



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



In the matter of:)	
)	
)	ISCR Case No. 22-01106
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

03/08/2023

Decision

OLMOS, Bryan J., Administrative Judge:

Applicant did not provide sufficient evidence to mitigate the security concerns under Guideline H, Drug Involvement and Substance Misuse, regarding his use of marijuana as recently as late 2021 while granted access to classified information. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on October 19, 2021. On August 31, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, Drug Involvement and Substance Misuse. The DOD issued the SOR under Executive Order (Exec. Or.) 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 4 (SEAD 4), *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

Applicant answered the SOR on September 1, 2022, and elected a decision on the written record by an administrative judge from the Defense Office of Hearings and Appeals (DOHA), in lieu of a hearing. On November 2, 2022, Department Counsel submitted the Government's File of Relevant Material (FORM), including documents identified as Items 1 through 6. Applicant received the FORM on November 16, 2022. He was afforded 30 days after receiving the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not respond to the FORM.

The case was assigned to me on February 21, 2023. The SOR and the Answer (Items 1, 3) are the pleadings in the case. Item 2 is the SOR transmittal letter. Items 4 through 6 are admitted without objection.

Findings of Fact

The single allegation in the SOR concerns Applicant's alleged use of marijuana from April 2020 through October 2021 while granted access to classified information. Applicant admitted SOR ¶ 1.a with an explanation. His admission is incorporated into the findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact:

Applicant is 26 years old. He has never married and has no children. After graduating high school in 2014, he earned a bachelor's degree in 2018. He began working as an engineer with a defense contractor in May 2019. He submitted his initial SCA in July 2019 and was subsequently granted a security clearance. He left his first contracting position in September 2021 and started with his current employer, another defense contractor, in October 2021. (Items 4, 6)

Applicant did not list any drug use on his July 2019 SCA. On his October 2021 SCA, he disclosed that he began smoking marijuana in April 2020 as the COVID-related lockdowns began. Applicant lives in State 1. He smoked marijuana in a neighboring state, State 2, where its purchase and use was legal under state law. After a few weeks, he stopped using marijuana when he began feeling "paranoid" each time he smoked. About a year later, marijuana became legal in State 1 and Applicant started smoking marijuana weekly. (Items 4, 6)

In August 2021, Applicant briefly stopped using marijuana so that he could interview and take a drug test for his current employer in connection with the hiring process. Once Applicant passed the drug test, he resumed his use of marijuana. (Item 4)

On his October 2021 SCA, Applicant disclosed that all of his marijuana use occurred while he possessed a security clearance. He further stated "I intend to use this drug since it's legal in [State 1], although I will not if it is necessary to stop for this security clearance, or for my job." (Item 4)

During his January 2022 background interview, Applicant explained he smoked marijuana with his former girlfriend and her cousin. He described feeling a “paranoid anxiety” each time he smoked and stopped using it. However, he started using marijuana again when it became available in State 1. Applicant admitted that, during this time, he held a security clearance with his previous employer, a defense contractor. However, Applicant claimed that the contractor had a “laid-back environment” and he did not recall ever being briefed about drug use or being required to take a urinalysis. (Item 5)

However, Applicant stated that shortly after starting with his current employer, that employer’s security officer told him that he could not use marijuana while holding a security clearance. Applicant claimed that he was “surprised” to learn that marijuana remained illegal under federal law, which, in his view, “contradicted” state law. He claimed that he never used marijuana in high school or college because it was illegal and he had since only used in states where it was legal. Applicant asserted he would not have used marijuana if it was illegal for him to do so. He claimed that he had no intent of using marijuana in the future. (Item 5)

In his June 2022 Response to DOHA Interrogatories, Applicant detailed that he used marijuana weekly from April 2020 through May 2020 and again from May 2021 through August 2021. After he passed his August 2021 drug test, Applicant increased his marijuana use to every other day until he stopped in October 2021. (Item 5)

In his Answer to the SOR, Applicant stated “I used marijuana in places it was legalized ... and didn’t realize I was breaking this guideline since it was only illegal at the federal level. I have stopped using marijuana since my security officer warned me about this guideline and I don’t plan on using it in the future.” (Item 3)

Applicant did not respond to the Government’s FORM or otherwise offer any mitigating evidence beyond what he had previously stated.

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” 484 U.S. 518, 531 (1988).

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. Likewise, I have not drawn 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. 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline H, Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern regarding drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

- (a) any substance misuse (see above definition);

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

The Controlled Substances Act (“CSA”) makes it illegal under Federal law to manufacture, possess, or distribute certain drugs, including marijuana. (Controlled Substances Act, 21 U.S.C. § 801, et seq. See § 844). 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).

