



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



In the matter of:

Appearances

For Government: William Miller, Esq., Department Counsel
For Applicant: *Pro se*

02/25/2025

Decision

Goldstein, Jennifer, Administrative Judge:

Applicant did not mitigate the security concerns under Guidelines H (Drug Involvement and Substance Misuse), J (Criminal Conduct), and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

On May 30, 2019, Applicant completed an Electronic Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On October 13, 2022, Applicant completed a second SCA (GE 2). On March 19, 2024, the Defense Counterintelligence and Security Agency (DCSA) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and Security Executive Agent Directive 4, establishing in Appendix A, the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

The SOR detailed reasons why the DCSA did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guidelines H, J, and E. Applicant provided a response to the SOR dated March 21, 2024 (Answer-1). On April 9, 2024, Department Counsel filed an amended SOR, to make the allegations conform with Applicant's Answer 1. Applicant answered the amended SOR on April 11, 2024 (Answer 2). On December 11, 2024, the case was assigned to me. On January 21, 2025, the Defense Office of Hearings and Appeals (DOHA) issued a notice scheduling the hearing on February 5, 2025. The hearing was held as scheduled, using the Microsoft Teams video teleconference system.

During the hearing, Department Counsel offered eight exhibits into evidence, marked GE 1-8, and two hearing exhibits (HE) marked I and II. Applicant offered twelve exhibits, marked Applicant exhibits (AE) A-L, and called three witnesses. There were no objections to any of the proffered exhibits, and GE 1-8 and AE A-L were admitted into evidence. On February 19, 2025, DOHA received a copy of the transcript (Tr.).

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

Under the Guideline for Drug Involvement and Substance Misuse, the amended SOR alleges that Applicant used marijuana from 1991 to at least April 2022 (amended SOR ¶ 1.a); and that his marijuana use from about December 2021 to April 2022 was while holding a sensitive position (amended SOR ¶ 1.b). Under the Guideline for Criminal Conduct, he was alleged to have been arrested in January 2013 for Disorderly Conduct and Battery (amended SOR ¶ 2.a) and was arrested in July 2022 for Assault on a Female (amended SOR ¶ 2.b). Under the Guideline for Personal Conduct, the amended SOR alleged that Applicant falsified his response to Section 23 on his SCA with respect to his marijuana use (amended SOR ¶ 3.a). Applicant admitted the allegations in amended SOR ¶¶ 1.a, 1.b, 2.b, and 3.a. He denied amended SOR ¶ 2.a.

Applicant is 52 years old. He earned a doctoral degree in 2019. He works as an adjunct professor and as a research scientist for a government contractor. He has been working as an employee of the government contractor since 2019. He was granted a security clearance in 2019. He testified that he has worked on one classified program. He has been married since 2006 and has four minor children. His wife (W) and two oldest children testified on his behalf. (GE 1; Tr. 96-99)

Applicant has used marijuana at varying frequencies since 1991. His estimates about the frequency of use were inconsistent between his testimony and his statements made during his subject interview. While he has had extended periods of abstinence from marijuana use, he has a history of "relapse." Applicant first used marijuana in 1991 while in college. He used it at a varying frequency up to three or four times per week. In

1994, he left college without a degree. He did not use marijuana again for ten years. (Answer 2). In the mid-2000s until approximately 2011, he occasionally used marijuana approximately twice per year while visiting his brother. He did not use marijuana in 2012 because he was completing an undergraduate degree in mathematics. After graduation in 2013, he recalls using marijuana about three times between 2013 and 2017. He abstained from marijuana use for approximately two years while in the doctoral program. He chose to use marijuana in approximately 2017 through January 2019 about once per month. (GE 7) He did not use it again until winter break 2021. In his January 2023 subject interview he estimated he smoked marijuana three to four times per year since December 2021. In his Answer-1, he claimed "in 2022, [he] rarely used it" until Christmas break, when he "again fell and used a little in a social setting." In early 2023, he claimed he "rarely used it" and claimed to have fully stopped using marijuana in September 2023. (GE 1, GE 2, GE 7 at 1, 4; Answer 2; Tr. 93-111)

Applicant stated his intention to abstain from marijuana use during his January 4, 2023 subject interview. However, he continued to use marijuana until September 2023. He claimed he has not used marijuana in the past year and a half. He stated he threw out the last of the marijuana he possessed in fall 2023. Since then, he has associated with marijuana-using friends that encouraged him to use it, but he has declined. (GE 2, GE 7 at 1, 4; Answer 2; Tr. 93-116)

