



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 19-02805
)	
Applicant for Security Clearance)	

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
 For Applicant: *Pro se*
 12/03/2020

Decision

HESS, Stephanie C., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse) and Guideline J (Criminal Conduct). Applicant mitigated the security concerns raised by the alleged criminal behavior but failed to mitigate the security concerns raised by his recent marijuana-related charges and use of marijuana while holding a security clearance. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on June 30, 2018. On April 9, 2020, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline H (Drug Involvement and Substance Misuse) and Guideline J (Criminal Conduct). The DOD acted under Executive Order (E.O.) 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 adjudicative guidelines (AG) implemented by DOD on June 8, 2017.

Applicant answered the SOR on May 14, 2020, and requested a decision on the record without a hearing. Department Counsel submitted the Government’s written case

on September 9, 2020. On September 10, 2020, a complete copy of the file of relevant material (FORM,) which included Government Exhibits (GX) 1 through 6, was sent to Applicant. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on September 21, 2020, and responded on October 8, 2020. The DOHA transmittal letter and receipt are marked as Administrative Exhibit 1. The case was assigned to me on November 12, 2020.

Findings of Fact

Under Guideline H, the SOR alleges that Applicant used marijuana with varying frequency from about January 2006 until December 2018, and from about July 2016 until December 2018 while holding a security clearance. The SOR further alleges that in March 2006, August 2016, and November 2017 Applicant was charged with possession of marijuana. Applicant admits each of these allegations with explanations.

Under Guideline J, the SOR cross-alleges the marijuana-related allegations and also alleges that Applicant was charged with driving under the influence of alcohol (DUI) in May 2009. Applicant admits this allegation with an explanation. Applicant's admissions are incorporated in my findings of fact.

Applicant, 34, is a contract specialist employed by a defense contractor since May 2009. He worked for the same defense contractor as a summer intern between May and August 2008. He received his bachelor's degree in 2009. He has held a security clearance since August 2008. (GX 3; GX 4.)

Applicant used marijuana recreationally between January and March 2006. In March 2006, he was charged with possession of marijuana, a misdemeanor. He completed a drug education course and the charge was dismissed. (GX 3; Answer.)

In May 2009, Applicant was charged with DUI, a misdemeanor. He was admitted into the state's pre-trial alcohol education system and successfully completed a 10-class alcohol intervention program. The DUI charge was dismissed in December 2009. (GX 3; Answer.) Applicant asserted in his PSI that he never consumes alcohol before driving. There is no record evidence of any additional alcohol-related charges or misconduct.

According to 21 U.S.C. §844, simple drug possession, to include marijuana, is a misdemeanor under federal law. The amount required to constitute simple possession is not delineated in the statute. A first-offender can be sentenced to a term of imprisonment of not more than one year, a minimum of \$1,000 fine, or both. However, if an offender is convicted of simple possession after a prior drug-related offense has become final, the offender can be charged with a felony simple possession offense.

In 2011, the state where Applicant resides decriminalized marijuana. While still technically illegal, possession of less than one half ounce of marijuana is treated as a civil offense punishable by a fine. In 2012, the state enacted a law allowing certain individuals

legal access to medical marijuana. According to the state's Department of Consumer Protection (DCP) website, the law sets forth the specific medical conditions for which medical-marijuana use has been approved. In order for a person to legally use medical marijuana, a physician must certify that the person has a medical condition that qualifies him or her for a medical-marijuana registration certificate. The person must then make application to the DCP for a medical-marijuana certificate. Without such a certificate, possession and use of marijuana remains illegal.

In July 2016, Applicant began smoking marijuana to help alleviate the pain from flare-ups of a medical condition. The marijuana use also helped him reduce his prescribed medications which have serious long-term-use side effects. He smoked marijuana approximately 20 times between July 2016 and December 2018. He stopped using marijuana because he did not want to jeopardize his employment. Applicant has not made application to the DCP for a medical-marijuana certificate. (GX 4.)

