



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



In the matter of:)	
)	
)	ISCR Case No. 21-02619
)	
Applicant for Security Clearance)	

Appearances

For Government: Karen Moreno-Sayles, Esq., Department Counsel
 For Applicant: *Pro se*
 05/16/2023

Decision

BENSON, Pamela C., Administrative Judge:

Applicant failed to mitigate the drug involvement and substance misuse and criminal conduct security concerns. National security eligibility is denied.

Statement of the Case

On February 25, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H (drug involvement and substance misuse) and J (criminal conduct). The 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 implemented by the DOD on June 8, 2017.

On March 23, 2022, Applicant responded to the SOR (Answer). He admitted SOR ¶¶ 1.a and 1.b, but he did not specifically address the allegation under Paragraph 2, Guideline J SOR ¶ 2.a, which referenced SOR ¶¶ 1.a and 1.b. I interpreted his omission as a denial of SOR ¶ 2.a. He requested a determination on the written record, in lieu of a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge.

On July 5, 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 3. 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. Applicant did not submit any information within the 30-day period. I admitted into evidence the three Government exhibits (Items 1-3) without objections.

Findings of Fact

Applicant is 37 years old. He has never been married and does not have any children. He earned a bachelor's degree in 2008. Since October 2009, he has worked for a federal contractor as a lead automation engineer. This is his first application for a DOD security clearance. (Item 2)

Drug Involvement and Substance Misuse

The SOR alleges under Guideline H that Applicant has used marijuana from about January 2004 to June 2021. (SOR ¶ 1.a) He has also purchased marijuana from about January 2004 to June 2021. (SOR ¶ 1.b) He listed this information on his June 2021 security clearance application (SCA) and admitted these allegations in his Answer. (Item 2; Answer)

In August 2021, Applicant participated in a background interview with an authorized DOD investigator. He stated that he first used marijuana in college, and he used marijuana on a weekly basis from approximately 2004 to 2008. After college, he stopped all use of marijuana when he became involved in the hiring process with his current employer. He was aware that he would be required to pass a pre-employment drug test. He passed the drug screen and was hired in October 2009; at which time he resumed his use of marijuana, but on a monthly basis. He used marijuana with friends and the effects from the marijuana made him feel relaxed. His purchases of marijuana did not cause him to experience financial problems. His monthly use of marijuana remained consistent until June 2021. He told the investigator that he stopped marijuana use at that time because he learned that his employer had sponsored him for a DOD security clearance. He is aware that using illegal drugs violates federal law and it is inconsistent with his employer's drug policy. He has no intention of using marijuana in the future. (Item 3)

Applicant told the investigator that he believed he had enough will power to reject marijuana if it were offered to him because his job is more important to him than using marijuana. He also stated that if he was not in the process of obtaining a DOD security clearance, he would continue using marijuana, despite knowing such use violated federal law and his employer's drug policy. (Item 3)

Criminal Conduct

The SOR alleges under Guideline J (criminal conduct) that Applicant used and purchased marijuana from about January 2004 to about June 2021. (SOR ¶ 2.a.)

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, 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 two conditions that could raise a security concern and may be disqualifying in this case:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase . . .

The record establishes AG ¶¶ 25(a) and 25(c). Applicant used and purchased marijuana from about January 2004 to about June 2021.

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; and
- (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.

None of the mitigating conditions apply. Applicant has a long history, nearly two decades, of using and purchasing marijuana. He is aware that marijuana use violates federal law and his employer's drug policy. Just before he was hired, he stopped using marijuana to pass the pre-employment drug test. He passed the drug screen and was hired by his employer in 2009. Thereafter he resumed using marijuana on a monthly basis until June 2021. At this time, he was informed that his employer was going to sponsor him for security clearance eligibility.

Applicant stopped all marijuana use once he became aware that he was in the process of obtaining a DOD security clearance. He also admitted that if he were not in process for a security clearance determination, he would still be using marijuana. Although I appreciate Applicant's candid statements, his long history of marijuana use, and pattern of poor choices demonstrate that he does not possess the requisite traits of reliability, trustworthiness, and good judgment that are necessary for all DOD security clearance holders. Applicant failed to mitigate the drug involvement and substance misuse security concerns.

Guideline J: Criminal Conduct

The security concern related to the criminal conduct guideline is set out in AG ¶ 30:

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 lists conditions that could raise a security concern and may be disqualifying. One potentially applies:

(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.

The record evidence establishes Applicant possessed, purchased, and used marijuana on multiple occasions from about January 2004 to about June 2021. Each time he possessed marijuana he committed a federal criminal offense. AG ¶ 31(b) applies.

AG ¶ 32 lists two conditions that could mitigate the 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; 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.

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 regularly possessed and used marijuana despite knowing such use violated federal law and his employer's drug policy. He has been actively deceiving his employer for over a decade after being hired and resuming his use of marijuana. As such, his behavior continues to cast doubt on his current reliability and willingness to comply with laws, rules, and regulations. Applicant failed to establish mitigation under the above mitigating conditions.

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

Applicant has shown that his personal interests come first, even if his preferences violate rules, laws, and regulations. He was aware that he should not use illegal drugs, but he continued to do so for over a decade after his employer hired him in 2009. I find it possible that Applicant would also be willing to deceive the government by resuming marijuana use if he were to be issued a DOD security clearance. He is not trustworthy or

dependable; characteristics that are required for individuals entrusted with our nation's secrets. 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. In light of all the facts and circumstances surrounding this case, I conclude Applicant has not met his burden of proof and persuasion. He failed to mitigate the drug involvement and substance misuse and criminal conduct 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
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, I conclude that it is not clearly consistent with the interests of national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge