



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



In the matter of:)
)
) ISCR Case No. 22-01670
)
Applicant for Security Clearance)

Appearances

For Government: Rhett E. Petcher, Esq., Department Counsel
For Applicant: *Pro se*

05/30/2024

Decision

LAFAYE, Gatha, Administrative Judge:

Applicant failed to provide sufficient evidence to mitigate security concerns alleged 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 submitted a security clearance application (SCA) on April 8, 2022. On March 27, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (CAS) issued a Statement of Reasons (SOR) alleging security concerns under Guidelines H (drug involvement and substance misuse) and E (personal conduct). 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 May 27, 2023, and requested a hearing before an administrative judge. The case was assigned to me on August 11, 2023. On November 20, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice scheduling the hearing for December 12, 2023. Applicant contacted me on the day of the hearing, requesting an extension due to his inability to secure a connection to the hearing. I granted an extension as requested, and, in coordination with Department Counsel, Applicant and his sponsor, set the new hearing date for January 10, 2024. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. I labeled the Government's Disclosure letter as a Hearing Exhibit (HE), and included it in the record as HE I.

Applicant testified and at the end of the hearing, I left the record open until February 2, 2024, to allow additional time for the submission of documentary evidence. Within a reasonable time, he requested an extension of time, which I granted until close of business February 21, 2024. Applicant timely submitted documentary evidence, labeled as Applicant's Exhibits (AE) A and B, which were admitted in evidence without objection. DOHA received hearing transcripts (Tr.) on December 26, 2023, and January 23, 2024, respectively.

Findings of Fact

In Applicant's response to the SOR, he admitted allegations in SOR ¶¶ 1.a, 1.b, and 2.a through 2.c. He did not respond to SOR ¶ 2.d, which was procedurally accepted as a denial. Applicant's admissions are incorporated in my findings of fact.

Applicant is 24 years old. He received his diploma from a technical high school in June 2017. He participated in technical training but did not attend college and has not yet received a degree. He has never been married and does not have children. (GE 1, GE 2; Tr. at 20)

Applicant has worked for a major defense contractor since April 2019. He started as a pipefitter learner, but was recently promoted to a full pipefitter mechanic. (GE 1 at 10; Tr. at 66-68). The position requires a security clearance. (Tr. at 10-11) He was granted a secret security clearance in about May 2019, and has actively held it since. (GE 2 at 28; Tr. at 21). He joined the U.S. Navy in October 2019, but was released from the Navy in the same month due to his inability to complete the Navy's fitness requirements. After being released from the Navy, he returned to his position as a pipefitter within a few days. (GE 1; Tr. at 20, 54, 66-67)

Applicant completed his first SCA in March 2019. He responded "no" to the question in Section 23, Illegal Use of Drugs or Drug Activity, which asked whether, in the last seven years, he had illegally used any drugs or controlled substances. (GE 2 at 26). He completed a second SCA in April 2022, and responded "no" to the same question. He also responded "no" to a related question in Section 23, which asked whether he had "ever illegally used or otherwise been illegally involved with a drug or controlled substance while possessing a security clearance." (GE 1 at 26-27)

In March 2021, Applicant was stopped for speeding in State 1, his home state. The officer noticed a strong smell of marijuana emanating from the car, and asked whether he had any marijuana in the car. Applicant denied having marijuana in his car, and explained that he could not use marijuana because of his job. (GE 4 at 9) He and his female passenger, also his roommate, were required to exit the car while officers conducted a search. Officers found a 12-inch buck knife, and a bag containing 24.5 grams of marijuana in a backpack in the car's rear seat. Applicant acknowledged ownership of the backpack, which resulted in his arrest and transport to the police station. At the hearing, he testified he informed the arresting officer that the marijuana found in his backpack was not his property. He stated he waited for his roommate to claim it, but she did not. He claimed that he lent his backpack to her for use on the camping trip. (Tr. at 13-14, 55-56, 64, 79-81)

Applicant was charged with possession of marijuana, and a large fixed-blade knife, both of which were confiscated. (GE 4 at 1-6; Tr. at 13-14, 55-56, 64) He testified that he knew his roommate was carrying marijuana, and had it with her during their camping trip. He stated he was alright with her carrying marijuana with her; she did not have a clearance; it was hers; and he did not partake in smoking marijuana with her. He testified his roommate smoked marijuana alone on their camping trip. (Tr. at 29-34; 55-56, 72-77). He did not report the incident to his facility security officer (FSO) or anyone in his supervisory chain of command. (Tr. at 80) Instead, he stated he "gave it some time" and tried to "get through the probation" before saying anything. (Tr. at 80-81)

