



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



In the matter of:)
)
) ISCR Case No. 21-01552
)
Applicant for Security Clearance)

Appearances

For Government: Allison Marie, Esq., Department Counsel
For Applicant: *Pro se*

08/29/2022

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 23, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) 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.

Applicant responded to the SOR, and requested a decision based on the written record in lieu of a hearing. Department Counsel submitted the Government's file of relevant material (FORM) dated September 27, 2021, including documents identified as Items 1 through 7. Applicant received the FORM on October 14, 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 an undated response that is marked as Applicant Exhibit (AE) A. There were no objections by Applicant or Department Counsel, and all exhibits are admitted into evidence. The case was assigned to me on February 9, 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 February 2015 until June 2020, and that he used marijuana from about February 2015 until June 2020 “while holding a security clearance.” In Applicant’s undated answer to the SOR, he admitted both SOR allegations. (Items 1, 2)

Applicant is 29 years old. He received a bachelor’s degree in May 2015. He married in September 2015 and divorced in June 2020. He has no children. He has been employed by a federal contractor since May 2014, initially as an intern and subsequently as a full-time employee. He has held a security clearance since about July 2014. (Items 3 through 7)

Applicant completed a security clearance application (SCA) in July 2014. He certified that he had not illegally used any drugs or controlled substances in the previous seven years. He was interviewed by a government investigator on various dates from September 2014 to December 2014, and in September 2015. There is no indication illegal drug use was discussed by the investigator or Applicant during the background interviews. (Items 5, 6, 7)

Applicant completed another SCA on January 8, 2021, and disclosed that he had illegally used marijuana from approximately February 2015 to June 2020 while possessing a security clearance. He described his illegal marijuana use as “Less than once a year, when there was marijuana at a group event. Very limited usage, and it has never actually affected me.... Someday if marijuana/[tetrahydrocannabinol] THC is fully legalized, I may be more inclined to participate in some capacity.” (Item 3 at 34-36)

During a February 23, 2021 interview with a government investigator, Applicant confirmed that he used substances containing THC from approximately February 2015 to June 2020. He said that he smoked marijuana four times from approximately February 2015 to June 2020, and consumed an edible containing THC in 2019. He stated that he smoked marijuana about once a year at parties by taking one puff of marijuana as it was passed around. He said that he did not recall the specific dates he used marijuana, and did not know who brought it to the parties. He also said that he legally purchased a chocolate bar containing THC from a state-authorized dispensary in 2019. He stated that he was curious about what it felt like to be high, but had never experienced a high from his marijuana/THC [hereinafter marijuana] use. He said that he last used marijuana in

June 2020. He stated that he did not intend to illegally use marijuana in the future, but might if it was legalized under federal law. He said that he avoids situations where marijuana may be used, and did not know if anyone he socializes with illegally uses drugs. He has not participated in any drug counseling or treatment. (Item 4 at 4-5)

In his undated response to the SOR, Applicant admitted both SOR allegations. He stated that he had “used marijuana very infrequently, maybe 5-6 times” over a five-year period. He noted that he had “no interest in seeking it out again, unless it were to become a fully legal activity,” and that it had been over a year since his last use. He also noted that:

I used marijuana while holding a security clearance. . . I will add that although I had a clearance, I have never had a reason to use it, and have no knowledge of any classified [government] information. If I were entrusted with that information in the course of my work, it would be more important to me to protect that knowledge.

(Item 2 at 2)

In his undated response to the FORM, Applicant again stated that he did not recall the date he first used marijuana, but was certain that it was sometime after he graduated from college in May 2015. He stated that he had incorrectly estimated February 2015 as the date of his first use in previous submissions, and said that he had never lied about his drug use during an investigation including during the September 2015 background interview. He averred that his self-reported drug use evidenced his truthfulness. (AE A)

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."

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).

