



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



In the matter of:)	
)	
)	ISCR Case No. 20-01848
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: *Pro se*

03/09/2023

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On March 3, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudication Facility (DCSA CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. The DCSA CAF acted 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) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on March 22, 2022, and requested a hearing. The case was assigned to me on September 2, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 28, 2022, and the hearing was held as scheduled on November 16, 2022. The Government offered exhibits (GE) 1-3, which were admitted into evidence without objection. Two hearing exhibits (HE I and II) reflecting the Governments exhibit list and discovery letter were marked accordingly. Applicant testified, but he did not offer any exhibits. DOHA received the hearing transcript (Tr.) on November 28, 2022.

Findings of Fact

In Applicant's answer, he admitted some of the allegations in the SOR (¶¶ 1.a-1.c and 2.b), and denied other allegations (¶¶ 2.c-2.d) (He failed to admit or deny ¶ 2.a, which is a cross-allegation of ¶¶ 1.a-1.c, under Guideline E. His admissions to the underlying Guideline H allegations will also be recognized as an admission to this allegation). He also provided some explanation for his conduct. I adopt his admissions as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 29 years old. He is single, never has married, and has no children. He has worked as a computer engineer for his current employer, a federal contractor, since September 2017. That contractor is subject to the drug-free workplace provisions of 41 U.S.C. 701 *et seq.* Applicant holds a bachelor's degree. (Tr. 6, 20; GE 1-2)

The SOR alleged, under Guideline H, that Applicant used (from December 2012 to October 2019) and purchased marijuana (from December 2012 to April 2014). It also alleged Applicant used marijuana after being granted a security clearance in 2017. I find this allegation, SOR ¶ 1.b, is duplicative with SOR ¶ 1.a because it alleges the same conduct, i.e., use of marijuana. The SOR language stating that the use was "after being granted a security clearance" does not equate to the disqualifying language of "while granted access to classified information or holding a sensitive position" and is therefore superfluous. I find in favor of Applicant regarding SOR ¶ 1.b. (SOR ¶¶ 1.a-1.c)

Under Guideline E, the SOR cross-alleged all the allegations listed above. (SOR ¶ 2.a) Additionally, the SOR alleged that Applicant deliberately provided false information when completing his September 2019 security clearance application, specifically relating to Section 23; and during his background interview with an investigator in November 2019, when he denied his marijuana use between December 2012 and October 2019. (SOR ¶¶ 2.b-2.d)

Applicant admitted his marijuana use between February 2012 and April 2014 in his September 2017 SCA. He described that use as experimental and that he used marijuana approximately once a week as a freshman in college. He also stated he had no intent to use marijuana in the future because he "no longer enjoy the effects of marijuana." He received his secret security clearance in approximately January 2018. In 2019, his employer requested that Applicant seek a top secret clearance. This required

the completion of a new SCA. Applicant completed this SCA in September 2019. (Tr. 20; GE 1-2)

In his 2019 SCA, under Section 23, Applicant denied using any illegal drugs within the past seven years and he also denied using drugs while possessing a security clearance. He failed to list on this SCA his drug use from December 2012 to April 2014, which he previously listed on his September 2017 SCA. These uses would fall within the seven-year window about which the question asked. In November 2019, Applicant was interviewed by a background investigator and was asked the same two questions, i.e., whether he had any involvement with illegal drugs in the last seven years and if he had any involvement with illegal drugs while holding a security clearance. Applicant answered “no” to both questions. (GE 1-2 (section 23), GE 3 (p. 7-using bottom center page numbers))

The investigator confronted Applicant with his admissions from his 2017 SCA. After being confronted, Applicant admitted to his earlier marijuana use (2012 to 2014) and expounded on more recent use. He described smoking marijuana in leaf form with a water pipe at home or at parties. He used about four times annually, with his most recent use in October 2019, which he claimed was also his last use. He claimed his last purchase of marijuana was in April 2014. He also claimed that he did not associate with anyone who uses drugs. He has not received any drug treatment or counseling. (GE 3 (p. 7))

