



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



In the matter of:)	
)	
)	ISCR Case No. 21-02692
)	
Applicant for Security Clearance)	

Appearances

For Government: Karen Moreno-Sayles, Esq., Department Counsel
For Applicant: *Pro se*

10/03/2022

Decision

RICCIARDELLO, Carol G., Administrative Judge:

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

Statement of the Case

On February 9, 2022, the Department of Defense (DOD) 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; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective on June 8, 2017.

Applicant answered the SOR on February 17, 2022, 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), and Applicant received it on June 9, 2022. He was afforded an opportunity to file objections and submit material in refutation,

extenuation or mitigation within 30 days of receipt of the FORM. The Government's evidence is identified as Items 1 through 3. Applicant provided a response to the FORM that is marked as Applicant Exhibit (AE) A. There were no objections to any of the evidence submitted and all exhibits are admitted into evidence. The case was assigned to me on September 12, 2022.

Findings of Fact

Applicant admitted all of the SOR allegations. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 39 years old. He earned a bachelor's degree in 2011 and is pursuing another degree. He works part-time for a company and has worked for a federal contractor since May 2021. He has never married and has no children.

Applicant disclosed on his June 2021 security clearance application (SCA) that he began using marijuana sporadically in high school in 1997, and used it more habitually in his 20s, smoking it on a daily basis and several times a day. During his 30s his usage declined and he took longer breaks from using marijuana. In the past four years, he has stopped seeking it out to purchase, and he reduced his usage. He disclosed that his current usage was once every couple of weeks while golfing with friends when they provide the marijuana. (Item 2)

Applicant further disclosed in his SCA that he uses marijuana as a way to relax and enjoy time with his friends and while golfing when he has no responsibilities. He had no intention of using marijuana regularly or in the evenings. If it were legalized at the federal level he may consider more regular use, but it was not worth seeking it out at that point. (Item 2)

Applicant disclosed that he purchased marijuana from September 2000 to August 2017. He regularly purchased marijuana from 2014 to 2017. He said he purchased it about every few weeks for a few months, and then there would be times that he would not purchase any for a few months. He stated that the reason he purchased marijuana was because: "If an individual wants their own supply of marijuana to smoke at their leisure, for any period of time, they must seek out an individual [who] sells it and buy some." (Item 2) He did not intend to purchase marijuana in the future. (Item 2)

Applicant was interviewed by a government investigator in July 2021. Applicant told the investigator that he did not have any intentions to stop using marijuana as he enjoyed how it makes him feel, and he planned to continue to socialize with his friends who use marijuana. He further stated he has reduced his marijuana use, but did not plan to stop using marijuana. He said that he purchased marijuana once a week from September 2000 to August 2017. He had no intention of purchasing it in the future. He has never attended drug counseling, treatment, or drug education classes and has not

had his drug use assessed professionally. He has not been diagnosed as drug dependent or with drug abuse. (Item 3)

In Applicant's answer to the SOR, he admitted that from October 1997 to May 2021 he used marijuana with varying frequency; from September 2000 to August 2017, he purchased marijuana on various occasions; and he intended to continue using marijuana in the future. (Item 1)

In his SOR answer, Applicant stated:

My use during this time was done with no malice or desire to intentionally disobey or not comply with any laws, rules, or regulations. I used it simply from the standpoint that I enjoyed the sensation that consumption of marijuana provided along with the social interaction of my friends who were also experimenting at the time.

* * *

As I've gotten older, my desire for the sensation alongside all the other mitigating factors of acquiring marijuana have waned and discouraged me from using on any type of regular basis. Those mitigating factors would be the people that I would have to associate with to acquire marijuana, any possible legal ramifications that may occur if I would get caught with the substance, and any negative circumstances that may affect my job or career due to the previous two factors. (Item 1)

Applicant explained in his answer that his use of marijuana did not impact his ability to be responsible and show up for work and perform his assigned tasks. He further stated that "I think it would be ignorant to deny it didn't have any effect, but it is reasonable to say that effect has been minimal." (Item 1) He stated that his use of marijuana has never had any negative repercussions with law enforcement and he has never received any citations with regard to his use and possession of marijuana. (Item 1)

Applicant stated in his SOR answer that he purchased marijuana because he "wanted to enjoy that sensation on my own terms with a frequency that was determined by me." (Item 1) He further explained:

When a person reaches a point where they decide to enjoy a substance at their own leisure, at their own pace, they must seek out a source to purchase it from. Because these substances are illegal, it creates a black market where individuals can acquire their desired substance. If a person desires a substance, they are going to find a way to get it and it doesn't matter what the substance is and in many cases it doesn't matter what the consequences are. I have never sought out any other substances beyond marijuana because of the mitigating factors I mentioned [previously].

