



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



In the matter of:)
)
) ISCR Case No. 23-00940
)
Applicant for Security Clearance)

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: *Pro Se*

11/15/2024

Decision

BORGSTROM, Eric H., Administrative Judge

Although Applicant continues to attend social gatherings where others use marijuana, he has abstained from any illegal drug use or purchase for about two years. He failed to timely file his state income tax returns for several years, and he continued to owe outstanding taxes, interest, or penalties as of the close of the record. He mitigated the drug involvement and substance misuse security concerns; however, he did not mitigate the financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On November 28, 2023, 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 F (financial considerations). The DCSA 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 implemented by the DOD on June 8, 2017.

In Applicant's January 14, 2024 response to the SOR (Answer), he denied allegations in SOR ¶ 1.a. and 2.b., admitted in part and denied in part the allegation in SOR ¶ 1.b., and admitted SOR ¶ 2.a.. He requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. As discussed below, the Government amended SOR ¶¶ 1.a., 1.b., 2.a., and 2.b. pursuant to ¶ E3.1.13 of the Directive on April 5, 2024. In Applicant's April 29, 2024 response (Answer to the Amended SOR), he did not object to the amendment, and he admitted all four allegations as amended.

On May 15, 2024, the Government was ready to proceed to hearing. I was assigned this case on July 30, 2024. On August 16, 2024, DOHA issued a Notice of Hearing, scheduling an in-person hearing for September 17, 2024. The hearing proceeded as scheduled. The Government proffered two exhibits, Government Exhibits (GE) 1 and 2, which I admitted without objection. Applicant testified and proffered three exhibits, Applicant Exhibits (AE) A through C, which I admitted as without objection.

At Applicant's request, I held the record open until October 1, 2024, to provide him an opportunity to supplement the evidentiary record. On September 27, 2024, Applicant submitted an email (AE D); three character-reference letters (AE E); correspondence from the Internal Revenue Service (IRS) (AE F); and screenshots from the state tax authority (STA) website (AE G). DOHA received the hearing transcript (Tr.) on September 27, 2024.

On October 28, 2024, I contacted Applicant requesting more complete screenshots of AE G. On October 31, 2024, he submitted additional screenshots from the STA website (AE H). I admitted AE D through H without objection. The record closed on October 31, 2024.

Amendments to the SOR

On April 5, 2024, Department Counsel amended the SOR as follows:

SOR ¶ 1.a. You failed to file, as required, Federal income tax returns for at least tax year 2022. As of the date of your August 16, 2023 interrogatory response, the tax return remains untiled.

SOR ¶ 1.b. You failed to file, as required, [State] income tax returns for at least tax years 2017, 2018, and 2019. As of the date of this Statement of Reasons, the tax returns remain untiled.

SOR ¶ 2.a. You purchased marijuana from about April 2021 to at least November 2023.

SOR ¶ 2.b. As of the date of your [Office of Personnel Management] subject interview, conducted on about December 21, 2022, you intend to continue purchasing marijuana.

In his April 29, 2024 Answer to the Amended SOR, Applicant admitted all four allegations as amended. (Tr. 8-9)

During the hearing, Department Counsel moved to amend SOR ¶ 2.a. to change the date of last purchase to "November 2022" to conform with Applicant's testimony. He also moved to add an allegation SOR ¶ 2.c. as follow, "You used marijuana from April 2021 to May 2022." Without objection, I granted both motions. (Tr. 65-66)

Findings of Fact

Applicant is 56 years old. He graduated from high school in 1986. He attended college from 1986 to 1992, but he did not receive a degree. He has never married, but he has resided with his partner (R) since April 2007. Applicant and R reside with their 16-year-old child. They had a second child who died in April 2021 at age eight. (GE 1; Tr. 23-25)

