



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



In the matter of:)
)
) ISCR Case No. 24-00121
)
Applicant for Security Clearance)

Appearances

For Government: Andre Gregorian, Esq., Department Counsel
For Applicant: Dan Meyer, Esq.

12/12/2024

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

This case involves 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 submitted security clearance applications (SCA) on July 12, 2012, and March 1, 2022. On March 11, 2024, the Department of Defense (DoD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The DoD acted under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4, National Security Adjudicative Guidelines (AG) (December 10, 2016).

Applicant submitted his Answer to the SOR (Answer) on June 9, 2024, and requested a hearing before an administrative judge. On July 2, 2024, he withdrew his request for a hearing and requested a decision based on the administrative record. On

August 5, 2024, the Defense Office of Hearings and Appeals (DOHA) Department Counsel submitted the Government's file of relevant material (FORM), including documents identified as items 1 through 8. Applicant received the FORM on August 7, 2024. He was given 30 days from receipt of the FORM to submit materials in response, and to object to the Government's evidence. Through his counsel, he submitted a FORM response containing 282 pages on September 25, 2024. He submitted one additional document dated October 7, 2024.

On or about October 4, 2024, having received the response from Applicant, the case was forwarded to the DOHA hearing office. The case was assigned to me on November 19, 2024. The Government items were marked as Government Exhibits (GE) 1 through 8 and are admitted without objection. I marked and admitted Applicant's submissions as Applicant Exhibits (AE) A and B, and they were admitted without objection.

Findings of Fact

In Applicant's Answer to the SOR, he admitted SOR ¶¶ 1.a through 1.c, and 2.a. He denies intentionally falsifying his March 1, 2022 SCA, as alleged in SOR ¶ 2.b. His admissions are incorporated in my findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 31 years old. He is a high school graduate and has attended some college. He served in the U.S. Marine Corps from August 2012 through March 2021, when he was honorably discharged. He is married and has no children. He has a 100% Department of Veteran Affairs (VA) disability rating. (GE 1; AE A at 195-197, 213-226, 253-255)

Applicant first tried marijuana at the age of 19 in approximately 2011. It was provided by friends. He claimed that after one use, he told his friends that he would no longer partake in using marijuana. He is no longer friends with these individuals. (GE 3; AE A at 124)

Applicant used tetrahydrocannabinol (THC) gummies (the psychoactive compound in marijuana) in January 2022. At that time, he was job hunting. When he applied for a job with a government contractor, he claims he stopped using the gummies. On March 1, 2022, the same day he submitted his second SCA, he took a pre-employment urinalysis. His urine tested positive for THC. On April 22, 2022, he took another drug test, and no THC was detected. (GE 3, GE 4; AE A at 124)

Applicant omitted his marijuana/THC use in 2011 on his July 12, 2012 SCA, and omitted his THC gummy use on his March 1, 2022 SCA. His omissions related to Section 23, which asks about illegal use of drugs. He stated "No" on both SCAs when asked whether he had illegally used drugs or controlled substances in the last seven years. He deliberately failed to disclose the information set forth above regarding his marijuana/THC use. He admitted that he intentionally falsified the 2012 SCA because he was "scared

that [his] past would affect his ability to join” the Marine Corps. He denied that he intentionally omitted his use of THC gummies in 2022. He claimed that he “miss-clicked” on the answer “No.” (Answer; GE 2; AE A at 39, 78)

The report of investigation shows that Applicant voluntarily disclosed his use of gummies and his failed drug test when the investigator asked him about drug use during his 2022 subject interview. He told the investigator that he used cannabidiol (CBD) gummies in January 2022 to help him sleep. He indicated he did not know if the gummies contained THC. (AE A at 121) However, in January 2023, Applicant admitted to a second investigator that the gummies contained THC. He explained he decided to try gummies containing THC as he no longer held a security clearance and lived in a state that permitted recreational marijuana use. (AE A at 124)

Applicant sought treatment with a VA Medical Center in April 2024. He completed an assessment with the substance use disorder clinic on April 30, 2024, and began participation in a 12-week Early Intervention/Substance Abuse Recovery Group in June 2024. He successfully completed the group sessions on October 7, 2024. (AE A at 252; AE B)

