



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



In the matter of:)	
)	
)	ISCR Case No. 20-01134
)	
Applicant for Security Clearance)	

Appearances

For Government: Dan O’Reilly, Esq., Department Counsel
For Applicant: *Pro se*

07/05/2022

Decision

PRICE, Eric C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H, drug involvement and substance misuse. Eligibility for access to classified information is denied.

Statement of the Case

On July 10, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse. The action was taken 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) effective within the DOD on June 8, 2017.

On September 12, 2021, Applicant answered the SOR, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government’s file of relevant material (FORM) dated November 9, 2021, including documents identified as Items 1 through 4. Applicant received the FORM on November

30, 2021. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. Applicant submitted no response. There were no objections by Applicant, and all Items are admitted into evidence. The case was assigned to me on February 28, 2022.

Findings of Fact

After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Under Guideline H, the SOR alleges that Applicant used marijuana with varying frequency from about June 2016 to about March 2019, and that he purchased marijuana from early 2017 to about March 2019. In Applicant's September 2021 answer to the SOR, he admitted both SOR allegations. (Items 1, 2)

Applicant is 22 years old. He graduated from high school in June 2018 and started college in September 2018. He lived in campus housing from September 2018 to at least June 2019, and reported that he was seeking a degree. He has not been married and has no children. He started an internship for a federal contractor in May 2019. (Items 3, 4)

Applicant completed a security clearance application (SCA) in May 2019. He disclosed that he used marijuana from June 2016 to March 2019. He stated that he smoked marijuana once or twice a week to relieve stress, and that he did not know how many times he had used marijuana. He reported that he enjoyed using marijuana, but did not intend to use it in the future to avoid risking employment opportunities. He noted that if the recreational use of marijuana were legalized, that he intended to use marijuana again. He denied being involved in the illegal purchase of marijuana. (Item 3)

Applicant was interviewed by a government investigator in June 2019. He verified the accuracy of his SCA responses, and clarified that if marijuana use were legalized under Federal law he would resume using it because that would not jeopardize his employment opportunities. He stated that he smoked marijuana approximately once every three months from June 2016 until September 2018. He said that after he started college in September 2018, he smoked approximately one gram of marijuana that was shared with one-two friends on each occasion, one-two times per week. He smoked the marijuana at a friend's home, off campus residences, parks, or in the woods or forests. He identified nine people that he had smoked marijuana with including long-term friends identified as references in his SCA, and one roommate. He said that he smoked marijuana for experimentation, social purposes, and as a means to relax. He believed that marijuana was a better option for relaxation than alcohol. He said that he continued to socialize with individuals who use drugs illegally. He noted that his parents, brother, former girlfriends and the nine individuals he identified were aware of his marijuana use, and believed that since his marijuana use was known that it could not be used for blackmail or coercion. He stated that the marijuana was obtained by friends and shared among the group, and that he had purchased marijuana for use by the group. He noted that he had failed to disclose that he had purchased marijuana on his SCA and attributed that failure to an unintentional

oversight. He reported that he first purchased marijuana in early 2017 and had most recently purchased marijuana in March 2019. He said that he purchased approximately 3.5 grams of marijuana twice a month, for an unspecified period of time, from a friend. He said that he understands rules and regulations are in place for a reason, and follows them to the best of his ability. He has not sought counseling or treatment for his marijuana use. (Items 3, 4)

Applicant did not provide documents or evidence in response to the SOR, and did not submit a response to the FORM. (Item 1)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” EO 10865.

When evaluating an applicant’s suitability for national security eligibility, 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 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 common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an “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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 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).

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.

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

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

Applicant admitted that he used marijuana between June 2016 and March 2019, and that he purchased marijuana from early 2017 to about March 2019. I find 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.

In his May 2019 SCA, Applicant disclosed that from approximately June 2016 to March 2019, he smoked marijuana one-two times weekly to relieve stress. He noted that he enjoyed using marijuana, but did not intend to use it in the future because that could negatively impact his employment opportunities. He also noted that if the recreational use of marijuana were legalized, that he intended to use it again. He denied being involved in the illegal purchase of marijuana.