From March 2012 to May 2018, Applicant was employed full time as a manager for a private company. From May 2018 to March 2020, he was employed full time as a software specialist for a private company. In March 2020, he was laid off, and he remained unemployed until June 2022. While unemployed, he received income from unemployment compensation and from distributions from a family trust. Since June 2022, he has been employed full time as a systems administrator for a DOD contractor. He has never had access to classified information. (GE 1, GE 2; Tr. 23-24)

Federal and State Taxes

Since 1998, Applicant has resided in a state that does not collect taxes for income generated from wages; however, the state does collect taxes from income generated from dividends and interest. (Tr. 32-33)

As to amended SOR ¶ 1.a., Applicant credibly testified that he filed an extension to file his Federal income tax (FIT) return for tax year (TY) 2022. The return was due on or before October 15, 2023. He paid approximately \$4,000 in estimated Federal taxes on or before April 15, 2023, and he timely filed his FIT return in about September 2023. He further testified that he had timely filed his FIT return and paid his taxes for TY 2023. After the hearing, Applicant provided IRS documentation confirming that he was current on all filings and payments to the IRS as of September 27, 2024. (Answer to the Amended SOR; AE F; Tr. 42-46)

Applicant admitted that he had not yet filed his state income tax (SIT) returns for TY 2017, TY 2018, and TY 2019 (SOR ¶ 1.b.). He testified that a tax attorney had timely prepared his returns for each missing TY but that the returns had remained unsigned and untiled on Applicant's desk. He further testified that he had paid sufficient estimated taxes for TY 2017 and TY 2018 and believed that he did not owe any taxes for those years. He did acknowledge that he may owe penalties for the late filings and that he had repeatedly received correspondence from the STA seeking the untiled SIT returns. (Answer; Answer to the Amended SOR; GE 1; AE A, AE C; Tr. 27, 34-35, 40)

Applicant has been aware of his untiled SIT returns for several years. He reported his untiled returns in his July 2022 e-QIP and during his November 2022 security interview. He confirmed these untiled returns in his August 2023 response to DOHA

interrogatories, his January 2024 Answer, and his April 2024 Answer to the Amended SOR. He filed the SIT returns for TY 2017, TY 2018, and TY 2019 on September 13, 2024, and he submitted a \$1,128 payment for his TY 2019 taxes and penalties at that time. At the hearing, Applicant admitted that he filed his missing returns due to the upcoming security clearance hearing. As for the delay, Applicant said the prepared returns were on his desk at home but they "got covered up by other things on the stack of paper and I just never got to it." He also admitted that he had occasionally received notices from the STA about his untiled returns. (Answer; Answer to the Amended SOR; GE 1, GE 2; AE C; Tr. 28-36, 41-42)

After the hearing, Applicant provided STA documentation (AE G, AE H) reflecting the outstanding balances for TY 2014 through TY 2022 as of October 2024:

Tax Year	Balance
2014	\$141
2015	\$0
2016	\$160
2017	\$361
2018	\$148
2019	\$272 (adjusted to reflect \$1,128 payment)
2020	\$102
2021	\$0
2022	\$34
TOTAL	\$1,218

In his post-hearing email, Applicant disagreed with STA accounting because he had paid estimated payments that had exceeded the calculated tax liability; however, it is unclear whether penalties and interest were imposed due to the late filings. He intended to make an appointment with the STA to resolve any discrepancies and pay any remaining taxes, interest, and penalties. (AE D)

At the hearing, Applicant testified that he timely filed his SIT returns for TY 2020, TY 2021, and TY 2022, and that he timely paid the estimated tax liability for each year. (Tr. 38-39)

Drug Involvement

As amended, the SOR alleges drug involvement and substance misuse security concerns based upon Applicant's illegal purchase of marijuana (SOR ¶ 2.a.), his expressed intent to continue to purchase marijuana (SOR ¶ 2.b.), and his marijuana use (SOR ¶ 2.c.).