Applicant was issued a security clearance effective November 1, 2019. He signed a non-disclosure agreement on that day. (GE 5) He acknowledged that he had access to classified information when he used the marijuana on six to twelve occasions. He asserts his marijuana use was "extremely infrequent" and that he "now realize[s] that this is strictly forbidden." He expressed his intent in writing to abstain from marijuana use. (Answer 2; Tr. 116-122)

Applicant was arrested in January 2013 and charged with Disorderly Conduct and Battery. On this occasion, he was playing a song he created for his children on his laptop. W shut his laptop because she did not want their children exposed to rock music. Applicant indicated rock music is "like satanic to her." He claims that W screamed at him for half an hour, and he decided to take the kids to their grandmother's house to get away from the yelling. W threatened to call the police if he took the children. She started to dial 911. He grabbed the phone and "stiff-armed her" to stop her from calling 911. W testified, "[H]e threw me to the floor because of that." She hit her head when she was thrown. She testified that she sought medical treatment and was diagnosed with a mild concussion. He claimed that W was mistaken and that "the tests came back negative" for a concussion. The hospital notified the police of the domestic violence, and Applicant was arrested and charged with Disorderly Conduct and Battery. According to the FBI rap sheet in evidence, the Battery charge was dismissed, but he was convicted of Disorderly Conduct and placed on probation. Applicant claims he was not convicted of this charge. (GE 4 at 8, GE 8; Tr. 55-61, 68-70, 81-87, 123-130)

Applicant was arrested in July 2022 for Assault on a Female. On this occasion, W was cooking a late lunch for their family. Applicant insulted her cooking. A verbal dispute ensued. W said the argument became physical when Applicant pushed W "hard

to the wall." Applicant said he grabbed her shoulders, she pushed him, and then he pushed her back. She hit her head on the wall as she fell. She indicated that she wanted to call for help, but Applicant took the phone away. He denied that he took her phone. She went to her neighbor's and then to the hospital. She stated she was diagnosed with a concussion. As a result of this altercation, Applicant was arrested and charged with Assault. He entered into a deferred prosecution agreement where he was placed on probation for one year and he was required to participate in 26 weeks of 90-minute counseling sessions. He successfully completed his period of probation, and the charges were dismissed. (GE 3, GE 6; Tr. 70-78, 87-92, 130-138)

During the hearing, W testified that their relationship "is really struggling." Applicant asked his wife if he was a truthful person and if he had said something that was untrue. She responded that his "setting up dates with other women" was untruthful and mentioned that he was not honest about money. (Tr. 65) She testified that they argue daily and that he has spat on her, but never hit her. (Tr. 72) Applicant entered videos of W into evidence. They depict W yelling and in one video she throws food at him. He claimed they show he has been an unrelenting victim of his wife's abusive behavior. (AE B, AE H, AE J-L; Tr. 31, 54, 80-92) W indicated that she angers easily and has provoked him. (Tr. 79)

When Applicant completed his SCA in May 2019, he did not disclose his marijuana use in the seven years preceding his application. He answered Section 23 "No," despite knowing he had used marijuana during that timeframe, as alleged on the SOR. (GE 2.) Unalleged, but relevant to mitigation, he did disclose some marijuana use on his October 13, 2022 SCA, but he reported, "Only one use on a holiday during the past four years." This was an intentional under-reporting of his marijuana use. During his subject interview on January 4, 2023, he was asked about the frequency of his use. He reported that since December 2021, he smoked marijuana three to four times per year. During the subject interview, he was also asked about his omission of marijuana use on his 2019 SCA. The investigator's report reflected that he said he did not list his marijuana use because the frequency and amount used was minimal. He claimed at hearing that despite inhaling marijuana smoke on several occasions, he did not consider himself to be a "user" of marijuana. He also justified his falsification by noting that everyone lies. (Answer-1; GE 1, GE 2, GE 5, GE 7; Tr. 140-142)

Applicant taught his daughter math and his son piano. His son is an award-winning pianist, and several of the videos entered in evidence were of his piano performances. The children testified that, outside of the two alleged criminal incidents, they have not witnessed him being violent. He has never used violence against them. (AE A, AE E-G, AE I; Tr. 9-28)

Applicant's 2022 annual performance review reflects that he is "bright and capable." His ratings were outstanding and exceeds expectations. In 2023, he received a promotion. In his new role, he met or exceeded all expectations. (AE C, AE D)

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* at 531. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." See ISCR Case No. 17-04166 at 3 (App. Bd. Mar. 21, 2019) It is "less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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. 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* 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.

