



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



In the matter of:)
)
) ISCR Case No. 20-02974
)
Applicant for Security Clearance)

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: Mark S. Zaid, Esq.

10/13/2021

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the drug involvement and substance misuse security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On December 2, 2020, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement and substance misuse. Applicant responded to the SOR on January 21, 2021, and requested a hearing before an administrative judge. The case was assigned to another administrative judge on April 7, 2021, and reassigned to me on July 6, 2021. The hearing was convened as scheduled on August 27, 2021. Government Exhibit (GE) 1 was admitted in evidence without objection. The objection to GE 2 was overruled, and it was admitted in evidence. Applicant testified, called four witnesses, and submitted Applicant's Exhibits (AE) A through J, which were admitted without objection.

Findings of Fact

Applicant is a 43-year-old employee of a defense contractor. He has worked for his current employer since 2007. He is applying for a security clearance for the first time. He has an associate's degree and additional college credits and certifications. He is married, with a child and two stepchildren. He and his wife also helped raise a child that they think of as one of their children. (Transcript (Tr.) at 49-50, 71-72; GE 1; AE A, B)

From 2014 to 2018, Applicant lived in a state where marijuana use was legal under state law. His wife had success with medical marijuana in treating her illness. Applicant researched marijuana for medicinal purposes. He knew that while legal under state law, it was a controlled substance and illegal under federal law. On his doctor's recommendation, he used marijuana in the form of edibles, rubs, and vapes for his insomnia and pain management. (Tr. at 53-56, 64-65, 73, 80-81, 85-87; Applicant's response to SOR; GE 1, 2)

In 2018, Applicant moved to a state that permitted marijuana use for medicinal purposes. He used the marijuana rubs, but he did not take any edibles after he moved in 2018, and he did not use marijuana in vape form until he received a card from the state's cannabis commission. The state made recreational marijuana use legal under state law. It was no longer necessary for Applicant to have a medical marijuana card as anyone could purchase and use it under state law. (Tr. at 56, 66, 82-84, 88-89; Applicant's response to SOR; GE 1, 2)

Applicant reported his marijuana use on the Questionnaire for National Security Positions (SF 86) he submitted in April 2020. He noted that he intended to continue to "use edibles, rubs or vapes as necessary to assist with insomnia and pain management." (GE 1)

Applicant fully discussed his marijuana use when he was interviewed for his background investigation in May 2020. He indicated that he was aware that marijuana use was illegal under federal law, but he followed the state's approach. When he responded to DOHA interrogatories in October 2020, he indicated that he planned to continue using marijuana for medicinal purposes for his insomnia and pain management. (GE 2)

Applicant did not understand the full ramifications of his marijuana use until he received the SOR and discussed it with his attorney. He was previously incorrectly advised that as long as he was completely honest, that his marijuana use would not preclude him from holding a security clearance. The last time he purchased marijuana was in December 2020, and the last time he used marijuana was in January 2021. He now completely realizes that marijuana use is against the law, not responsible conduct, and inconsistent with holding a security clearance. (Tr. at 22-25, 67, 75-77, 80, 92-98; Applicant's response to SOR; AE F)

Applicant was not a recreational drug user. He credibly testified that he does not intend to use marijuana or any other illegal drug in the future. He honestly admitted that if marijuana is legalized federally, he would consider using it again for its medicinal properties. His wife also used marijuana for medicinal purposes. She does not hold a security clearance, but she stopped using marijuana to support her husband. They have both pursued treatments for their ailments that do not involve marijuana. Applicant passed a drug test in August 2021. He was evaluated by a licensed clinical social worker (LCSW) who concluded that he did not meet the criteria for cannabis use disorder. He provided a signed statement of intent to abstain from all illegal drug use with the acknowledgment that any future involvement with illegal drugs would be grounds for revocation of his security clearance. I found him to be forthcoming and credible. (Tr. at 57-58, 64-65, 70, 75, 78-79, 89-91, 100-105; AE D, I, J)

Applicant called witnesses and submitted documents and letters attesting to his excellent job performance and character. He is praised for his professionalism, technical expertise, reliability, trustworthiness, leadership, work ethic, dependability, and honesty. (Tr. at 14-28; AE E-H)

Policies

This case is adjudicated under Executive Order (EO) 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), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is

responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Controlled substance means any “controlled substance” as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);

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

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

Applicant possessed and used marijuana. AG ¶¶ 25(a) and 25(c) are applicable. He indicated that he intended to continue to use marijuana. He no longer holds that position. AG ¶ 25(g) was applicable at one time.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

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

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

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used; and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Marijuana remains a controlled substance and illegal under federal law. It is sometimes difficult for those of us who are part of DOD, and particularly those in the legal community, to truly understand how prevalent and accepted marijuana use has become. Well-known celebrities and sports figures advocate its use and have become cannabis entrepreneurs. Colleges provide courses in cannabis entrepreneurship, and one college offers a bachelor's degree in that discipline.¹ Major business publications provide articles on getting started in the industry.² The National Institutes of Health states that cannabis may be helpful in treating certain conditions and ailments.³ States have not only decriminalized marijuana, they have become active participants in its use, as indicated by the creation of state agencies. I do not cite these facts because I

¹ See, e.g., [Growth Potential | Johnson & Wales University \(jwu.edu\)](http://www.jwu.edu)

² See, e.g., [Advice For Young Cannabis Entrepreneurs Looking To Get Started \(forbes.com\)](http://forbes.com).

³ [Cannabis \(Marijuana\) and Cannabinoids: What You Need To Know | NCCIH \(nih.gov\)](http://nccih.nih.gov).

condone marijuana use; I do not. I cite them to provide context to the world Applicant lived in when he made the decision to use marijuana for medicinal purposes, and why it took so long for him to stop.

Applicant now completely realizes that marijuana use is against federal law, not responsible conduct, and inconsistent with holding a security clearance. He credibly testified that he will not use illegal drugs in the future. He fully disclosed his drug use on his SF 86 and throughout the security clearance proceedings. He signed a statement of intent to abstain from all illegal drug use with the acknowledgment that any future involvement with illegal drugs would be grounds for revocation of his security clearance. I found him to be forthcoming and credible. There are no bright-line rules for how long an applicant must go without problematic conduct. Under the facts of this case, I find that Applicant has abstained from illegal drug use for an appropriate period, and that illegal drug use is unlikely to recur. Applicant's conduct no longer casts doubt on his reliability, trustworthiness, and good judgment. AG ¶¶ 26(a) and 26(b) are applicable.

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(d):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline H in my whole-person analysis. I also considered Applicant's favorable character evidence.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the drug involvement and substance misuse security concerns.

Formal Findings

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

Paragraph 1, Guideline H: For Applicant

Subparagraphs 1.a-1.c: For Applicant

Conclusion

It is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Edward W. Loughran
Administrative Judge