At the hearing, Applicant admitted that he had used marijuana on about an annual basis in his 20's, but that he then had abstained from any drug involvement for over 20 years. Following the death of their young child in April 2021, Applicant and R began using marijuana to self-medicate their grief and symptoms of depression. Applicant traveled to a nearby state, where recreational marijuana was permitted under state law, he purchased

marijuana from a state-licensed dispensary, and he transported the marijuana back to his state of residence. He purchased gummies infused with tetrahydrocannabinol (THC) for his and R's consumption. Applicant used THC gummies approximately one to three times a week from April 2021 until May 2022. Although he committed to abstain from further marijuana consumption in May 2022, because he was job hunting, he continued to purchase THC gummies for R's consumption until November 2022. (Answer; Answer to the Amended SOR; GE 1, GE 2; AE A, AE B; Tr. 47-52, 62-64)

During his December 2022 security interview, Applicant had expressed his intent to continue purchasing marijuana on R's behalf in the future. Shortly after the security interview, he and R decided that he would no longer purchase marijuana or THC products on her behalf. Applicant has not purchased marijuana since November 2022, and R has abstained from marijuana since about November 2022. (Answer; Answer to the Amended SOR; GE 1, GE 2; AE A, AE B; Tr. 51-53, 62-64, 67)

Prior to the death of their child, neither R nor Applicant had used marijuana during the course of their relationship. R has recently been prescribed and takes prescription medication to manage her grief and mental-health condition. Applicant has one brother who may use marijuana, but that brother does not use it in Applicant's presence. Applicant has participated in a weekly social gathering for many years, and three of the attendees continue to regularly use marijuana in Applicant's presence; however, Applicant himself has never smoked marijuana with them. In the past, he had ingested a THC gummy prior to these social gatherings, and he has informed his friends that he no longer uses marijuana. (Tr. 58-60, 64, 69)

Applicant admitted his marijuana use in his July 2022 e-QIP and during his December 2022 security interview. In his e-QIP and in his Answer, he stated his intent to abstain from marijuana use in the future. During the hearing, he credibly and candidly testified about his drug involvement. At the time of his drug involvement, he had been aware that his purchase, use, and transport of marijuana violated Federal drug laws. (Answer; GE 1; GE 2; AE A; Tr. 59-60)

Whole Person

Applicant proffered three character-reference letters in support of his clearance eligibility. His supervisor lauded his dependability, work performance, trustworthiness, and ability to work in a team. A co-worker praised Applicant's punctuality, reliability, dedication, integrity, and congeniality. A longtime friend and co-worker noted Applicant's adherence to his security responsibilities in the workplace and good character. (AE E)

Policies

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(a), 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 sensitive 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive 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 F: Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An

individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds ...

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

The Government did not establish that Applicant failed to timely file or pay his FIT return(s), including the return for TY 2022 (SOR ¶ 1.a.). Applicant credibly testified that he filed for an extensions while timely paying his anticipated tax liability. He provided corroborating evidence from the IRS that all filings and tax liabilities are satisfied. SOR ¶ 1.a. is found for the Applicant.

For TY 2017, TY 2018, and TY 2019, Applicant filed for extensions to file his returns; however, he did not file these returns until September 13, 2024. Although he made estimated tax payments for TY 2017 and TY 2018, he made no such payments for TY 2019. At the close of the record, Applicant owed state income taxes, penalties, and interest for several tax years, including TY 2017 through TY 2019. He may have incurred penalties and interest due to his late filings. AG ¶¶ 19(c) and 19(f) apply as to SOR ¶ 1.b.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following are potentially applicable in this case:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce, or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;
- (d) the individual has initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented

proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements

Applicant bears the burdens of production and persuasion in mitigation. An applicant is not held to a standard of perfection in his debt-resolution efforts or required to be debt-free. "Rather, all that is required is that an applicant act responsibly given his circumstances and develop a reasonable plan for repayment, accompanied by 'concomitant conduct,' that is, actions which evidence a serious intent to effectuate the plan." ISCR Case No. 15-02903 at 3 (App. Bd. Mar. 9, 2017). See, e.g., ISCR Case No. 13-00987 at 3, n. 5 (App. Bd. Aug. 14, 2014).