Applicant admitted his marijuana use and purchase of marijuana in his SOR answer. He also admitted intentionally providing false information on his 2019 SCA because he became aware that using drugs could disqualify him from holding a security clearance. He admitted during his testimony that he provided false information because he was concerned he might lose his job if he admitted to his marijuana use. (Tr. 20, 23)

Applicant offered the following explanation for his conduct. When he was hired in 2017 by his defense contractor employer he claimed to have stopped using marijuana because he lived in a state where it was illegal. He was transferred to a new location within the company in August 2019. His transfer was to a state where marijuana use and possession is legal under state law. He began using marijuana when he arrived in the new state because he claimed he was unaware that use of marijuana was illegal under federal law. He further claimed that he was first made aware of the federal prohibition when his background investigator stated this to him in November 2019, which is when he claims he stopped using marijuana. He also claimed he could not remember being briefed by his employer that marijuana use was illegal under federal law and prohibited by its employees. I find these claims not credible. (Tr. 22, 30)

Policies

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 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(a), 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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

AG ¶ 24 expresses the security concern pertaining to drug involvement and substance misuse:

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. Two conditions are potentially applicable in this case:

(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.

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

Applicant used marijuana on multiple occasions between December 2012 and October 2019. He purchased marijuana between December 2012 and April 2014. I find that AG ¶¶ 25(a) and 25(c) apply to SOR ¶¶ 1.a and 1.c.

Although he has held a security clearance since January 2018, there is no record evidence that he had access to classified information during the times he used any illegal drugs while holding a security clearance. 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).

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.

While Applicant's use and purchase of marijuana was infrequent, his uses were as recent as 2019. It is troubling that Applicant broke the commitment he made in his 2017 SCA not to use marijuana in the future by using marijuana when he moved to a state where marijuana use is legal under state law. Despite this statement of intent not to use again, Applicant's short abstention is insufficient to convince me that recurrence is unlikely. Additionally, his use of marijuana while holding a security clearance casts doubt upon his current reliability, trustworthiness, and good judgment. AG ¶ 26(a) does not apply, while AG ¶ 26(b) has some application.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security concern:

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 national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. They include:

(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;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing;

(2) while in another country, engaging in any activity that is illegal in that country; and

(3) while in another country, engaging in any activity that, while legal there, is illegal in the United States.

Applicant admitted that he deliberately provided false information on his 2019 SCA and during his 2019 background investigation interview. He did so because he admitted that he was afraid of losing his job if he provided the truthful details of his marijuana use. Applicant's actions were deliberate. Therefore, AG ¶¶ 16(a) and 16(b) are established.

Applicant's drug involvement and substance misuse is cross-alleged under Guideline E. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. The conduct also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶¶ 16(c) and 16(d) are not perfectly applicable because the alleged conduct is sufficient and is explicitly covered for an adverse determination under the drug involvement and substance misuse guideline. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

I have also considered all of the mitigating conditions for personal conduct under AG ¶ 17 and considered the following relevant:

(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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Intentionally providing false information on a SCA and to a government investigator are not a minor offenses and doing so certainly casts doubt on Applicant's trustworthiness, reliability, and good judgment. His marijuana use, as recently as 2019, while holding a security clearance, and his poor judgment as demonstrated when he used marijuana despite his SCA written pledge not to do so also casts doubt on his reliability, trustworthiness, and judgment. AG ¶17(c) does not apply. Although Applicant claims he will not use marijuana in the future, he has made such a commitment in the

past, which he failed to keep. Additionally, he has not obtained drug treatment or counseling. AG ¶ 17(d) does 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 guideline 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 considered that he used marijuana as recently as October 2019, while holding a security clearance. I also considered the circumstances he described surrounding his uses and his stated intent not to use drugs in the future.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct.

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 and 1.c:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT

Subparagraph 2.a:
refers to SOR ¶ 1.b)

Against Applicant (except as it

Subparagraphs 2.b-2.d:

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 interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge