



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



In the matter of:)
)
) ISCR Case No. 20-03123
)
Applicant for Security Clearance)

Appearances

For Government: Raashid S. Williams, Esq., Department Counsel
For Applicant: *Pro se*

02/09/2022

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 March 1, 2021, 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 March 16, 2021, and requested a hearing before an administrative judge. The case was assigned to me on January 5, 2022. The hearing was convened as scheduled on January 18, 2022. Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibit (AE) A, which was admitted without objection. The record was held open for Applicant to submit additional documentary evidence. He submitted a document that I have marked AE B and admitted without objection.

Findings of Fact

Applicant is a 48-year-old employee of a defense contractor. He has worked for his current employer since January 2019. He is applying for a security clearance for the first time. He has a bachelor's degree, which he earned in 1996, and he attended a school that helped him pass an examination to be licensed as a real estate agent. He is married for the second time after his first marriage ended in divorce. He has two children and four stepchildren. (Transcript (Tr.) at 10, 22-23; GE 1, 2)

Applicant started smoking marijuana in 1992 when he was a freshman in college. He continued to sporadically use marijuana through November 2018. He used hallucinogenic mushrooms on one occasion in 2017, but he did not like the experience and never used them again. (Tr. at 10, 14-15; Applicant's response to SOR; GE 1, 2)

Applicant lives in a state that has not legalized marijuana. In 2016, he invested in a registered marijuana farm in a state that has made marijuana legal under state law. He owned about 12% of the farm. He had no involvement in the operation of the farm. He sold his share of the farm for \$75,000 in December 2020. (Tr. at 16-17; Applicant's response to SOR; GE 1, 2; AE A)

Applicant reported his use of marijuana and hallucinogenic mushrooms and his investment in the marijuana farm on the Questionnaire for National Security Positions (SF-86) he submitted in July 2019. He reported that he used marijuana about once a year, with his last use in November 2018. He checked the box indicating that he intended to use marijuana in the future, with the explanation: "THC combined with CBD have proven therapeutic effects on the human body, and THC is legal in two-thirds (33/50) of US states plus our nation's capital. I do not smoke or consume THC in public places and do not operate a motor vehicle while under the influence." (GE 1)

Applicant discussed his drug use during his background interview in July 2019. He stated that he did not intend to use illegal drugs in the future. He repeated that position in his response to interrogatories in November 2020, in his March 2021 response to the SOR, and at his hearing. (GE 2)

Applicant has not used any illegal drugs since November 2018, before he started work for a defense contractor and before he submitted his SF-86. He understands that marijuana possession is against federal law, and illegal drug use and investments in the marijuana industry are inconsistent with holding a security clearance. He credibly testified that he does not intend to use marijuana or any other illegal drug in the future. He provided 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 (Tr. at 10-11, 15-20; Applicant's response to SOR; GE 1, 2; AE B)

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 Security Executive Agent (SecEA) promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications on December 21, 2021 (Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position, dated December 21, 2021 (SecEA Clarifying Guidance)). It states in pertinent part:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a "whole-person concept." This requires adjudicators to carefully weigh a number of variables in an individual's life to determine whether that individual's behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.

* * *

Finally, with regard to the topic of investments, agencies should note that an adjudicative determination for an individual's eligibility for access to classified information or eligibility to hold a sensitive position may be impacted negatively should that individual knowingly and directly invest in stocks or business ventures that specifically pertain to marijuana growers and retailers while the cultivation and distribution of marijuana remains illegal under the Controlled Substances Act. Under [the adjudicative guidelines'] guidance for personal conduct (Reference B, Guideline E), a decision to invest in an activity, including a marijuana-related business, which the individual knows violates federal law could reflect questionable judgment and an unwillingness to comply with laws, rules, and regulations. That is, it is appropriate for adjudicative personnel to consider whether an individual is knowingly facilitating violations of the Controlled Substances Act by engaging in such investments. On the other hand, if the marijuana-related investment is not direct, such as an investment in a diversified mutual fund that is publicly-traded on a United States exchange, adjudicators should presume that individual did not knowingly invest in a marijuana-related business; thus, the indirect investment should not be considered relevant to adjudications.

In some instances, the investment itself may be illegal, which is also relevant to [the adjudicative guidelines'] guidance for criminal conduct (Reference B, Guideline J), which by its very nature calls into question an individual's ability or willingness to comply with laws, rules, and regulations. However, under the whole-person concept, any mitigating factors should be considered. For example, if an individual holds direct stock investments pertaining to marijuana growers and retailers, divestment of such activity or disassociation of such activity should be considered a mitigating factor when rendering an adjudicative decision.

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 and hallucinogenic mushrooms. He was part owner of a registered marijuana farm in a state that has made marijuana legal under state law. AG ¶¶ 25(a) and 25(c) are applicable. He indicated in his SF-86 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.

Applicant has not used marijuana since November 2018, more than three years ago. He used hallucinogenic mushrooms on one occasion in 2017, but he did not like the experience and never used them again. He sold his share of the marijuana farm. He credibly testified that he does not intend to use marijuana or any other illegal drug in the future.

Applicant understands that marijuana possession is against federal law, and illegal drug use and investments in the marijuana industry are inconsistent with holding a security clearance. He fully disclosed his drug involvement on his SF-86 and throughout the security clearance proceedings, which bolsters his credibility. His conduct no longer casts doubt on his reliability, trustworthiness, and good judgment. I find that Applicant has abstained from illegal drug use for an appropriate period, and that illegal drug use is unlikely to recur. 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 the SecEA Clarifying Guidance. I conclude that this decision is consistent with that guidance.

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.d:	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