



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



In the matter of:)
)
) ISCR Case No. 22-00269
)
)
Applicant for Security Clearance)

Appearances

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

03/01/2023

Decision

DAM, Shari, Administrative Judge:

Applicant failed to mitigate the drug involvement and substance misuse and personal conduct security concerns related to his use of marijuana. Based on the pleadings and exhibits, national security eligibility for access to classified information is denied.

History of Case

On September 8, 2021, Applicant submitted a security clearance application (SCA). On April 28, 2022, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct). The action was taken under Executive Order 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 National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DoD on June 8, 2017.

Applicant filed an undated Answer to the SOR and elected to have his case decided on the written record in lieu of a hearing. On November 21, 2022, Department Counsel submitted the Government's File of Relevant Material (FORM), containing three Items. Applicant received the FORM on December 19, 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. Applicant did not provide a response to the FORM, object to the Government's evidence, or submit documents. Hence, all Items are admitted into evidence. The case was assigned to me on February 9, 2023.

Findings of Fact

Applicant admitted all allegations contained in both paragraphs of the SOR. (Item 1) His admissions are incorporated into these findings.

Applicant is 33 years old. He earned a bachelor's degree in 2012. He has worked as a digital design engineer for a defense contractor since August 2017. (Item 1)

Applicant has a history of using marijuana, beginning in March 2011 when he was in college and continuing, with varying frequency, into September 2021 when he submitted his SCA for a position with a defense contractor. He stated that he used marijuana "most days in a week during the evenings." (Item 2 at 28) He said he used it for arthritis because it helps alleviate his pain and relieves nausea, which he experiences from cancer medications. (*Id.*)

Applicant also disclosed in his SCA that in February 2017, he was previously investigated for a "TS-SCI clearance without success." (Item 2 at 31) At that time he was employed by a defense contractor, who terminated him for his admitted use of marijuana and inability to obtain a security clearance because of it. (Item 1) He stated that he used marijuana from December 2011 to February 2012, while working as an intern for defense contractor A and holding a security clearance. (Item 1)

During a December 2021 interview with a government investigator, Applicant stated that after he was denied a security clearance in February 2017, and he was terminated from his position with defense contractor B. He then stopped using marijuana because he wanted to apply for a job with defense contractor C, and he knew he may need to pass a drug test required for employment. In June or July 2017, he passed a drug screening and began working for defense contractor C in August 2017. He subsequently resumed using marijuana in spring of 2018. He uses marijuana in the evenings during the week and on weekends. He primarily uses it for medicinal purposes but acknowledged there is a social element in using it. He said he was unfamiliar with any employment requirements to report his marijuana use. (Item 3)

Applicant denied that any physician prescribed marijuana for him. He indicated that marijuana is legal in his home state. He obtains it at a local dispensary. He told the investigator that he would rather work on unclassified projects, than stop using marijuana. He said his family and friends are aware of his marijuana use. (Item 3) There is no credible

evidence that he has participated in a substance abuse program or has any intention to quit using marijuana.

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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. The entire process is a conscientious scrutiny of applicable guidelines in the context 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states that 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 applying 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, "[a]ny 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 *a/so* Executive Order 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 describes the concerns related 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.

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.

Recently, the Security Executive Agent (SecEA) promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications. It states in pertinent part:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a "whole-person concept." This requires adjudicators to carefully weigh a number of variables in an individual's life to determine whether that individual's behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual

may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.¹

AG ¶ 25 sets out four conditions that could raise a security concern and may be potentially disqualifying in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant has illegally used and possessed marijuana with varying frequency from March 2011 up to August 2021, as alleged. He used it from December 2011 to February 2012 after being granted access to classified or sensitive information while working for a defense contractor. He admitted in his 2022 Answer that he intends to continue using it. The evidence established the above disqualifying conditions.

AG ¶ 26 lists conditions that could mitigate security concerns raised under this guideline. Three may potentially apply:

- (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;
- (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 *Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, dated December 21, 2021 (SecEA Clarifying Guidance), at page 2.

- (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; and
- (d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant did not present evidence to establish mitigation under any of the above conditions. His use of marijuana is ongoing. He has illegally used and possessed marijuana from 2011 when he was in college, up to 2022, when he submitted his Answer to the SOR. He has used it with varying frequency. He asserted that he has used it as a medicinal aid to alleviate the pain he has suffered for many years from several medical conditions. He has not participated in a substance abuse treatment program, and there is no evidence to suggest that he intends to do that or stop using marijuana.

Guideline E: Personal Conduct

AG ¶ 15 explains the security concerns relating 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.

AG ¶ 16 describes a condition that could raise a security concern and may be potentially disqualifying in this case:

- (f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Between December 2011 and February 2012, Applicant possessed and used marijuana while working for defense contractor A and having been granted access to classified or sensitive information. In February 2017, Applicant was terminated from a position with defense contractor B because he admitted that he used and possessed marijuana in violation of the employer's work policies. He then stopped using marijuana in order to pursue a position with defense contractor C, and he knew he would likely be required to pass a drug screening test. Soon after passing a drug screening test and

starting his current position, he resumed using and possessing marijuana on a regular basis. The evidence establishes the above disqualifying condition and demonstrates questionable judgement as articulated in AG ¶ 15.

AG ¶ 17 provides a condition that could potentially mitigate security concerns raised under this guideline:

(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 used and possessed marijuana while working as an intern for defense contractor A between 2011 and 2012, during which time he had been granted access to classified or sensitive information. He continued to use it until he was terminated by defense contractor B in February 2017 after acknowledging he used it. Applicant then stopped using it until spring of 2018. During that interim, he passed a drug screening test and obtained his current position with defense contractor C. He subsequently resumed using marijuana on a regular basis. Applicant's intentional acts to bypass federal regulations was a serious breach of trust and casts serious doubt on Applicant's reliability and good judgment.

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 facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in this whole-person analysis.

Applicant has a long history of using marijuana beginning in 2011 when he was in college and continuing into the present. He stopped using it in 2017 when he lost a defense position. For a couple months between 2017 and 2018, he stopped using it to avoid a positive drug screening because he had applied for another federal position. After he obtained a position, he resumed using it and continues to use it on a daily basis. He is candid about his usage, and he asserts that marijuana brings him pain relief for his medical issues. While his usage may have some medical benefit for him, it does not provide a waiver of federal law regarding the use and possession of marijuana for federal contractors. The law is clear. It is prohibited and he is precluded from working for a defense contractor and holding a security clearance, regardless of whether marijuana is legal in his state. He is a mature person and is subject to the consequences of his decisions. Applicant failed to demonstrate rehabilitation, significant behavioral changes, or mitigate the security concerns raised. Overall, the evidence raises serious doubt as to Applicant's present eligibility and suitability for a security clearance.

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:	AGAINST APPLICANT
Subparagraphs 1.a through 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

Considering the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant access to classified information. National security eligibility is denied.

SHARI DAM
Administrative Judge