Applicant's SIT returns were timely prepared by a tax attorney but sat on Applicant's desk for years. He received correspondence from the STA about his unfiled returns, and those missing returns were raised as a security concern in his e-QIP, during his security interview, in the DOHA interrogatories, in the SOR, and in the Amendment to the SOR; however, he did not file the returns until a week before the hearing. The outstanding taxes, penalties, and interest remain unresolved. Although Applicant timely filed and paid his SIT returns for TY 2020 through TY 2022, his procrastination for several years regarding TY 2017, TY 2018, and TY 2019 casts doubt as to his reliability, judgment, and ability to follow rules and regulations. Applicant did not mitigate the financial considerations security concerns.

Guideline H: Drug Involvement and Substance Misuse

The security concern for drug involvement 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. In this case, the following disqualifying conditions potentially apply:

(a) any substance misuse;

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

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

Marijuana is a Schedule I controlled substance under Federal law pursuant to Title 21, Section 812 of the United States Code. Schedule I drugs are those which have a high potential for abuse; have no currently accepted medical use in treatment in the United States; and lack accepted safety for use of the drug under medical supervision. Section 844 under Title 21 of the United States Code makes it unlawful for any person to knowingly or intentionally possess a controlled substance not obtained pursuant to a valid prescription.

On October 25, 2014, the then Director of National Intelligence (DNI) issued guidance that changes to laws by some states and the District of Columbia to legalize or decriminalize the recreational use of marijuana do not alter existing federal law or the National Security Adjudicative Guidelines, and that an individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security eligibility determinations.

On December 21, 2021, the DNI issued clarifying guidance concerning marijuana, noting that prior recreational use of marijuana by an individual may be relevant to security adjudications, but is not determinative in the whole-person evaluation. Relevant factors in mitigation include the frequency of use and whether the individual can demonstrate that future use is unlikely to recur.

Applicant admitted using marijuana one to three times a week between April 2021 and May 2022. He purchased marijuana, for his own and R's consumption, on multiple occasions between April 2021 and November 2022. During his November 2022 security interview, he expressed his intent to continue to purchase marijuana for R in the future. Applicant's conduct violated Federal drug law. AG ¶¶ 25(a), 25(c), and 25(g) apply.

Conditions that could mitigate the drug involvement security concerns are provided 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 or misuse is grounds for revocation of national security eligibility.

Applicant and R lost their young child in April 2021. They both began using marijuana to cope with the grief and depression symptoms triggered by that loss. In May 2022, Applicant discontinued his marijuana use as he sought employment. He has not used marijuana or any illegal drugs in over 30 months. Shortly after his December 2022 security interview, Applicant and R decided that he would no longer purchase marijuana for R's use. R herself has not used marijuana since about November 2022, and she is currently taking prescription medications to treat her mental-health condition. They have both provided statements of intent not to use illegal drugs in the future. Applicant's current drug involvement is limited to weekly social gatherings where his friends use marijuana. Applicant himself has never smoked marijuana with his friends, and they are aware he has abstained from future marijuana use. Applicant has established a pattern of abstinence and his limited interactions with others who use marijuana does not cast doubt on his reliability and judgment. AG ¶¶ 26(a) and 26(b) apply. Applicant mitigated the drug involvement and substance misuse security concerns.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of trust 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 Guideline F, Guideline H, and the factors in AG ¶ 2(d) in this whole-person analysis.

Applicant has thrived in his new employment, as attested to by his supervisor and co-workers. He credibly testified that he is committed to abstaining from all illegal drug

involvement, as demonstrated by his pattern of abstinence over the last 30 months. Although he has mitigated the drug involvement and substance misuse security concerns, Applicant's repeated and longtime failure to file his SIT returns raise concerns about his judgment and ability to follow rules and regulations. He did not mitigate the financial considerations security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive; are:

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

Conclusion

In light of all of the circumstances presented by the record in this case, I conclude that it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Eric H. Borgstrom
Administrative Judge