



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



In the matter of:)	
)	
[Name Redacted])	ISCR Case No. 18-00158
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Michelle Tilford, Esquire, Department Counsel
For Applicant: Stephen C. Glassman, Esquire

01/24/2019

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted an application for a security clearance (e-QIP) on February 23, 2017. On February 28, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H, Drug Involvement; and Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented within the Department of Defense on June 8, 2017.

On April 3, 2018, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on May 10, 2018. Another administrative judge was assigned the case on August 9, 2018. On September 21, 2018, a Notice of Hearing was issued, scheduling the hearing on October 25, 2018. The case was transferred to me on October 10, 2018, because of the unavailability of the assigned administrative judge. The hearing was held as scheduled. During the hearing, the Government offered five exhibits which were admitted as Government (Gov) Exhibits 1 - 5. Applicant testified, called one witness, and offered one exhibit which is admitted as Applicant Exhibit (AE) A (consisting of a green notebook containing

a brief from Applicant's counsel and five attached exhibits), without objection. The transcript was received on November 2, 2018. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is granted.

Findings of Fact

In his answer to the SOR, Applicant admits to the allegations.

Applicant is a 49-year-old senior-level employee for a DOD contractor who seeks a security clearance. He has been employed with the DOD contractor since June 2013. He has held a top secret security clearance since 2008. He has a bachelor's degree and has also attended executive-education courses. He is married and has three children. Two are in college and the youngest is in high school. (Tr.17-22, 34, 53; Gov 1) (Note: The facts in this decision do not specifically describe employment, names of witnesses, or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information.)

Under the drug involvement concern, the SOR alleged Applicant used marijuana in February 2014 and in January 2016 after being granted a security clearance in 2008. The same conduct is cross-alleged under the personal conduct concern. In his response to the SOR, Applicant admits the allegations, but states he did not believe he was committing a crime because marijuana use occurred in a state where marijuana use is legal. (Response to SOR, dated April 3, 2018)

On September 25, 2014, Applicant submitted an electronic questionnaire for investigations processing (e-QIP) for a periodic reinvestigation. In response to Section 23 – Illegal Use of Drugs or Drug Activity, Applicant listed that he used marijuana once on vacation. He believed marijuana was legal in the state where he used it. Applicant indicated on his e-QIP application that "It was legal in [state redacted], or so I thought at the time." (Gov 2, section 23)

On August 29, 2014, Applicant submitted a Standard Form 86 (SF 86), seeking to upgrade his security clearance for access to sensitive compartmented information (SCI). His sponsor was another government agency who sponsored him for his work as a contractor with the agency. In response to questions regarding illegal drug use, he listed marijuana use in January 2013 in a state where marijuana use was legal and marijuana use in June 2014 with his former college roommate. The location as to where the use occurred in June 2014 was cut off on the SF 86. (Item 5 b) The January 2013 and June 2014 marijuana usage was not alleged in the SOR. As such, it will not be considered under the disqualifying factors, but will be considered when applying matters of extenuation and mitigation.

As part of processing for SCI access, the other government agency had Applicant execute a Personnel Security Policy Advisory on August 29, 2014, which states:

As a condition of receiving or retaining security clearance with [other government agency], you are required to adhere to various personnel

security policies. These policies are in effect to provide NSA affiliates from being targets of espionage and other hostile activities carried out by or on behalf of foreign intelligence entities.” The policies included:

Improper Use of Drugs – The improper usage of drugs by [other government agency affiliates] (e.g., [other government agency] employees, military assignees or representatives, contractors, consultants, and experts) and applicants is strictly prohibited. Improper use includes the illegal use of controlled substances as well as the use, transfer, possession, sale or purchase of any drug for purposes other than their intended medical use. . . .

Failure to observe the policies summarized above may constitute grounds for disqualification from initial or continued access to [other government agency] information and facilities. Your signature below indicates your understanding and willingness to comply with these policies.

