



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



In the matter of:)	
)	
)	ISCR Case No. 20-00768
)	
Applicant for Security Clearance)	

Appearances

For Government: Brian Farrell, Esq., Department Counsel
For Applicant: Daniel F. Aldridge, Esq.

03/14/2024

Decision

HYAMS, Ross D., Administrative Judge:

Applicant did not mitigate the drug involvement and personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 1, 2018. On August 20, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse) and Guideline E (personal conduct). Applicant answered the SOR on February 2, 2021, and requested a hearing before an administrative judge. The case was assigned to me on June 15, 2023.

The hearing convened on October 26, 2023. Department Counsel submitted Government Exhibits (GE) 1-3, which were admitted in evidence without objection. Applicant did not submit any documentation at the hearing. At the end of the hearing, he offered a recent drug test result. I held the record open for a week and he timely submitted Applicant's Exhibit (AE) A, which was admitted in evidence without objection.

Findings of Fact

In his answer, Applicant did not expressly admit or deny the SOR allegations, but he admitted the underlying facts of the allegations. These admissions are incorporated into the findings of fact. Based on my review of the pleadings, evidence submitted, and testimony, I make the following additional findings of fact.

Applicant is 62 years old. He has worked as a chief software systems engineer for a government contractor since 2015. He was married in 1988 and divorced in 2002. He remarried in 2007. He has four adult children. He earned a bachelor's degree in 1983 and has taken courses towards a master's degree but has not yet earned the degree. (Tr. 16-18; GE 1, 2)

The SOR alleges under Guideline H that Applicant used marijuana with varying frequency from 1978 through April 2018 (§ 1.a), and he used marijuana while granted access to classified information from 2011 through April 2018 (§ 1.b). The SOR cross alleges these allegations under Guideline E (§ 2.a).

Applicant claimed that he has been candid and honest about his marijuana use since he started filling out SCAs in 1985. Documentation of any SCAs prior to 2008 was not provided. Applicant reported that his marijuana use has varied in frequency over the years. He claims he used it as a social activity and went years with no use. He stated that marijuana helped him with anxiety, relaxation, and sleep. He claimed he has never tested positive for marijuana. (Tr. 18-23)

From April 2018 to about October 2022, Applicant claimed he had been using cannabidiol (CBD) products to relax and treat anxiety. He reported that he used CBD products through vaping, creams, and gummies. He testified that he did not look at the CBD packaging to determine if the THC content was under the legal limit.¹ He stated that

¹ The Security Executive Agent for the United States Government provided clarifying guidance concerning marijuana on December 21, 2021. Part of that guidance addressed CBD products:

With respect to the use of CBD products, agencies should be aware that using these cannabis derivatives may be relevant to adjudications in accordance with SEAD 4. Although the passage of the Agricultural Improvement Act of 2018 excluded hemp from the definition of marijuana within the Controlled Substances Act, products containing greater than a 0.3 percent concentration of delta-9 tetrahydrocannabinol (THC), a psychoactive ingredient in marijuana, do not meet the definition of "hemp." Accordingly, products labeled as hemp-derived that contain greater than 0.3 percent THC continue to meet the legal definition of marijuana, and therefore remain illegal to use under federal law and policy. Additionally, agencies should be aware that the Federal Drug Administration does not certify levels of THC in CBD products, so the percentage of THC cannot be guaranteed, thus posing a concern pertaining to the use of a CBD product under federal law. Studies have shown that some CBD products exceed the 0.3 percent THC threshold for hemp, notwithstanding advertising labels (Reference F). Therefore, there is a risk that using these products may nonetheless cause sufficiently high levels of THC to result in a positive marijuana test under agency-administered employment or random drug testing programs. Should an individual test positive, they will be subject to an investigation under specific guidelines established by their home agency.

his wife purchased it for him. For about the last year, he claimed that he has used prescription medication to treat the conditions for which he previously used marijuana. (Tr. 18-23, 34)

In Applicant's January 2008 SCA, he reported using "pot" (marijuana) from 1978 through May 1983. He admitted using it while possessing a security clearance and did not estimate the number of times it was used. In his May 2018 SCA, he reported using THC (marijuana) from 1978 through April 2018. He admitted using it while possessing a security clearance. (GE 1, 2)

In his July 2018 verified background interview with a government investigator, Applicant admitted using marijuana from 1978 through April 2018, and from 2011 through 2018 while possessing a security clearance. At times, he used marijuana about three times a week, but he did not use it every week. He used marijuana at social gatherings and at home. He admitted the same timeline of marijuana use in his June 2020 response to interrogatories. (GE 3)

Applicant testified that he infrequently used marijuana in the late 1980's and early 1990's, when his children were young. He used it at social gatherings and at home with his wife. He admitted his wife and many of his friends still use marijuana, and at times they use it in his presence. He could not say that he would abstain from using marijuana in the future if he does not continue to possess a security clearance. He has never had drug treatment or counseling. (Tr. 23-44)