Applicant had a secret security clearance at the time of his arrest. In his April 2022 SCA, he reported the incident as follows:

A friend and I were stopped and searched by police after a camping trip and I was arrested for a survival knife in the vehicle. (GE 1 at 24-25; Tr. at 79-81)

He did not disclose that he was charged with marijuana possession. Moreover, he responded "no" to a series of questions related to his arrest, including whether, as a result of the reported offense, he was "charged, convicted, currently awaiting trial, and/or ordered to appear in court" in a criminal proceeding against him. In the comments section, he stated that his case "would be closed and sealed to the public and charges dropped" in August 2022. (GE 2 at 24-26; Tr. at 80-83). Applicant also denied he had "ever been charged with an offense involving alcohol or drugs." (GE 2 at 26)

In Applicant's May 2022 background interview, which he authenticated in January 2023, he disclosed he first used marijuana in 2017. He stated he took two puffs of a marijuana cigarette, which was offered by a classmate after track practice. He reported feeling high, and sick. (GE 3 at 4; Tr. at 39-40). During the hearing, however, he testified he was not sure the cigarette he smoked actually contained marijuana, asserting that it could have been "Black & Mild," a tobacco product. He stated he believed it was a marijuana cigarette, but that he was not entirely sure of it. (Tr. at 25-29, 39-40)

Applicant disclosed that he next used marijuana in October 2021 at a Halloween party. An unknown female offered him a cigarette filled with marijuana. He took four puffs of the marijuana cigarette, became high, and felt relaxed. He stated he then took the remaining marijuana cigarette home, and two weeks later, he smoked it alone at his home to relax. (GE 3 at 5)

Applicant stated in his May 2022 background interview that, from December 2021 until February 2022, he purchased marijuana from a dispensary in State 2, which he asserted decriminalized the purchase and use of marijuana for recreational purposes. He last used marijuana in February 2022, because he no longer had transportation to get to the dispensary in State 2 to purchase it. He stated he did not disclose his marijuana use in the SCA for this period because the recreational use of marijuana had been decriminalized in State 1, his resident state. (GE 1, GE 3 at 5, 8; Tr. at 25-26) He did not provide a copy of, nor did he reference the laws in State 1 or State 2, that he proclaimed decriminalized the recreational use of marijuana. During the hearing, he testified that he stopped using marijuana because he did not want his marijuana use to continue to affect his job:

I stopped [using marijuana] because I knew then after getting into this predicament, way after the arrest and after my probation passed. ... I didn't want it to affect my job any further. (Tr. at 52)

He went on to state that he developed physical fitness goals, and he didn't want his marijuana use to affect his workouts. He felt that using marijuana "just makes [him] lazier, makes [him] want to do less;" and he wanted to better himself. (*Id.*)

Applicant admitted during the hearing that he deliberately falsified information by failing to disclose his 2017 marijuana use in his 2019 SCA (SOR ¶ 2.c), because he was concerned that admitting he used marijuana would hinder his ability to obtain a security clearance. (GE 2 at 26; Tr. at 34-35, 61-62; Response to SOR of May 27, 2023) He testified he was surrounded by a crowd during the time that was "not good," and everyone was using marijuana. In his mind he believed that, if you could not be "locked up in prison" for using marijuana, then it was "not illegal." (Tr. at 35-36) He stated that he did not know marijuana was federally illegal, and that he did not ask anyone because his employer placed a document on the reader board informing personnel that marijuana was "legal" in State 1, but that employees could not bring marijuana to work; or consume it on work hours. He stated he believed the rule was relaxed. (Tr. at 46-49) Applicant did not submit a copy of the notice document or any evidence to support his statement.

Applicant submitted two supplemental documents: a letter from his supervisor and a letter from a colleague. His supervisor attested to his strong work ethic, and value to the organization; along with his reliability, helpfulness, and positive attitude. His colleague stated the same, adding that he was more technically proficient because of Applicant's willingness, and helpfulness in sharing his knowledge with others. (AE A and AE B)

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; and

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

Applicant admitted that he used marijuana from 2017 to about February 2022, to include after being granted access to classified information; and that in March 2021, he was charged with possession of marijuana. His admissions are supported by other evidence in the record. AG ¶¶ 25(a) and 25(c) apply; however, AG ¶ 25(f) does not apply, as discussed *infra*.