While the actual statement signed by Applicant is not in the record, the Clearance Decision statement of the other government agency indicates he signed the statement on August 29, 2014. (Gov 5a)

Applicant was interviewed by an investigator conducting a background investigation on June 12, 2015. I considered the summary of the interview, but gave it less weight because it is unsworn and unauthenticated. (See Directive, enclosure 3, para 1.20) Applicant’s 2014 marijuana use was discussed during the interview. The investigator’s summary of the interview states that Applicant had no desire to try marijuana again because he now realizes marijuana use remains illegal under federal law. (Gov 4) Applicant did not recall this interview or making the above statement. He conceded under cross-examination that if it was in the statement he probably said it. (Tr. 59)

On January 11, 2016, Applicant underwent a counterintelligence polygraph. During the pre-polygraph interview, Applicant told the polygrapher that he used marijuana in 2014 and 2016 while on vacation in a state where marijuana use was legal. His most recent use of marijuana occurred about two weeks before the polygraph. He believed that it was okay to use marijuana because it was legal in the state where he used it. The polygrapher told him that the use of marijuana was not okay because marijuana use was still illegal under federal law. Applicant claimed that he was not aware of this until he was so advised by the polygrapher. Applicant testified the polygrapher told him something to the effect that they would not be having this conversation a year from now, implying that marijuana may become legal nationwide. (Tr. 35-36; Gov 3 at 9-10)

The polygrapher asked Applicant if he intended to use marijuana in the future. Applicant responded, “I don’t know that I’d never use it again.” Applicant testified he intended to be honest and meant that he might possibly use marijuana again if it became legal under federal law or if he retired and traveled to a place where marijuana is legal. He stressed that he had no intentions of using marijuana while possessing a

security clearance and while working for the U.S. government. He believes the polygrapher mischaracterized his answer. (Tr. 38-39, 60-61; Gov 3 at 10)

The polygrapher summarized the interview as follows:

[Applicant] reported that from approximately January 2013 to January 2016, he smoked marijuana approximately twice a year. In each instance, he was given marijuana free of charge from a friend. He reported that the last time he smoked marijuana was “this past Thursday,” which was 7 January 2016. He reported that he had an active security clearance at the time. [Applicant] initially reported that he is likely to smoke marijuana again in the future; however, when asked if he would cease smoking the substance as a condition of employment, he stated, “yes.” (Gov 5a at 2)

Applicant disputed the polygrapher’s assertion that he used marijuana approximately twice a year from 2013 to January 2014. Applicant testified there were a number of statements reflected in the report that were not factual or were taken out of context. (Tr. 59-61) On October 17, 2016, the other government agency denied Applicant access to SCI. (Gov 5a)

On February 23, 2017, Applicant submitted an e-QIP. He listed that he used marijuana on two occasions in February 2014 and January 2016. On both occasions, he was on vacation with friends. Marijuana use was legal in the state where he vacationed with friends. Applicant later indicated in response to the question regarding future use “I now understand that was in violation of a federal statute by doing so.” (Gov 1, section 23)

In response to Section 25 – Investigations and Clearance Record on the same e-QIP application, Applicant answered “Yes” in response to “Have you EVER had a security clearance eligibility/access authorization denied, suspended, or revoked?” He explained:

I smoked marijuana in a state where it was considered legal, while not realizing that I was violating the terms of my clearance given the federal nature of the action. I made it clear that if my employment status was contingent upon not smoking marijuana I would refrain. I have also completely refrained (January 2016) since I became aware that I violated the terms of my clearance.

(Gov 1, section 25)

Applicant has not used marijuana since January 2016. He is not a habitual user. He claims all marijuana use occurred with friends while on vacation in a state where marijuana was legalized in 2013. He provided a statement on October 25, 2018, indicating that he does not intend to use marijuana in the future and is aware that any future involvement or misuse is grounds for revocation of national security eligibility. (Tr. 39; AE A, exhibit 3)

Applicant no longer attends his friends' annual vacation. He avoids situations where friends may use marijuana. Applicant testified that he was not addicted to marijuana. His marijuana usage never created problems in his life. He believed it was legal to use marijuana in the state where he was on holiday and only partook in the marijuana that was being passed around at the house where he and his friends were staying before they went out to dinner. If he was informed that marijuana use remained illegal under federal law, he would not have used it. (Tr. 36-37, 42-45, 71)

When asked why he was surprised to learn that marijuana was illegal under federal law in his 2017 background investigation, Applicant testified:

There are - - you hear constant stories in the media about what is and is not legal, factual. There is so much conflicting information. And by the way, as my OPM investigator said to me, there is so much conflicting information out there that there is not a clear story as to what's legal, what's not, and as with any element of life, things constantly evolve and change. And, as I understood, that is the case. (Tr. 62-63)