Applicant admitted that he used marijuana while possessing a security clearance and granted access to classified information. He first received a security clearance in 1985 and has had access to classified information for almost the entire time since then. He has been using marijuana throughout this period. He had to undergo preemployment drug screening before starting new jobs in about 1995 and 2015. He stated that he temporarily stopped using marijuana so that he could pass the preemployment drug tests. (Tr. 23-44)

The Substance Abuse and Mental Health Services Administration (SAMSHA) provided a warning about CBD products on July 24, 2019:

Studies have shown that some CBD products' labeling does not accurately reflect their content. Cannabis based products containing a THC level greater than 0.3% on a dry weight basis do not fall under the Farm Bill's definition of hemp even if they are labeled as such. In one study, the amount of CBD in 69% of the 84 tested CBD products was inconsistent with that on the label, and some products contained unlabeled cannabinoids, including THC in amounts up to 6.4 mg/ml. As such, an employee's drug test may be positive for the THC metabolite, delta-9-tetrahydrocannabinol-9-carboxylic acid (THCA), due to THC in the CBD product.

SAMSHA further advised that "federal agencies should make every effort to inform applicants and employees of the risk that using such products may result in a positive marijuana test."

In the “Your Use of Illegal Drugs and Drug Activity” section of his 2008 SCA, Applicant commented: “I actually have no empirical evidence that the substance involved was actually pot. I am answering yes although I could not testify to it.” In the “Illegal Use of Drugs or Drug Activity” section of his 2018 SCA, when asked about the frequency of his use of marijuana, he wrote “Social. Occasional, I have no empirical evidence that the substance involved was pot and could not testify to it. I include it for completeness candidness in the questionnaire.” At the hearing he was asked about these comments and stated that he did not test any of the marijuana before he used it and none of it was labeled. He asserted he did not know for sure if the plant he was smoking was marijuana or if there was THC in it. He admitted he had never been given marijuana in any form with labeling on it. (Tr. 44-47; GE 1, 2)

Throughout his hearing, Applicant asserted that he has an excellent and impeccable record and is very honest and trustworthy. He did not provide any documentation supporting these assertions. He stated his social use of marijuana would not make him compromise national security. He submitted the results of a drug test he took the day prior to the hearing, which showed that he tested negative for marijuana. (Tr. 10-14, 18-23, 49-51; AE A)

Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.”

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is

responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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 of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern regarding drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

- (a) any substance misuse (see above definition);

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

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

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

The Controlled Substances Act makes it illegal under federal law to manufacture, possess, or distribute certain drugs (Controlled Substances Act, 21 U.S.C. § 801, et seq. See § 844). All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. §§811, 812. Marijuana is classified as a Schedule I controlled substance, §812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment.

Applicant admitted using marijuana over a 40-year period and using it while granted access to classified information. He did not convincingly disavow future use of marijuana. AG ¶¶ 25(a), 25(c), 25(f), and 25(g) apply.

I have considered the mitigating conditions under AG ¶ 26. The following are potentially applicable:

(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

(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 is grounds for revocation of national security eligibility.

AG ¶ 26(a) does not apply. Applicant used marijuana over a 40-year period, including while possessing a security clearance and having access to classified information. He knew that using illegal drugs while granted access to classified information or holding a sensitive position was not permitted, and that marijuana was an illegal drug. He minimized his marijuana use in past SCAs to gain a security clearance. He stopped use to avoid detection on preemployment drug screening, and then resumed using marijuana. He falsified his 2008 and 2018 SCAs by trying to hide material facts from the government in stating that it was not clear that he had used marijuana, because he had not tested it and it was not labeled. I cannot find his claims of abstinence credible, considering his history of minimizing and lying about his marijuana use. His marijuana use was recent, frequent, and is likely to recur. It continues to cast doubt on his current reliability, trustworthiness, and good judgment.

AG ¶ 26(b) does not apply. Applicant did not provide sufficient evidence to find that he disassociated from drug using associates and contacts, or changed the environment

where marijuana is used. He did not provide a signed statement to abstain from all drug involvement and substance misuse.

Guideline E, Personal Conduct

AG ¶ 15 details the personal conduct security 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, 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...

I have considered the disqualifying conditions under AG ¶ 16 and the following is potentially applicable.

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

Applicant admitted using marijuana over a 40-year period and using it while granted access to classified information and holding a sensitive position. Over the years, he has not been truthful with the government and his employers about his use of marijuana. He continues to associate with marijuana users and did not convincingly disavow future use. AG ¶¶ 16(c), 16(f), and 16(g) apply.

I have considered the mitigating conditions under AG ¶ 17. The following is potentially applicable:

(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.

AG ¶ 17(c) does not apply. Applicant's illegal marijuana use over 40-years, including while granted access to classified information or holding a sensitive position,

and being untruthful about it to the government and his employers is not a minor offense, nor is it infrequent. There is insufficient evidence to conclude that it is unlikely to recur or that it does not cast doubt on his reliability, trustworthiness, and good judgment.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility for a security clearance. He did not provide sufficient evidence to mitigate the security concerns under Guideline H or Guideline E.

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.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

Ross D. Hyams
Administrative Judge