



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



In the matter of:)	
)	
)	ISCR Case No. 20-02658
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

03/07/2023

Decision

WHITE, David M., Administrative Judge:

Applicant truthfully disclosed his two instances of minor social marijuana use that occurred in 2013 and 2019. Resulting security concerns were mitigated by these candid voluntary admissions, and by his credible expression of intent to abstain from substance misuse in the future. Based upon a review of the record as a whole, national security eligibility for access to classified information is granted.

History of Case

On February 22, 2019, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) to apply for reinvestigation and continuation of the security clearance he held for 20 years while working for a major defense contractor. On February 17, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct). 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 Security Executive Agent Directive (SEAD) 4 National Security Adjudicative Guidelines (AG), which came into effect on June 8, 2017.

Applicant submitted his written Answer to the SOR on March 1, 2021. He admitted the SOR allegations in SOR ¶¶ 1.a through 1.c, and denied the allegations in SOR ¶¶ 1.d and 2.a. He also requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on February 22, 2022. DOHA issued a Notice of Hearing on April 15, 2022, setting the hearing, at Applicant's request, for April 21, 2022. On that date, Department Counsel offered Government Exhibits (GE) 1 through 3 into evidence. Applicant testified, but offered no documentary evidence. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on May 2, 2022.

Findings of Fact

Applicant is 50 years old. He has been married since 2012. His 16-year-old stepdaughter and 9-year-old daughter still reside in the family home, which he purchased in 2002. He earned an engineering bachelor's degree in 1994, and earned master's degrees in aerospace engineering and business administration in, respectively, 1999 and 2007. He began his current employment with a major defense contractor in December 1996, and has held a security clearance since 1999. He has advanced through increasingly responsible positions, and is currently a senior engineering manager. His current duties mostly involve unclassified work on commercial projects, but his supervisors requested him to apply for continued national security eligibility so he could continue his intermittent temporary work advising DoD-support programs on technical, planning, staffing, and budgeting considerations. He never served in the military or held a Federal civil service position. (GE 1; Tr. 9, 27-32.)

Shortly after the recreational use of marijuana was legalized under his state's laws in 2013, Applicant's wife wanted to obtain and try some. Applicant agreed to participate, and she brought home an edible and a joint for them to share on a weekend evening. Applicant was assigned to commercial projects that involved no classified work during that time, and his company's drug policies only prohibited being under the influence of, or using, alcohol or drugs while at work. It did not occur to him that this experimentation at home would have any connection to, or effect on, his security clearance or employment so he did not report it to anyone at the time. However, in response to the "**Illegal Use of Drugs or Controlled Substances**" question in Section 23 of his 2019 e-QIP, he commented, "I have used Marijuana once in the past 7 years after it had been legalized for personal use in [his state of residence]." (Answer; GE 1; GE 2; Tr. 32-35.)

Applicant completed most of the entries on his 2019 e-QIP during late 2018, but delayed its submission because he needed to obtain some updated information about people he listed as contacts. As alleged in SOR ¶ 2.a, he responded, "No," to the question in Section 23 asking, "**While Possessing a Security Clearance** Have you **EVER** illegally

used or otherwise been **illegally** involved with a drug or controlled substance while possessing a security clearance other than previously listed?” (Emphasis in the original.) As described above, Applicant had previously listed the 2013 marijuana use that was, at the time he was filling out this section of the e-QIP, the only time he had used it. He also expressed his understanding that this use was not illegal, but he disclosed it to provide complete information. (Answer; GE 1; GE 2; Tr. 25-26, 32-42.)

During January 2019, Applicant attended a party hosted by a friend of his wife. He did not know any of the other people at the party. When a marijuana pipe was passed around the group, he took one or two puffs on it to be sociable. This also occurred on a weekend evening during a period when he was exclusively assigned to unclassified commercial projects at work. It did not occur to him in late February, when he completed the contact information on his e-QIP and submitted it, that he needed to add this second marijuana use to his answers in Section 23. During a security interview with a Government investigator on May 28, 2019, Applicant volunteered the information concerning his 2019 marijuana use without being confronted about it. At no time did he intentionally conceal or misrepresent his two incidents of drug involvement. (Answer; GE 1; GE 2; Tr. 25-26, 35-43.)

Applicant believes that decriminalization of some controlled substances represents sound public policy, and that Federal laws prohibiting marijuana use may be changed to mirror the legalization spreading through multiple state law changes. However, he has only used the drug twice, his wife does not regularly use it, and he firmly expressed that he has no desire or intention to use marijuana in the future. (GE 2; Tr. 26-27, 44-45.)

Policies

When evaluating an applicant’s national security eligibility, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, each guideline lists potentially disqualifying and mitigating conditions. 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 AG ¶ 2 describing the adjudicative process.

The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(b) and 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, pertinent, and reliable information about the person, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that any doubt concerning personnel being considered for national security eligibility 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. I have avoided drawing inferences grounded on mere speculation or conjecture.