Applicant is remorseful about his marijuana use. He would never have used marijuana had he known the seriousness of his actions. He does not believe any of his friends would pressure him to use marijuana again. His family, several of his closest friends, and some of his colleagues at work are aware of his past marijuana use. His marijuana use cannot be used to blackmail him. (Tr. 36, 49-50; AE 3 at 10)

The Facility Security Officer (FSO) of Applicant's employer (FSO A) testified during the hearing. He is a vice-president of administration and also serves as the FSO as an additional duty. The company has 21 people who have or need security clearances. In 2015, he trained to be an FSO by taking online training offered by the Center for Defense Security Excellence. During the online self-paced training, FSO A claims there was no discussion about the use of marijuana and the impact on security clearances. He never told Applicant about the adverse consequences of using marijuana while possessing a security clearance. (Tr. 72-77)

FSO A claimed he only learned there was an issue about using marijuana while possessing a security clearance after Applicant told him about it after his background investigation interview. The Defense Security Service (DSS) sends out monthly e-mails about high-level facility security updates and changes in policy. FSO A cannot recall any of the e-mails containing information about the use of marijuana while possessing a security clearance. (Tr. 73-77)

FSO A is familiar with the SF 86. He is aware that the questionnaire contains questions regarding illegal drug use. If an employee came to him and told him of their marijuana use, he would file an incident report. He testified he is required to report the use because marijuana remains illegal at the federal level. He is aware of that the policy regarding marijuana use has not changed. He never told Applicant or employees of the company that it was okay to use marijuana. He is aware of the statutory law on a federal drug-free workplace. He is aware that employees are subject to urinalysis. Applicant never came to him to inquire about the use of marijuana, how it relates to federal law, or

the affect it would have on his security clearance. He does not recall if he received any updates on DoD policy regarding the state legalizations of marijuana and how it affects federal law. (Tr. 78-86)

Whole-Person Factors

Mr. M. met Applicant through a young leader's business association. Applicant has been the leader of the organization over the past five years. Mr. M. is the president of a \$6 billion privately-held company and holds a top secret security clearance. He believes Applicant is worthy of holding a security clearance because of the tremendous value his company provides to the U.S. government. If his privileged access is removed, it would be harmful to his business and its over 130 employees. He strongly recommends Applicant be allowed to maintain a security clearance. (AE A, exhibit 4)

Mr. A. is a long-time friend, neighbor and associate of Applicant's. He describes Applicant as "an astute and responsible professional" and a wonderful father and husband. They have been neighbors for seven years. They attend the same church, health club as well as social events. Applicant's reputation is "impeccable." He is highly regarded in the community. He describes Applicant as a loyal U.S. citizen who possesses the necessary judgment to be trusted with matters of national security. He is a man of high integrity and good moral character. (AE A, exhibit 5)

Numerous business colleagues of Applicant provided favorable comments about Applicant on his LinkedIn page. (AE A, exhibit 1)

DOD and Federal Government Policy on Marijuana Use

On October 25, 2014, the Director for National Intelligence, issued a memorandum titled, "Adherence to Federal Laws Prohibiting Marijuana Use" addressing concerns raised by the decriminalization of marijuana use in several states and the District of Columbia. The memorandum states that changes to state and local laws do not alter the existing National Security Adjudicative Guidelines. "An individual's disregard for federal law pertaining the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations."

On May 26, 2015, the Director of the United States Office of Personnel Management (OPM) issued a memorandum titled, "Federal Laws and Policies Prohibiting Marijuana Use." The Director of OPM acknowledged that several jurisdictions have decriminalized the use of marijuana, allowing the use of marijuana for medicinal purposes and/or for limited recreational use but states that Federal law on marijuana remains unchanged. Marijuana is categorized as a controlled substance under Schedule I of the Controlled Substances Act. Thus knowing or intentional marijuana possession is illegal, even if the individual has no intent to manufacture, distribute, or dispense marijuana.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that 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).

Guideline H, Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription drug 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 disqualifying conditions that could raise security concerns. I find the following drug involvement disqualifying conditions apply to Applicant's case.

AG ¶ 25(a) any substance misuse;

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.

The SOR alleges and Applicant admits he used marijuana once in 2014 and once in 2016, both times while on vacation with friends in a state where marijuana use is legal. AG ¶ 25(a) and AG ¶ 25(c) apply. His use occurred while he held a security clearance. AG ¶ 25(f) applies.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline H, Drug Involvement. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (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. September 22, 2005))

Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions potentially apply to the Applicant's case:

AG ¶ 26(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; 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.