In reaching my decision, I specifically considered the following:

The Controlled Substances Act makes it illegal under Federal law to manufacture, possess, or distribute certain drugs, including marijuana. See 21 U.S.C. § 801, *et seq.* All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. §§811, 812. Marijuana is classified as a Schedule I controlled substance, §812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment. §812(b)(1). See *Gonzales v. Raich*, 545 U.S. 1 (2005).

The Director of National Intelligence (DNI) Memorandum ES 2014-00674, "Adherence to Federal Laws Prohibiting Marijuana Use," October 25, 2014, states:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative

Guidelines An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

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 in this case. Those that are potentially applicable in this case include:

- (a) any substance misuse;

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

- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant admitted that he used marijuana with varying frequency from about 2015 to June 2020, and that he purchased and consumed an edible containing THC in 2019. Use of these substances is illegal under federal law. The fact that THC or marijuana may be legal in a state where Applicant has lived or worked makes no difference, See ISCR Case No. 20-01772 (App. Bd. Sept. 14, 2021) (noting continued relevance of October 25,

2014 DNI Memorandum in the application of Guideline H for marijuana cases). AG ¶¶ 25(a) and 25(c) apply to Applicant's illegal drug use, as alleged in SOR ¶ 1.a.

AG ¶ 25(f) does not apply. It is unclear from the record whether Applicant was granted access to classified information when he used marijuana. Although he admitted that he used marijuana from 2015 to 2020 while holding a security clearance, in his SOR response he noted that he had never had a reason to use the clearance and had no knowledge of any classified government information. Eligibility for access to classified information and the granting of access to classified information are not synonymous concepts. They are separate determinations. The issuance of a security clearance is a determination that an individual is eligible for access to classified national security information up to a certain level. Security clearance eligibility alone does not grant an individual access to classified materials. In order to gain access to specific classified materials, an individual must have not only eligibility (i.e., a security clearance), but also must have signed a nondisclosure agreement and have a "need to know." See ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022)

Additionally, SOR ¶ 1.b alleges that Applicant used marijuana "*while holding a security clearance,*" not "*while granted access to classified information,*" as stated in AG ¶ 25(f) (emphasis added). As such, it does not allege the conduct identified in AG ¶ 25(f). The allegation does not allege any conduct that is not already alleged in SOR ¶ 1.a; it merely pleads an aggravating factor that does not raise any additional disqualifying conditions. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005). SOR ¶ 1.b is concluded for Applicant

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 provided mitigating information including that he: (1) used marijuana relatively infrequently - five to six times over a period of approximately five years; (2) last used marijuana in June 2020; (3) voluntarily disclosed his marijuana use in his January 2021 SCA; (4) has avoided environments where illegal drugs may be used since June 2020, and (4) stated his intent not to illegally use marijuana in the future.

However, Applicant used marijuana over a period of approximately five years while holding a security clearance. Although he revised the estimated date that he first used marijuana from approximately February 2015 to sometime after May 2015, each use occurred after he had submitted his 2014 SCA, after he had been granted a security clearance in July 2014, and after background interviews with a Government investigator on various dates from September 2014 to November 2014. He also used marijuana after being interviewed by a Government investigator in September 2015, and last used marijuana less than eight months before submitting his January 2021 SCA. “An applicant who uses marijuana after having been placed on notice of its security significance, such as using after having completed a clearance application, may be lacking in the qualities expected of those with access to national secrets.” ISCR Case No. 17-03191 at 3 (App. Bd. Mar. 26, 2019) (citing ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019) (“An applicant’s misuse of drugs after having been placed on notice of the incompatibility of drug abuse with clearance eligibility raises questions about his or her judgment and reliability”)). The circumstances of Applicant’s illegal use of marijuana while holding a security clearance reflect poor judgment and raise questions as to his trustworthiness. See, e.g., ISCR Case No. 11-03909 at 2-3 (App. Bd. Aug. 30, 2012). AG ¶¶ 26(a) and 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 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 29 years old and has been employed by the same Federal contractor since 2014. However, 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. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. 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:	For 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