In August 2016, Applicant and his friend went to a bar in a neighboring state. Applicant's friend drove, and was pulled over by the police after leaving a bar. The police officer asked Applicant and his friend if there is anything in the vehicle that the officer should know about. Applicant and his friend each surrendered approximately one gram of marijuana. The officer gave them each a citation for \$125 for possession of marijuana and a summons to appear in court. Marijuana is decriminalized in this state. Applicant hired an attorney who appeared on Applicant's behalf. The charge was deferred for 13 months during which time Applicant was required not to be cited for any additional misconduct. Applicant complied and the charge was dismissed. (GX 4.)

In November 2017, Applicant was pulled over in his state of residence for failure to maintain his lane. According to Applicant, the officer asked Applicant if there was anything in the vehicle that the officer should know about, and Applicant surrendered a bag containing approximately one or two grams of marijuana. (GX 4.) However, the officer's incident report states that the officer's partner approached Applicant's vehicle and observed "a few grams [of marijuana] in a jar on his backseat." (GX 5.) The officer issued Applicant a summons for leaving the lane of travel and for possession of marijuana, one ounce or less. Applicant appeared in court and the two charges were dismissed. (GX 4; GX 5.)

In December 2017, Applicant obtained a letter from his physician that stated that the physician had referred Applicant for medical-marijuana therapy for a "recognized medical condition." The letter set forth Applicant's diagnosed medical condition, however, the delineated condition is not included in the list of medical conditions approved for medical-marijuana use. (GX 5.)

In his January 2019 personal subject interview (PSI), Applicant stated that he has not used marijuana since December 2018, has no intention of future use of marijuana, and does not associate with anyone who uses it. In his November 2019 responses to interrogatories, Applicant stated under oath that he did not intend to use illegal substances in the future. (GX 4.)

However, Applicant did not make any assertions about his future intentions on the use of marijuana in his answer to the SOR. Instead, Applicant referenced the December 2017 letter from his physician referring Applicant for medical marijuana therapy. Additionally, in his response to the FORM, Applicant discussed his medical condition and set forth a list of side effects caused by his prescribed medications. He also attached two photographs depicting the medical condition and a copy of the December 2017 letter from his physician.

In his PSI, Applicant stated that he did not list his then ongoing marijuana use on his June 2018 e-QIP because it was for “medical purposes” which was acceptable in his state of residence. In response to Section 22 – Police Record of the e-QIP, Applicant listed his August 2016 possession of marijuana charge by citation number and docket number and stated that the case was dismissed in December 2016. He checked that the offense involved alcohol or drugs, but did not disclose the actual charge of possession of marijuana. He listed his November 2017 possession of marijuana charge in the same manner. There is no evidence that Applicant reported either the 2016 or 2017 possession of marijuana charges to his facility security officer.

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant’s meeting the criteria contained in the AG. 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.” See 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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; see AG ¶ 2(b).

Guideline H, Drug Involvement and Substance Misuse

The concern under this guideline is set out in AG ¶ 24:

The illegal use of controlled substances . . . 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.

Applicant’s admissions, corroborated by the record evidence, establish the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse;

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution . . . ;
and

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

The following mitigating conditions may also apply:

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

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

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

Applicant admits to using marijuana approximately 20 times between July 2016 and December 2018 while holding a security clearance. He justifies his use by claiming that it was for medicinal purposes and that medical marijuana use is legal in his state of residence. In support of this, Applicant provided a December 2017 letter from his physician referring Applicant for medical marijuana therapy for his medical condition. Applicant also stated that he stopped using marijuana in December 2018 because he didn't want to jeopardize his employment.

