



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



In the matter of:)	
)	
)	ISCR Case No. 21-02709
)	
Applicant for Security Clearance)	

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
 For Applicant: *Pro se*
 03/03/2023

Decision

BENSON, Pamela C., Administrative Judge:

Applicant’s illegal use of marijuana occurred after he stated he had no future intent to use marijuana following his use during college. He was granted a DOD security clearance, and he continued his use of marijuana thereafter. The drug involvement and substance misuse security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On February 4, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse). The CAF took action 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 implemented by the DOD on June 8, 2017.

On August 29, 2022, Applicant’s undated response to the SOR (Answer) was received at the Defense Office of Hearings and Appeals (DOHA) office. He denied, with explanation, both SOR allegations under Guideline H. (SOR ¶¶ 1.a and 1.b.) He requested a determination on the written record. (Items 1 and 2)

On October 4, 2022, Department Counsel submitted a file of relevant material (FORM) and provided a complete copy to Applicant. Department Counsel's FORM includes Items 1 through 5. DOHA provided notice to Applicant that he had 30 days from the receipt of the FORM to provide objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. The notice added that Applicant's lack of response may be considered as a waiver of any objections, and that the Administrative Judge would make a determination based solely on information included in the Government's FORM.

On October 14, 2022, Applicant received the FORM and its attachments. He did not submit a response to the FORM within 30 days of receipt, and he did not raise objections to the authenticity or admissibility of Items 1 through 5. The case was assigned to me on January 26, 2023. I admitted Items 1 through 5 into evidence without objection.

Findings of Fact

Applicant is 30 years old. He has never been married but he is currently living with his fiancée. He earned a bachelor's degree in 2014, and a master's degree in 2020. Since June 2015, he has worked for a government contractor as an engineer. He was issued a DOD security clearance in about March 2018. (Items 1, 4 and 5)

Drug Involvement and Substance Misuse

The SOR alleges under Guideline H that Applicant had used marijuana with varying frequency from December 2011 through November 2020. (SOR ¶ 1.a.) His use of marijuana continued after he had been granted a DOD security clearance in March 2018. He denied both of the allegations. He did not provide an explanation of the circumstances or time period of his marijuana use in his Answer to the SOR. (Items 1 and 2)

Applicant listed in his December 2016 security clearance application (SCA) that he had used marijuana from December 2011 through December 2013. He described his use as experimental and primarily in college. He also stated that he did not intend to use marijuana in the future. He acknowledged marijuana use was illegal, and he did not like the way it made him feel. (Item 3)

Applicant completed another SCA in March 2021. He disclosed that he used marijuana from December 2011 through November 2020. His continued use of marijuana occurred after college and after he claimed he had no intent to use marijuana in the future. Based on the information he disclosed in the 2021 SCA, his use of marijuana also occurred after he was hired by his sponsoring employer in June 2015, and after he was issued a DOD security clearance in March 2018. (Item 4)

Applicant was interviewed on May 28, 2021, by an authorized DOD investigator. Applicant admitted that he sporadically used marijuana between December 2011 and November 2020. His most recent use occurred during the pandemic, and he had purchased it from a dispensary in his state where marijuana use is legal. After using it, he

realized that although marijuana is legal in his state of residence, it is considered illegal under federal law. He used marijuana while possessing a security clearance because he was not clear about the laws. He told the investigator that he did not intend to use marijuana in the future. (Item 5)

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 to be 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, administrative judges apply the guidelines 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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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." The applicant 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.

Section 7 of EO 10865 provides that adverse 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 . . . 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.

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

AG ¶ 25(a) any substance misuse; and

AG ¶ 25(f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant used marijuana from about December 2011 to November 2020, and he used it after he had been granted a DOD security clearance in March 2018. The above disqualifying conditions apply.

I have considered the mitigating conditions under AG ¶ 26. The following are potentially applicable:

AG ¶ 26(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

AG ¶ 26(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 a 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 used marijuana to at least November 2020. He only realized after he used marijuana in 2020 that his conduct was illegal under federal law. Although he was very candid about his continued use of marijuana during the current investigation, I find his explanation about not understanding marijuana use is prohibited for security-clearance holders to be implausible. In a 2016 SCA, he stated that he was aware marijuana use was illegal, and he stated his intention to never use marijuana again. Based on that information, he was granted a DOD security clearance in March 2018. All government contractor employers are required to give annual training to their employees possessing DOD security clearances. For Applicant to claim ignorance of whether it was appropriate to use marijuana in November 2020 while possessing a security clearance since March 2018 is not convincing. If he was confused about the laws, he should have requested advice from his facility security officer (FSO). There is no information in the record that after Applicant realized using marijuana was illegal under federal law, he immediately reported this information to his FSO, as required.

Applicant stated on his 2016 SCA that he did not intend to use marijuana in the future. He did not keep his word, and he used marijuana after making this significant declaration. His current statement that he does not intend to use marijuana in the future no longer carries certainty or conviction. None of the mitigating conditions apply. Drug involvement and substance misuse security concerns are not mitigated.

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 and the factors in AG ¶ 2(d) in this whole-person analysis.

The Federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. In deciding whether to grant or continue access to classified information, the Federal government can take into account facts and circumstances of an applicant's personal life that shed light on the person's judgment, reliability, and trustworthiness. Furthermore, security clearance decisions are not limited to consideration of an applicant's conduct during work or duty hours. Even if an applicant has a good work record, his off-duty conduct or circumstances can have security significance and may be considered in evaluating the applicant's national security eligibility.

Applicant's illegal use of marijuana occurred after he stated his intent to abstain from using marijuana, and after he was issued a DOD security clearance. His explanation of confusion over state and federal law is not credible. His misconduct does not support a finding that he is trustworthy and reliable. Given the entirety of the record evidence, I conclude that Applicant failed to mitigate the drug involvement and substance misuse security concerns.

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.b.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, I conclude that it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge