



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



In the matter of:)	
)	
)	ISCR Case No. 20-01855
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: *Pro se*

08/09/2021

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, drug involvement. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On October 23, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudication Facility (DCSA CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H. The DCSA CAF 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 (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on December 7, 2020, and requested a hearing. The case was assigned to me on June 6, 2021. Applicant was first contacted by me on

June 17, 2021, concerning his hearing. On June 21, 2021, he proposed the hearing date of July 7, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 24, 2021, and the hearing was held as scheduled on July 7, 2021. This hearing was convened as scheduled using the Defense Collaboration Services (DCS) video teleconferencing capabilities. The Government offered exhibits (GE) 1 and 2, which were admitted into evidence without objection. The Government's exhibit list was marked as a hearing exhibit (HE) I. Applicant testified and offered exhibits (AE) A-C, which were admitted without objection. The record remained open until July 9, 2021, but no new exhibits were submitted. DOHA received the hearing transcript (Tr.) on July 16, 2021.

Findings of Fact

In Applicant's answer to the SOR, he admitted the Guideline H allegation, with explanations. I adopt his admission as a finding of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 58 years old. He is married and has two children, ages 8 and 11. He has worked as a software developer for his own independent-contractor business for approximately 24 years. He holds a bachelor degree in computer science and mathematics. He is seeking a security clearance for the first time. (Tr. at 6, 27-28, 35; GE 1)

The SOR alleged Applicant purchased and used marijuana, with varying frequency, since January 1977, and that he intends to continue to purchase and use marijuana. The allegation is established by his security application admissions, his admissions to a defense investigator during his background investigation, and his admissions in his SOR answer. (GE 1, 2; SOR answer)

Applicant described his marijuana use as beginning in approximately 1977. He has continued his use of marijuana as recently as two days before his hearing. He uses marijuana casually and recreationally to relax. He does not use it during work hours or to excess. He purchases his marijuana from a legal dispensary in his state. Marijuana use does not violate state law where he resides. He compares his marijuana use to someone's recreational use of alcohol. His wife is aware of his marijuana use, and she also occasionally uses marijuana. He intends to use marijuana in the future. He clarified that he would stop using marijuana if he received a security clearance and his employer or client required such abstinence. Applicant pointed out the national trend on the state level toward legalization of marijuana. He also provided an article that compared alcohol use versus marijuana use in terms of short-term effects, and long-term effects, and potential for misuse. (Tr. at 29, 34-37; 39, 41-42; GE 1; AE A-B)

Applicant is very active in his community. He volunteers at his children's school and he serves as a commissioner on the local emergency preparedness commission.

He is recognized by others as an excellent parent and worker. He has a reputation for truthfulness, trustworthiness, and reliability. (Tr. 23-24, 29-30, 35; AE C)

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 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, 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(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." 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 section E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive section E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain 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 an 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.

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).

Analysis

Guideline H, Drug Involvement and Substance Abuse

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

(a) any substance misuse; and

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

Applicant started using marijuana in approximately 1977 and continues to use it through the present time. During his testimony, he stated his intent was to continue using marijuana. I find both of the above disqualifying conditions apply.

AG ¶ 26 provides conditions that could mitigate security concerns. Two potentially apply in this case:

(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's marijuana use was frequent and as recent as July 2021, two days before his security clearance hearing. He did not provide a signed statement of intent to abstain from all future illegal drug use. Additionally, at his hearing, he indicated his intent was to continue his use of marijuana, which he qualified by saying that if he was granted a clearance and was required to stop using marijuana by his employer, he would do so. Given his recent pattern of use, and his stated intent to continue his marijuana use, his current reliability, trustworthiness, and good judgment are called into question. While I understand his position that marijuana and alcohol use might be similar in a number of ways, they are dissimilar in terms of federal law on the legality of use. AG ¶¶ 26(a) and AG 26(b) do not apply.

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 the 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 guideline 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 considered Applicant's community activities, including his volunteering. I also considered his reputation for truthfulness, trustworthiness, and reliability. However, I also considered that his regular use of marijuana began in 1977, he continued to use it as recently as two days before his hearing, and his expressed intent to continue using marijuana. Despite his positive family, work, and community qualities, his intentional disregard for obeying federal law by continuing his use of marijuana does not put him in a position to hold a security clearance.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all of the circumstances, 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.

Robert E. Coacher
Administrative Judge