During his 18 months of marijuana use while holding a security clearance, Applicant was charged with possession of marijuana on two occasions. He did not report either incident to his facility security officer. When completing his e-QIP in June 2018, Applicant was still actively using marijuana. He did not disclose his ongoing marijuana use on his e-QIP. He stated that he did not list his use because it was for medicinal purposes which was legal in his state of residence. He did disclose his 2016 and 2017 citations as alcohol or drug-related charges, but listed only the citation numbers and docket numbers but did not list that the charges were for possession of marijuana.

In his January 2019 PSI, Applicant asserted that he had no future intention of using marijuana and that he no longer associated with anyone who used it. His responses to DOHA's November 2019 interrogatories included a signed, sworn assertion of Applicant's intention not to use marijuana or any other illegal drugs in the future. However, Applicant did not restate his intention of no future use of marijuana in his answer to the SOR.

Conversely, in his admission to the SOR allegation he used marijuana with varying frequency from about January 2006 to about December 2018, Applicant cited the letter from his physician referring Applicant for medical marijuana therapy. In his response to the FORM, Applicant attached a copy of the letter from his physician and photographs of his medical condition. He also described the side effects from long-term usage of his prescribed medications to treat his medical condition.

Applicant has repeatedly asserted that his use of marijuana was legal because it was for medicinal purposes which is legal in his state of residence. This argument fails for several reasons. First, the use of marijuana violates federal law. Second, while the use of medical marijuana is legal under the state law of Applicant's residency, Applicant did not have a qualifying medical condition during his recent period of marijuana use. Additionally, Applicant made no attempt to register for medical-marijuana-use certification. Despite Applicant's personal reason for using marijuana, without medical-marijuana-use certification, Applicant's marijuana use was recreational and in violation of state law as evidenced by his 2016 possession of marijuana charge. While marijuana is decriminalized in both states where Applicant was charged with possession of marijuana in 2016 and 2017, the fact that he was charged with these violations should have made him realize that his conduct was against the law.

Applicant asserts that he stopped using marijuana in December 2018, nearly two years ago. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

In considering the totality of the evidence, particularly Applicant's age and length of time as a security-clearance holder, I conclude that Applicant's marijuana use was recent and casts doubt on his current reliability, trustworthiness, and good judgment. Further, given his ongoing justification for his marijuana use as medicinal, I find it likely to recur despite his signed, sworn statement of no future intention of marijuana use. Applicant has not met his high burden of persuasion and has not mitigated the Guideline H concerns.

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.

I have considered the following disqualifying conditions under this guideline:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

AG ¶ 31(b): evidence . . . of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.

To constitute a pattern of minor offenses that gives rise to a concern about a person's overall judgment, reliability, or trustworthiness, there must be some discernable interrelation between the acts or incidents that is reflective of the person's overall character. Following the 2006 and 2009 charges, Applicant modified his behavior and there is no record evidence that Applicant participated in any illegal conduct for more than 10 years. Applicant's recent instances of marijuana possession and use occurred while Applicant was acting under the misconception that his use of marijuana for medicinal purposes was legal. He did not act with criminal intent. Taken together, these incidents do not constitute a pattern of criminal conduct as contemplated by this Guideline. While technically Applicant's behavior can be assessed under Guideline J as criminal conduct, I conclude that it is more appropriate to evaluate under Guideline H, as set forth above.

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(a).

I have incorporated my comments under Guidelines H and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but I have also considered the following:

Applicant was not forthcoming about his recent marijuana-related charges and did not disclose his marijuana use on his e-QIP. The fact that he has held a security clearance since 2008 cuts both ways for Applicant. On the one hand, he has held a clearance for 12 years without any evidence of any incidents. On the other hand, as a security-clearance holder, he is held to a high standard and knew or should have known his possession and use of marijuana violated federal law and the conditions of his security clearance. His recent conduct continues to cast doubt on his security-clearance worthiness.

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

has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraphs 1.a – 1.e:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct)	FOR APPLICANT
Subparagraphs 2.a - 2.b:	For Applicant

Conclusion

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

Stephanie C. Hess
Administrative Judge