I have not purchased any marijuana in several years and the primary reason for that is because everything around the hassle of finding and buying it became more than I wanted to deal with, and it didn't seem worth it to me anymore. I didn't like the people I would have to interact with, and it was difficult to find a good reliable source that also had good product. It reached a point that the sensation I felt from marijuana wasn't worth the things I had to go through to acquire it. (Item 1)

Regarding Applicant's intent to continue to use marijuana, he stated in his answer to the SOR the following:

I admit to expressing at least a desire or intention to continue to use marijuana in the future. My intention to use marijuana in the future is not meant to be done with any malice or with the intention to defy laws, rules, or regulations. My use currently is sporadic. I play golf a couple times a month with friends and if one of them happens to offer some, I will partake. I enjoy the feeling and being able to relax while I'm out having fun with my friends. I only do it when I have no responsibilities to worry about during my free time. I have no intention to use with any regularity or purchase any marijuana at any point in the future.

If I had a job that tested regularly or required me to not use, I would have no problem adhering to that policy. Which is an example of my ability to follow laws, rules, and regulations, if need be, as well as be responsible. (Item 1)

Applicant also stated that he was told by his bosses and colleagues the importance of being honest during the security clearance process and he has been honest and he is trustworthy. He chose to be forthcoming about his illegal drug use in his SCA and investigation.

In Applicant's response to the FORM, he stated that a lot of time had passed since he indicated his intent to continue using marijuana. His SOR answer was in February 2022 and his FORM response was in July 2022. He then stated that he was not completely sure of what his statement meant when he made it. He reiterated that he was told to be honest and he was. He stated he had expressed a willingness to discontinue his marijuana use in the future if it was worth it and his present job is worth it. He said his job is too important to him to jeopardize it by continuing to use marijuana. Applicant's response continued with an analysis of the decriminalization of marijuana in many states and proposals in Congress to decriminalize it federally and a bill to forbid the use of marijuana to be used to determine eligibility for a security clearance. (AE A)

Applicant further stated that because he disclosed his marijuana use it shows his overall trustworthiness and honesty. He reiterated he has had no interaction with law enforcement or history of arrests. He has no intention of disobeying any laws, rules, or regulations he must adhere to in order to hold a security clearance. He further stated that

a high percentage of people in the country would not bring his marijuana activity to court and this indicates that they do not see his conduct as a risk to national security. He believes his willingness to disclose his past and be honest should outweigh his past drug involvement. He said he does his job, pays his bills and taxes, goes home and enjoys “a few of the liberties I still have.” (AE A)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the 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 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.” 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 applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining 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 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 Misuse

The security concern relating to the guideline 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.

AG ¶ 25 provides conditions that could raise security concerns. The following are potentially applicable:

- (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

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

Applicant admits he used marijuana from October 1997 to May 2021. He admits he purchased marijuana from September 2000 to August 2017. In his June 2021 SCA, during his June 2021 background interview with a government investigator, and in his February 2022 answer to the SOR, he confirmed his intention to continue to use marijuana in the future. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 26 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 to overcome the 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 being 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 a long history of using marijuana and a significant history of purchasing it. He repeatedly stated he intended to continue using marijuana with his friends socially and if offered, he would use it when they golfed together. Applicant noted that because he disclosed his illegal drug involvement it shows he is honest and trustworthy and therefore the security concerns should be mitigated. Doing what you are legally required to do when completing an SCA does not negate derogatory information.

Applicant also noted that he has complied with laws, rules, and regulations and has not had any interaction with law enforcement. The use of marijuana was illegal in most states for the majority of the years Applicant was using it. Purchasing marijuana was also illegal. This contradicts Applicant's assertions that he has complied with the law. True, he may not have been arrested for his violations, but not getting caught is not the same as obeying the law. He indicated the reason he stopped purchasing marijuana was because the hassle it was to find and buy it was more than he wanted to deal with, he did not like the people he had to interact with, and it was difficult to find a reliable source and get good product. Although he stated he did not intentionally intend to violate the law, his actions contradict his statement.

In his SOR answer, Applicant indicated that if he had a job that regularly tested for drug use or required he not use illegal drugs, he would comply. In his response to the FORM, he stated a lot of time had passed since he made the above statements and he now has a job that he is willing to stop using drugs for. Under the right set of circumstances, Applicant is willing to comply with the rules and regulations of refraining from marijuana use. That is not the standard.

Applicant listed his last drug use on his SCA as May 2021. He repeatedly stated he used marijuana with friends when golfing. It is unknown if he used marijuana with his friends after he completed his SCA because at that time he planned to continue using marijuana. Regardless, his past use in May 2021 is recent and insufficient time has elapsed to establish a pattern of abstinence. Based on his repeated statements of using marijuana with his friends, I am not convinced future use is unlikely to recur. He did not provide evidence that he no longer associates with his friends who use drugs; changed or avoided the environment where drugs are used; or 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 a revocation of a national security eligibility. The above mitigating conditions 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.

Applicant failed to meet his burden of persuasion. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising 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
Subparagraphs 1.a-1.c:	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's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge