 2 that he proclaimed legalized or de-criminalized his drug activities during the relevant periods in each state. Towards the end of his testimony at the hearing, Applicant requested to change his answer regarding his intent to continue using marijuana, to state that he “would just discontinue use.” He further commented “it’s not worth losing my job over, or my clearance. I’m not going to die on this hill.” (GE 1 at 31; Tr. 59-65)

Applicant made inconsistent statements concerning his failure to disclose his illegal drug use or drug activities in his March 2022 SCA. In his April 2022 interview, he told the investigator he “just forgot about it.” In his SOR response and during his testimony, he asserted he did not disclose his illegal drug use or drug activities because he believed his activities were not illegal. During the hearing, he repeatedly commented on his desire to be honest. (GE 3 at 3; Tr. 14, 53-56, 62, 69-72)

Applicant testified he was highly successful at work. He stated he was generally rated in the “B-range,” exceeding expectations. He received on the spot awards for work performed in 2002 and 2021, but stated that he was just doing his job but something “stuck out.” (Tr. 74-78)

Policies

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

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

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

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.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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

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

Analysis

Guideline H, Drug Involvement and Substance Misuse

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

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable include:

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

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

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 admitted he purchased and used marijuana from January 2016 through October 2022 *after being granted access (emphasis added) to classified information or while holding a sensitive position (emphasis added)*, and that he intended to continue using marijuana. His admissions are supported by other evidence in the record. AG ¶¶ 25(a), 25(c), and 25(g) apply. AG ¶ 25(f) also applies, but merits further comments. SOR ¶ 1.b, as amended by the Government before the hearing, reads as follows:

b. You purchased and used marijuana, as set forth in subparagraph 1.a., after being granted access to classified information or while holding a sensitive position.

The term “while” used in AG ¶ 25(f) is significant because it defines the timing and scope of the disqualifying conduct addressed in the provision. It is distinguishable from the term “after,” which defines a different timing and scope. The amended language in SOR ¶ 1.b is sufficient to allege disqualifying conduct within the scope of AG ¶ 25(f) because it includes the language “or while holding a sensitive position.” Applicant, a program engineer, routinely participates in classified meetings as part of his job responsibilities, and he works in a sensitive position.

The following mitigating conditions 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.

AG ¶¶ 26(a) and 26(b) are not established. Applicant purchased and used marijuana for more than six years, and as recently as October 2022. During his interview and his SOR response, he stated his intent to continue using marijuana in the future, but only in an environment he deemed safe, and other personal caveats. Although he changed his previously stated future intent over halfway through the hearing, he was unable to clearly and convincingly commit to discontinue his misuse. He used marijuana starting in January 2016 while holding a sensitive position, and he continued to use and purchase marijuana through October 2022, about six months after his investigative interview.

Even assuming Applicant's marijuana use and purchase was de-criminalized in State 1 and State 2, Applicant was aware his drug involvement with marijuana violated federal law. He was also aware of, but unconcerned about, his employer's drug policy and random drug urinalysis testing program. Despite these facts, he continued to use marijuana in what he described as a "safe" environment, including his home, with a brother, cousins, and others he trusted. He did not provide a signed statement of intent to abstain from using or purchasing marijuana in the future.

The above mitigating conditions are not established under the facts here. Applicant has not met his mitigation burden. It is a long-established maxim of United States jurisprudence that ignorance of the law is not an excuse for failing to abide it. ISCR Case No. 19-00540 at 3 (App. Bd. Dec. 13, 2019) (*citing Rhode Island v. Massachusetts*, 45 U.S. 591, 613 (1846)). Moreover, the Appeal Board has consistently held that an applicant's use of illegal drugs after completing a security clearance application, or otherwise being placed on notice of the inherent incongruity between illegal drug use, and eligibility for a security clearance, raises questions about an applicant's judgment, reliability, and willingness to comply with laws, rules, and regulations. (*Id.*) (*citing* ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019)).

Applicant's purchase and use of illegal drugs while holding a sensitive position reflect poor judgment and raise questions about his reliability and trustworthiness. His evidence is insufficient to overcome concerns and doubts about his judgment, reliability, and his overall willingness to comply with laws, rules, and regulations.

Guideline E, Personal Conduct

The security concern under this guideline is described in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

AG ¶ 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.

Applicant made inconsistent statements about his failure to disclose his illegal drug use or drug activities in his March 2022 SCA. In his April 2022 interview, he told the investigator he "just forgot about it." In his SOR response and during his testimony, he stated he did not disclose his illegal drug use or drug activities because he believed his activities were not illegal. After considering these divergent statements, and all the other evidence in this case, I conclude Applicant deliberately provided false information about his use and purchase of marijuana on his SCA. AG ¶ 16(a) applies in this case.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

AG ¶¶ 17(a), 17(c), and 17(d) are not applicable. Applicant did not disclose his illegal drug activities in his SCA. His after-the-fact discussion with the investigator about his undisclosed illegal drug use, purchases, and his intent to continue using illegal drugs; is insufficient to mitigate his personal conduct security concerns. These late disclosures did not amount to a prompt, good-faith effort to correct his prior omission in this case. The evidence in this case leaves me questions and doubts about whether he has overcome his personal conduct security 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):

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

I have incorporated my comments under Guidelines H and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all evidence in the whole-person context, I conclude Applicant did not mitigate security concerns under Guidelines H (drug involvement and substance misuse) and E (personal conduct).

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
Subparagraphs 1.a - 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.c:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Gatha LaFaye
Administrative Judge