In October 2014, the Director of National Intelligence (DNI) issued a memorandum entitled “*Adherence to Federal Laws Prohibiting Marijuana Use*,” (2014 DNI Memo) which makes clear that changes in the laws pertaining to marijuana by the various states, territories, and the District of Columbia do not alter the existing National Security Adjudicative Guidelines, and that Federal law supersedes state laws on this issue:

[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.

The DOHA Appeal Board, which I am required to follow, has cited the 2014 DNI Memo in holding that “state laws allowing for the legal use of marijuana in some limited circumstances do not pre-empt provisions of the Industrial Security Program, and the Department of Defense is not bound by the status of an applicant’s conduct under state law when adjudicating that individual’s eligibility for access to classified information.” ISCR Case No. 14-03734 at 3-4 (App. Bd. Feb. 18, 2016). The current National Security Adjudicative Guidelines went into effect on June 8, 2017, after the 2014 DNI memo was issued. Nevertheless, the principle continues to apply.

Moreover, on December 21, 2021, DNI Avril D. Haynes issued a memorandum entitled, “*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.*” (2021 DNI Memo) The memo incorporates the AGs (at reference B) and the 2014 DNI Memo (at reference G) among various other relevant federal laws, executive orders, and memoranda. I take administrative notice of the 2021 DNI memo here, given its relevance to this case, its reliance on the AGs, and its recency.

The 2021 DNI memo specifically notes that “under policy set forth in SEAD 4’s adjudicative guidelines, the illegal use or misuse of controlled substances can raise security concerns about an individual’s reliability and trustworthiness to access classified information or to hold a sensitive position, as well as their ability or willingness to comply with laws, rules, and regulations.” (citing Guideline H, alleged in this case, and the AGs for personal conduct and criminal conduct, Guidelines E and J, not alleged in this case). Thus, consistent with these references, the AGs indicate that “disregard of federal law pertaining to marijuana remains relevant, but not determinative, to adjudications of eligibility for access to classified information or eligibility to hold a sensitive position.” (2021 DNI Memo)

Applicant submitted his first SCA in 2019, and his clearance was subsequently granted. He began using marijuana on a weekly basis from April 2020 through May 2020 and again from May 2021 through August 2021. After he passed his August 2021 drug test, he used marijuana every other day until October 2021, when he submitted his most recent SCA. By his own admission, his marijuana use occurred either while granted access to classified information or while holding a sensitive position. AG ¶¶ 25(a) and 25(f) both apply.

The adjudicative guideline includes two conditions in AG ¶ 26 that could mitigate the security concerns arising from Applicant’s drug use:

- (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) 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 is grounds for revocation of national security eligibility.

None of the mitigating conditions fully apply. Applicant's marijuana use was both recent and frequent. He initially used marijuana in April and May 2020, but stopped when it made him feel paranoid. However, a year later he resumed using marijuana weekly. This use occurred while he was granted access to classified information.

An applicant's use of illegal drugs after having completed a security clearance application or after otherwise having been placed on notice of the incompatibility of drug abuse and clearance eligibility raises questions about his or her judgment, reliability, and willingness to comply with laws, rules, and regulations. See, e.g., ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019). It has long been held that ignorance or mistake of law is generally not an excuse for failing to abide by legal obligations. See, e.g., ISCR Case No. 19-00540 at 2 (App. Bd. Dec. 13, 2019).

There is no evidence in the record that Applicant ever sought clarification from his first employer regarding the company's drug policies or the potential ramifications of his marijuana use while holding a security clearance. Instead, in August 2021, he stopped using marijuana just long enough to pass a drug test for his current employer. This circumstance strongly suggests that, in doing so, Applicant had at least a minimal understanding that ongoing drug use could negatively affect his employment. Yet, he resumed using marijuana anyway and at a greater frequency. Applicant's continued use of marijuana, even after the drug test, leaves me with concerns regarding his ability to comply with laws, rules, and regulations.

Applicant disclosed his past drug involvement and stated he no longer intends on using marijuana. These are steps to be considered in weighing mitigation. However, particularly given that he used marijuana after filling out an SCA and after being drug tested, I find that insufficient time has passed to show that his security significant conduct is behind him. The circumstances and extent of Applicant's illegal drug use preclude full application of either AG ¶ 26(a) or AG ¶ 26(b).

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 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.

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 did not request a hearing, nor did he respond to the FORM. In so doing, he did not provide any additional evidence in explanation or mitigation beyond his answer, and I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). Overall, the frequency, recency and seriousness of Applicant's conduct leaves me with questions and doubts as to his suitability for a security clearance.

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

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Bryan J. Olmos
Administrative Judge