



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



In the matter of:)	
)	
)	ISCR Case No. 21-00344
)	
Applicant for Security Clearance)	

Appearances

For Government: William Miller, Esq., Department Counsel
For Applicant: *Pro se*

05/16/2023

Decision

BENSON, Pamela, C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H (Drug Involvement and Substance Misuse), and Guideline J (Criminal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 2, 2020. On July 30, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H and Guideline J. The CAF acted 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 adjudicative guidelines (AG) effective on June 8, 2017.

Applicant provided an undated response to the SOR and requested a hearing before an administrative judge (Answer). The case was assigned to me on January 25,

2023. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 28, 2023, setting the hearing for April 11, 2023. The hearing was held as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5. Applicant testified but did not offer any documents. I admitted all proffered exhibits into evidence without objection. I held the record open until April 25, 2023, in the event either party wanted to supplement the record. Applicant timely submitted two documents, which I labeled as Applicant Exhibits (AE) A and B and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on April 18, 2023, and the record closed on April 25, 2023.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a-d in his Answer to the SOR. He did not specifically admit or deny ¶ 2.a, which referenced SOR ¶ 1.d under Guideline J. I will interpret his omission as a denial. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 38 years old. He earned a bachelor's degree in 2010. He married his wife in 2012, and they have twins, age 10. Since September 2014, he has been employed by a federal contractor as a quality assurance analyst. Applicant currently possesses a DOD security clearance. (Tr. 14-17; GE 1)

In his August 2020 SCA, Applicant disclosed that he used marijuana daily from June 2019 to November 2019, while he possessed a DOD security clearance. He listed that he did not intend to use marijuana in the future because it is unhealthy. He purchased marijuana on a monthly basis from June 2019 to November 2019. He also listed that he was arrested in November 2019 for felonious possession of marijuana and felonious distribution of marijuana. He was still awaiting trial for these charges at the time he completed his SCA. (Tr. 18-21; GE 1)

In December 2020, Applicant participated in a background interview with an authorized DOD investigator. Applicant provided details about his use of marijuana and stated that he would smoke about one or two puffs a day, approximately half of a gram of marijuana. He used marijuana to relieve his stress. He told the investigator that he would purchase marijuana from "pop up" parties near his residence. These events were held in a market setting where customers could purchase an item and then the individual was "gifted" with free marijuana. Applicant estimated that he spent \$200 a month for marijuana, and he had no intention of using marijuana again in the future. He researched other ways to relieve stress, and he currently uses meditation and binaural beats, that have significantly reduced his tension. (GE 2; Tr. 23-25, 41)

During the hearing, Applicant admitted that, when he was stopped by police in November 2019, he had about one-and-a-half ounces of individually packaged marijuana and several smoking devices in his backpack. The police also found

concentrated tetrahydrocannabinol (THC) in a wax form. He had recently purchased the marijuana and believed the amount would satisfy his marijuana needs for about one month. He admitted that he smoked marijuana more frequently on the weekends, and sometimes he added the concentrated THC to his marijuana. The police also found that Applicant possessed a large amount of cash in large denominations, approximately \$900. Applicant stated that his parents taught him to always carry a large amount of money. He normally carries around \$200 to \$300 cash on him, but he had extra money in his possession because he had just won approximately \$500 from a sports bet. He denied that he was selling marijuana. He admitted that he was aware marijuana was illegal under federal and state law and violated the requirements for individuals possessing security clearances. He reported his arrest to his employer's security officer. He attended Narcotics Anonymous for six months, participated in drug screenings, and he completed over 180 hours of community service. The court dismissed the charges against him. (Tr. 26-37, 39-42; GE 3, GE 4, GE 5)

Applicant testified that he stopped using marijuana in November 2019 only after he had been arrested. He admitted that if he had not been arrested, he most likely would have continued using marijuana. The arrest was a wake-up call. Although he possessed a DOD security clearance, he did not report his previous use and possession of marijuana to his security officer until after his arrest. (Tr. 36-37; GE 1)

Applicant provided a character reference letter from his team manager, who described Applicant as an effective leader of the team. He has no reservations about Applicant's character, responsibility, or patriotism. The team manager did not state in his letter whether he was aware of Applicant's illegal drug use. Applicant also submitted an April 20, 2023, drug screen certificate which showed no drugs were detected in his urine. (AE A and AE B)

Policies

When evaluating an applicant's suitability for a security clearance, 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 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(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.” 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 avoided drawing 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. 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 as to obtaining 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 as to 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

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, 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.

AG ¶ 25 provides conditions that could raise a security concern and may be 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; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant used marijuana daily from June 2019 to November 2019, while possessing a DOD security clearance, and he was arrested on drug-related charges in November 2019. The record establishes AG ¶¶ 25(a), 25(c), and 25(f).

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.

The guideline also includes conditions that could mitigate security concerns arising from drug involvement and substance misuse. The following mitigating conditions under AG ¶ 26 are potentially applicable:

- (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 to overcome the 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 being 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.

None of the mitigating conditions apply. Applicant's last use of marijuana occurred in November 2019 while he possessed a DOD security clearance. He failed to abstain from marijuana involvement despite acknowledging doing so was in violation of state and federal laws, and in contravention of the requirements for security clearance holders. He candidly admitted that if not for his 2019 arrest, he most likely would have continued to use marijuana. His marijuana use was daily, and he used marijuana more frequently on the weekends. He reported his marijuana use to his employer's security officer only after he had been arrested for drug-related misconduct. Overall, his use of illegal substances while possessing a security clearance continues to cast doubt on his reliability, trustworthiness, and good judgment. Applicant failed to mitigate the drug involvement and substance misuse security concerns.

Criminal Conduct

AG ¶ 30 describes the security concern about criminal conduct: "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations."

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant possessed and used marijuana (and a concentrated THC derivative) on multiple occasions from June 2019 to November 2019. Each time he used and possessed marijuana he committed a federal and state criminal offense. He was

arrested in November 2019 on felonious drug-related charges. AG ¶¶ 31(a) and 31(b) are established.

AG ¶ 32 lists conditions that could mitigate security concerns:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant presented some evidence of rehabilitation and mitigation. He has an excellent employment history while working for his employer for nearly nine years. The evidence against mitigation of criminal conduct security concerns is more persuasive. As discussed previously, the criminal conduct security concerns are not mitigated for the same reasons that the drug involvement and substance misuse security concerns are not mitigated. Applicant's frequent marijuana use, despite knowing such use violated laws and security regulations, continues to cast doubt on his reliability, trustworthiness, and willingness to comply with laws, rules, and regulations. This arrest occurred three and one-half years ago. More time without criminal activity involving marijuana must elapse before criminal conduct concerns will be fully 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 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 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 Guidelines H and J in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant's use of marijuana while holding a security clearance places a heavy burden on him to establish mitigation. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See Dorfmont, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

After considering the record as a whole, to include the circumstances surrounding Applicant's use and purchase of marijuana, I conclude that Applicant has not met his heavy burden of proof and persuasion due to the recency of his last use of marijuana while holding a DOD security clearance. His decision to use marijuana despite knowing he was violating laws and security regulations continues to cast doubt on his reliability, trustworthiness, and willingness to comply with laws, rules, and regulations. It was only after he was detected by law enforcement that he made the decision to abstain from using illegal drugs and report his misconduct to his security officer. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H and Guideline J.

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-1.d:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	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 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