The following disqualifying conditions are relevant:

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

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

AG ¶ 25(a) is established by Applicant’s admissions regarding his long history of drug use. He used marijuana at varying frequencies from about 1991 to April 2022. AG ¶ 25(f) is established by his acknowledgement that he was granted a security clearance in 2019, had access to classified materials, and continued to use marijuana despite his access to classified information.

The following mitigating conditions are potentially applicable:

AG ¶ 26(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;

AG ¶ 26(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used; and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

AG ¶ 26(a) is not fully established. He failed to establish that recurrence is unlikely, given his long history with marijuana. He has had long periods of abstaining from marijuana use, but has, as he put it, "relapsed." Applicant has not shown that his drug use is unlikely to recur.

As discussed above, he claims to be abstaining from marijuana use currently. However, given his history of lying about his marijuana use (addressed below) and lying to W about dating other women and about finances, I question his credibility. Additionally, AG ¶ 26(b)(1) and (2) do not apply because he continues to associate with marijuana users in environments where he is offered marijuana. Although he provided a signed statement of intent as described in AG ¶ 26(b)(3), AG ¶ 26(b) is not fully established.

Guideline J, Criminal Conduct

The concern under this guideline is set out in AG ¶ 30: "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations."

The following disqualifying condition is relevant:

AG ¶ 31(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

AG ¶ 31(b) is established. Applicant's actions in 2013 and 2022 caused injury to W. In 2013, he was charged with Disorderly Conduct and Battery. The Battery charge was dismissed, but he was sentenced to probation on the Disorderly Conduct charge. In 2022, he was charged with Assault on a Female. The charge was dismissed after he completed probation and an intervention program. These allegations are substantiated by the attachments to Applicant's answers to interrogatories and W's testimony.

The following mitigating conditions are potentially relevant:

AG ¶ 32(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 32(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶¶ 32(a) and 32(d) are not established. Applicant's videos of his wife, along with his wife's testimony, depict a struggling marriage. The volatility that led to the domestic incidents is not unusual in their home. While there has not been an arrest since 2022, Applicant has good performance appraisals from work, and Applicant completed the intervention program as ordered by the court, I cannot hold that Applicant is rehabilitated given the current volatile domestic situation and his wife's reports that he has spat on her.

Guideline E - Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out 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 cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. One is potentially applicable in this case:

AG ¶ 16(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant falsified answers on his 2019 SCA regarding his marijuana use. The cited disqualifying condition applies.

I have considered the following potentially mitigating conditions under AG ¶ 17:

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.

None of the mitigating conditions apply in this case. Applicant's conduct in falsifying his 2019 SCA demonstrated poor judgment. He claimed that he did not understand the definition of use and that he believed he was not a "user" of marijuana. However, he is highly educated and should have known he needed to answer fully and truthfully. Further, in his 2022 SCA, although he disclosed some marijuana use between 1991 and 2022, that disclosure was neither prompt nor complete. While he disclosed some marijuana use, he did not disclose the full extent of his use. He indicated that he did not intend to use marijuana again because he wanted to set a good example for his children. Despite that disclosure, he continued to use marijuana after stating he would not. He also justified his falsification by noting that everyone lies. His judgment remains questionable. He failed to establish mitigation.

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, J, and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance." ISCR Case No. 09-01652 at 3 (App. Bd. Aug. 8, 2011), *citing Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 4999 U.S. 905 (1991).

Applicant has not overcome this presumption. He has demonstrated recent questionable judgment. While he had favorable appraisals at work, his history of drug involvement, criminal conduct, and falsification creates questions about his trustworthiness. He did not meet his burden to mitigate these concerns. After weighing the disqualifying and mitigating conditions under Guidelines H, J, and E and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his drug involvement and substance misuse, criminal conduct, and 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 (Drugs/Misuse): AGAINST APPLICANT

Subparagraphs 1.a-1.b: Against Applicant

Paragraph 2, Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraphs 2.a-2.b: Against Applicant

Paragraph 3, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 2.a: 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. Clearance is denied.

Jennifer Goldstein
Administrative Judge