SOR ¶ 1.a, alleged: “From about 2017 to about February 2022, you used marijuana with varying frequency, to include **after** being granted access to classified information.”

The alleged conduct is covered under AG ¶ 25(a), but not under AG ¶ 25(f). The language of AG ¶ 25(f) covers illegal drug use “while granted access to classified information or holding a sensitive position,” a distinction with a difference. See ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022), for a discussion on the distinction between possessing or having a security clearance and being granted access to classified information. “Eligibility or access to classified information and the granting of access to classified information are not synonymous concepts.” *Id.*

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.

Applicant used marijuana in 2017 before he was granted a security clearance in 2019; and he continued to use marijuana through February 2022. He told the DOD investigator that he stopped using marijuana at that time because he no longer had transportation to the dispensary in State 2, where he stated he could purchase it legally. During the hearing he added that he also developed physical fitness goals, and he wanted to work out, and to be more active, and not lazy. Using marijuana made him lazier. He disclosed his arrest in 2021, and the charge for possession of a fixed-blade knife. However, he failed to disclose he was also charged with possession of marijuana, which the arresting officer found in his backpack. He claimed he did not know marijuana was federally illegal, and that, based on a notice document on his employer's reader board, he believed the rules regarding marijuana were relaxed. He was unable to present the employer's notice document as evidence he claimed he relied upon to support his belief.

It is a long-established maxim of United States jurisprudence that ignorance of the law is not an excuse for failing to abide by 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 has not mitigated the drug involvement and substance misuse security concerns in this case.

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; and

AG ¶ 16(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

The SOR alleged Applicant falsified material facts in his April 2022 SCA by failing to disclose he illegally used marijuana during the stated period (SOR ¶ 2.a); and denying he ever illegally used or was involved with marijuana while possessing a security clearance (SOR ¶ 2.b). It also alleged he falsified material facts in his March 2019 SCA by failing to disclose he used marijuana in 2017 (SOR ¶ 2.c). Finally, the SOR cross-alleged Guideline H allegations concerning his marijuana use during the stated period, and his charge for marijuana possession (SOR ¶ 2.d).

Applicant admitted to deliberately falsifying his response in SOR ¶ 1.c, because he was concerned that admitting he illegally used drugs would hinder his ability to obtain a security clearance. He also deliberately avoided disclosing his involvement with marijuana in his 2022 SCA. He left out the fact that he was charged with possession of marijuana, although he disclosed the other charge for which he was arrested: possession of a survival knife. He also responded “no” to all other questions concerning his illegal drug involvement in his 2022 SCA (SOR ¶¶ 1.a, 1.b) AG ¶ 16(a) applies. Facts discussed here also provide foundational support for allegations cross-alleged from Guideline H (SOR ¶ 2.d). His aberrant personal conduct here demonstrated a clear failure to abide by rules and regulations, making him vulnerable to exploitation. AG ¶ 16(e) is applicable.

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) and 17(d) are only partially applicable. Applicant's subsequent discussion with DOD investigators concerning his drug involvement is insufficient to mitigate his personal conduct security concerns. These subsequent disclosures to investigators did not amount to a prompt, good-faith effort to correct his prior omission in this case. Applicant is only partially credited with abstaining from illegal drug involvement since February 2022. He stopped using marijuana because he was unable to travel to State 2 to purchase marijuana from a dispensary. It was not a “hard stop” in February 2022. He is credited with taking positive steps to alleviate stressors and change his behavior, such as working out and staying healthy. The overall evidence here, however, leaves me with questions and doubts about whether he has overcome his personal conduct security concerns.

AG ¶ 17(c) is not applicable. Comments discussed in Guideline H above also apply here. Applicant exercised poor judgment by continuing to use marijuana after he was granted a secret security clearance in 2019. He also provided false responses to multiple questions concerning his drug involvement in his 2022 SCA. His conduct casts doubt on

his reliability, trustworthiness and judgment, and demonstrates an unwillingness to comply with federal rules and regulations.

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

Conclusion

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

Gatha LaFaye
Administrative Judge