During Applicant's June 2019 background interview he verified the accuracy of his SCA responses and provided the following additional information. He said that he would resume using marijuana if legalized under Federal law because that would not jeopardize his employment opportunities. He smoked marijuana approximately once every three months from June 2016 until September 2018, and increased his usage to one-two times weekly once college started in September 2018 until March 2019. He smoked approximately one gram of marijuana on each occasion that he shared with one-two friends. He identified nine individuals that he had smoked marijuana with including long-term friends and one roommate. He believed that marijuana is a better option for relaxation than alcohol. He continued to socialize with individuals who use drugs illegally. He said that his parents, brother, former girlfriends, and the nine individuals that he had used marijuana with were aware of his marijuana use. He stated that the marijuana was obtained by friends and shared among the group, and that he had purchased marijuana for use by the group. He attributed his failure to disclose that he had purchased marijuana on his SCA to an unintentional oversight. He first purchased marijuana in early 2017 and most recently purchased marijuana in March 2019. He said that he purchased approximately seven grams of marijuana a month, for an unspecified period of time, from a friend that he also has smoked marijuana with. He had not sought counseling or treatment for his marijuana use.

The only additional relevant information Applicant has provided since his June 2019 background interview was his September 2021 answer to the SOR in which he admitted, without further explanation or documentary evidence, that he had committed the conduct alleged.

AG ¶ 26(a) is not established. Applicant smoked marijuana from June 2016 until March 2019 with friends. His May and June 2019 statements that he abstained from smoking marijuana from March 2019 to June 2019 and did not intend to illegally smoke marijuana in the future are insufficient to convince me that recurrence is unlikely when considered in conjunction with his admitted preference for marijuana as a means to relax and intent to use marijuana in the future (if legal under Federal law), monthly purchases of approximately seven grams of marijuana over an unspecified period of time, and continued association with individuals who illegally use drugs. The record is somewhat ambiguous as to the frequency of his marijuana use, how much marijuana he used and who provided that marijuana. This limited record, including the absence of information or evidence regarding Applicant and his drug involvement or lack thereof since June 2019, is insufficient to support a conclusion that the security concerning behavior is unlikely to recur and casts doubt upon his current reliability, trustworthiness, and good judgment.

AG ¶ 26(b) partially applies. Applicant acknowledged his drug involvement from June 2016 to March 2019, claimed that he did not purchase or use marijuana from March to June 2019, and stated his intent to abstain from the illegal use of marijuana in May and June 2019. However, AG ¶ 26(b) does not fully apply because Applicant has not provided evidence of actions taken to overcome his drug involvement and he has not established a pattern of abstinence. He has provided no documentary evidence, and since June 2019, no information pertaining to actions taken to overcome his drug involvement or to establish a pattern of abstinence. His disclosures of his drug abuse do lend some credibility to his concurrent statements of intent to refrain from illegal drug abuse. However, when considered in conjunction with awareness of his marijuana use among individuals likely to be interviewed by investigators at the time he made the disclosures, his continued association with individuals who illegally use marijuana, and in the absence of evidence that he has changed or avoided environments where marijuana is used, I find his unsigned statements of intent insufficient to establish a pattern of abstinence.

Applicant's failure to disclose his marijuana purchases on his SCA was not alleged in the SOR. I find that Applicant unintentionally failed to disclose this illegal drug involvement on his SCA.

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 guidelines 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 have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

I considered that Applicant is now 22 years old and that he was 16 to 19 years old during the time period of his admitted drug involvement. While any illegal drug involvement is not condoned, Applicant's youth is an extenuating factor. His candor about his drug abuse in his SCA and during a background interview provide indications of Applicant's trustworthiness, willingness to comply with rules, and also lend some credibility to his May and June 2019 statements of intent to refrain from illegal drug abuse. However, for the reasons discussed above, I do not find his disclosures and statements of intent to abstain from the illegal use of marijuana dispositive. He has provided no documentary evidence and did not respond to the FORM with relevant and material facts about his circumstances, which may have helped to rebut, extenuate, mitigate, or explain the security concern.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

I have carefully applied the law, as set forth in *Egan*, EO 10865, and the Directive to the facts and circumstances in the context of the whole person. Applicant failed to meet his burden of persuasion and the record evidence leaves me with questions and doubts as to his eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns raised under Guideline H, drug involvement and substance misuse.

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
Subparagraph 1.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Eric C. Price
Administrative Judge