Applicant provided a sworn statement in which he declared his intent not to use illegal drugs, to include marijuana, in the future. He acknowledged in his statement that violation of his promise could lead to revocation of his security clearance. (AE A at 274) He also submitted negative results of urinalyses conducted on April 23, 2024, and September 17, 2024, to further substantiate his claim that he stopped using THC. (AE A at 276-278)

Applicant’s DD Form 214 reflects that Applicant received the Navy and Marine Corps Achievement Medal, Marine Corps Good Conduct Medal (2), and the National Defense Service Medal. (AE A at 199) He has received praise in his current position documented in quality checks and evaluations. (AE A at 200-212)

Applicant also presented declarations attesting to his character and trustworthiness. Each of the declarations praised Applicant for being a trustworthy individual with sound and dependable judgement. The declarations all recognized the concerns noted on the SOR but indicated that he still had their trust, and that Applicant was unlikely to use marijuana or THC products again. (AE A at 228-250)

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 concern under this guideline is set out 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. The following disqualifying conditions are potentially applicable:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug; and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Under this guideline, the SOR alleged and Applicant admitted that: he used marijuana during high school in either 2010 or 2011; he tried THC gummies to help him sleep in January 2022; and he tested positive for THC on a pre-employment urinalysis. The above disqualifying conditions are supported by the record.

The following mitigating conditions under AG ¶ 26 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 or misuse is grounds for revocation of national security; [and]

(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.

Applicant reports he used marijuana once approximately 13 years ago. In January 2022 he tried THC gummies to help him sleep over the course of a month. His use of illegal drugs was infrequent, and he now abstains from marijuana and THC gummy use. His drug use is unlikely to recur and does not cast doubt on his current judgment. AG ¶ 26(a) offers mitigation.

Applicant has also acknowledged his drug involvement and has provided actions to overcome his drug use including abstinence and participating in a substance abuse recovery group. He presented two recent urinalyses that show no signs of THC in applicant's sample. He no longer associates with the friends that first gave him the marijuana in high school. He also signed a statement of intent not to use drugs, including marijuana, in the future. AG ¶ 26(b) is applicable.

While Applicant participated in a substance abuse recovery group, he offered no prognosis to support full application of AG ¶ 26(d).

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 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:

(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.

I find that Applicant intentionally failed to disclose his marijuana use on his 2012 SCA and his THC gummy use on his 2022 SCA. His falsifications raise the above disqualifying condition. He admitted he intentionally falsified his answers in 2012 with respect to marijuana use because he was afraid he would not be able to enlist in the Marine Corps if they knew of his usage. His claim that he miss-clicked on “No” in 2022 lacks credibility, given his intentional falsification of the same question in the past and his subsequent positive drug test.

The following mitigating conditions, under AG ¶ 17, are potentially relevant:

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

(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;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

None of the mitigating factors in AG ¶ 17 provide full mitigation. Applicant admitted he deliberately lied about his marijuana use in 2012 because he feared it would affect his eligibility to join the Marine Corps. His explanation about his 2022 SCA was not credible. Applicant's false statements concerning his drug use are not “minor,” because such statements strike at the heart of the security clearance process. See ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011). An applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the industrial security program. See ISCR Case No. 01-03132 at 3 (App. Bd. Aug. 8, 2002). While Applicant voluntarily disclosed his drug use to the investigator, his disclosure was only after his positive urinalysis. His false statements are recent and were calculated to give him the most favorable profile for his security clearance application. Applicant failed to produce evidence to support full mitigation under this guideline.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common-sense 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 have applied the adjudicative factors in AG ¶ 2(d). I have also considered his honorable military service, his declarations of support, and his performance evaluations. I had no opportunity to evaluate his credibility and sincerity based on demeanor as a result of his election for a determination based on the written record.

After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant mitigated the concerns under Guideline H, but has not mitigated the security concerns raised by his conduct under Guideline E.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1: Guideline H:	FOR APPLICANT
Subparagraphs 1.a-1.c	For Applicant
Paragraph 2: Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is denied.

Jennifer I. Goldstein
Administrative Judge