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

A person who applies for national security eligibility seeks to enter 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 eligibility for access to classified information or assignment in sensitive duties. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified or sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of protected information.

Section 7 of EO 10865 provides, “Any determination under this order adverse to an applicant shall be a determination 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 concerns under the guideline for drug involvement and substance misuse are 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.

AG ¶ 25 describes two conditions that could raise security concerns and may be disqualifying based on the SOR allegations in this case:

- (a) any substance misuse (see above definition); and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant used small amounts of marijuana on two occasions six years apart. This establishes potential concerns under ¶ 25(a). Each use occurred during a period when he was solely working on unclassified commercial projects for his employer, involving neither access to classified information nor performance of security-sensitive duties. However, he did hold a DoD security clearance on both occasions, so technically had been granted eligibility for such access or duties. Accordingly, consideration of ¶ 25(f) concerns is warranted.

AG ¶ 26 provides two conditions that could mitigate the drug-related security concerns raised 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:
 - (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 my analysis, I have taken administrative notice of the Security Executive Agent (SecEA) *Clarifying Guidance Concerning Marijuana for Individuals Eligible to Access Classified Information or Eligible to Hold a Sensitive Position*, dated December 21, 2021. In her *Guidance*, the SecEA noted the increased number of states that have legalized or decriminalized the use of marijuana. She reaffirmed the 2014 SecEA memorandum regarding the importance of compliance with Federal law on the illegality of the use of marijuana by holders of security clearances. She provided further clarification of Federal marijuana policy, writing that this policy remains relevant to security clearance adjudications, “but [is] not determinative.” She noted that the adjudicative guidelines provided various opportunities for a clearance applicant to mitigate security concerns raised by his or her past use of marijuana.

Applicant experimented with marijuana once shortly after his state legalized recreational use in 2013, and took one or two puffs on a marijuana pipe as a social gesture at a party in January 2019. Applicant has a good job, has abstained from any other marijuana use throughout his life, and evinced a credible intent not to use it in the future. He did not submit a duplicative signed statement of intent, but the guideline cites this as a non-exclusive manner of demonstrating his acknowledgement and pattern of abstinence. Applicant readily acknowledged his infrequent use of marijuana in the past, and has established a credible pattern of abstinence since his last use in early 2019. He cannot fully disassociate from friends and family members who have occasionally used marijuana, but he declared his intent, subject to Title 10 U.S. Code § 1001, to abstain from future drug involvement.

Viewed in the context of the whole person, Applicant mitigated the security significance of his two incidents of marijuana use. His drug involvement was infrequent, stopped more than four years ago, is unlikely to recur, and does not cast doubt on his current reliability, trustworthiness, and good judgment. Substantial mitigation under AG ¶¶ 26(a) and 26(b) was established. Other potential mitigating conditions are inapplicable in the absence of prescription drug abuse or any recommended form of drug treatment.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concerns pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during the national security investigative or adjudicative processes.

AG ¶ 16 describes one condition that could raise security concerns and may be disqualifying under the facts alleged in the SOR:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant disclosed one use of marijuana on his 2019 e-QIP, although he did not understand it to have been illegal at the time he filled out the form. He failed to mention his second use by mistake, and not through any intent to omit or conceal this information. He freely volunteered the information about the second incident during his security interview to correct this omission. The record evidence clearly establishes that the alleged falsification was either accidental or unintentional, vice a deliberate act that would support a security concern under AG ¶ 16(a).

AG ¶ 17 includes two conditions that would mitigate the security concerns arising from Applicant's personal conduct, if it had involved a deliberate falsification:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Applicant provided evidence that establishes mitigation under both of the foregoing conditions, as discussed above. The omission was a one-time, harmless oversight.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is a mature adult, who fully disclosed and consistently demonstrated accountability for his minor misuse of marijuana four and nine years ago. He convincingly demonstrated his intention to abstain from further substance misuse. This is not a matter of substituting a credibility assessment for the facts of this case. Applicant has been honest and forthright throughout this process, which is important to establishing and maintaining national security eligibility. That integrity fortifies other strong evidence of his trustworthiness, responsibility, and willingness to comply with rules and regulations. The potential for pressure, exploitation, or duress is minimal since Applicant has voluntarily and fully disclosed his previous involvement with THC and his intention to abstain from drug involvement in the future. Recurrence of substance misuse is not likely, and he made no attempt to conceal it.

Overall, the evidence has eliminated any doubt as to Applicant's eligibility and suitability for a security clearance. He successfully met his burden to mitigate the security concerns arising under the Drug Involvement and Substance Misuse and the Personal Conduct guidelines.

Formal Findings

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

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraphs 1.a through 1.d:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to continue Applicant's security clearance. National security eligibility for access to classified information is granted.

DAVID M. WHITE
Administrative Judge