AG ¶ 26(a) applies because three years have passed since Applicant's last use of marijuana. At the time of use, Applicant believed his conduct was not illegal, because the state legalized the use of marijuana. He was unaware that marijuana use remained illegal under federal law. Applicant disclosed marijuana use on several security clearance applications in 2013, 2014, and 2016 while in a state where marijuana use was legal. Although there was an additional admitted use of marijuana in 2013 by Applicant that was not alleged in the SOR, I find the discrepancies in the number of times used to be minimal. Once he learned marijuana use was illegal under federal law, he stopped using marijuana. Applicant has not used marijuana for over three years, and he was forthcoming about his marijuana use, which shows trustworthiness.

AG ¶ 26(b) applies. Applicant stopped using marijuana in January 2016, when he discovered marijuana use remains illegal under federal law even though it is legal in the state where he used it. He was not a regular user. Although he attended the annual trip for ten years, he stopped attending to avoid being around his friends who use marijuana. He no longer associates with anyone who uses marijuana or any other illegal narcotic. On October 25, 2018, he provided a signed statement of intent to refrain from all drug involvement and substance misuse. Applicant was truthful about his marijuana use and demonstrated an appropriate pattern of abstinence.

Applicant met his burden to mitigate the security concerns raised under Guideline H, Drug Involvement. Applicant is warned that any future illegal marijuana use will result in the revocation of his security clearance.

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 the national security or adjudicative processes.

The following disqualifying conditions potentially apply to Applicant's case:

AG ¶ 16(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;

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 know, could affect the person's personal, professional, or community standing.

AG ¶ 16(c) applies to Applicant's marijuana use while entrusted with a security clearance. Applicant's past conduct raises issues about his judgment, reliability, and willingness to comply with rules and regulations. This raises doubts as to Applicant's ability to protect classified information.

AG ¶ 16(e) applies because Applicant's illegal marijuana use has the potential to affect his personal, professional, or community standing. As a senior leader of his company, Applicant should have demonstrated better judgment when opting to use marijuana even though it was legal in the state where he used it. He should have researched whether there would be security concerns raised when using marijuana even in a state where marijuana was legalized.

Under Guideline E, the following mitigating conditions potentially apply in Applicant's case:

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 is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

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; and

AG ¶ 17(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

All above mitigating conditions apply. Applicant used marijuana because it was legal under the state law. He was not aware that it was illegal under federal law. Upon learning it was illegal under federal law, Applicant immediately stopped using marijuana. He no longer attends the annual trip where the marijuana use occurred. Applicant was honest about his marijuana use and once he understood that his marijuana use was an issue, he stopped. He has not used marijuana in three years. He was not addicted to marijuana. He learned a difficult lesson, and his past marijuana use no longer casts doubt on his reliability, trustworthiness, or good judgment.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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.

There are reasons that support not granting a security clearance to Applicant. Questions are raised about Applicant's judgment because of his failure to look into whether marijuana use in state where it was legalized would raise a security concern. Having held a security clearance since 2008, he should have known better. There is some evidence that he was told during a 2015 background investigation interview that marijuana remained illegal under federal law, yet he used marijuana in January 2016.

I find the mitigating reasons outweigh the disqualifying reasons in Applicant's case. His honesty in disclosing his marijuana use during the security clearance process supports that he is trustworthy. At the location where he used the marijuana it was legal under state law. Once he understood that marijuana remained illegal under federal law and was incompatible with holding a security clearance, he stopped using marijuana and has not used marijuana for over three years. He signed a statement of intent to refrain from all drug involvement and substance misuse and acknowledged that any future substance misuse would result in the revocation of his security clearance. Applicant is a successful businessman who is highly regarded among his peers. He is a family man. He and his wife have three children.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has learned a significant lesson. Having been denied access to SCI in October 2016, he learned from his mistake in judgment and took steps to demonstrate his intent to refrain from illegal marijuana use. Concerns raised by Applicant's illegal marijuana use are mitigated. Applicant is warned that any future illegal marijuana use will result in the revocation of Applicant's security clearance.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted. Applicant is warned that any future use of illegal substances will result in the revocation of his security clearance.

ERIN C. HOGAN
Administrative Judge