



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



In the matter of:)
)
) ISCR Case No. 22-00920
)
Applicant for Security Clearance)

Appearances

For Government: Rhett E. Petcher, Esq., Department Counsel
For Applicant: *Pro se*

07/31/2023

Decision

HALE, Charles C., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H (drug involvement and substance misuse). Eligibility for access to classified information is denied.

Statement of the Case

On July 7, 2022, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H. Applicant responded to the SOR on September 12, 2022, and requested a hearing before an administrative judge. The case was assigned to me on June 1, 2023.

The hearing was convened as scheduled on July 19, 2023. Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. The Government's Disclosure letter dated October 25, 2022, was marked as Hearing Exhibit (HE) I. Applicant testified and offered no additional evidence. He declined to have the record held open. DOHA received the transcript (Tr.) on July 26, 2023.

Findings of Fact

In Applicant's Answer to the SOR, he admitted the three allegations, SOR ¶ 1.a, that he used marijuana with varying frequency from about 2011 to about October 2021; SOR ¶ 1.b, that he purchased marijuana from about June 2019 to about October 2021; and SOR ¶ 1.c, that he intended to use marijuana in the future.

Applicant is a 31-year-old employee of a defense contractor. He has worked for his current employer since 2017. He seeks to obtain a security clearance. He attended community college for three years but did not earn a degree. He is single and has no children. (GE 1 at 12, 14, and 21.)

Applicant has a history of marijuana use. In his 2021 Questionnaire for National Security Positions (SF 86), he reported using marijuana about two to three times a year socially between 2011 and 2019. (GE 1 at 65 and Tr. at 17-18 27, 28.) After joining his employer he was assigned work that required international travel and he started to use marijuana to help him sleep. (Tr. at 14, 17.) He stated on the SF 86 that he intended to use marijuana in the future because it helped him sleep. (GE 1 at 65 and Tr. at 12-14.) He testified he would switch to other legal means to help him sleep. (Tr. at 28-29.) He testified if it "stops [him] from getting [his] security clearance, [he] would not continue to smoke marijuana." (Tr. at 21.) In response to whether he would sign a statement concerning future use of marijuana, he offered he would sign a statement declining future use. (Tr. at 31.)

Applicant lived in a state where marijuana became legal under state law about midway during the period alleged. (Tr. at 27.) He stated he never illegally purchased marijuana but understood it was an illegal controlled substance under Federal law. (Tr. at 16, 21.) He admitted using marijuana in a social setting one or two times after receiving the SOR. His last use was about month before the hearing. He felt the security clearance application process was "extremely slow" and the project he would have used a security clearance for had been completed so he used marijuana. He acknowledged this was not an excuse. (Tr. at 18, 21, 23, 27.) He listed on his SF 86 as references, persons with whom he used marijuana socially. (Tr. at 29.)

Applicant testified he had been told by work colleagues, who also used marijuana and held DoD security clearances, that if he was truthful, he would not have a problem. (Tr. at 30-31.) When asked to divulge the people smoking marijuana while holding a DoD security clearance, he declined to answer the question. (Tr. at 32.) He added that since he did not have a security clearance, he would not report them. (Tr. at 36.) Any derogatory information that was not alleged in the SOR will not be considered for disqualifying purposes. However, it may be considered in the application of mitigating conditions, in making a credibility determination, and in a whole-person analysis.

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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 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. 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable 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) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant admitted he used marijuana, purchased marijuana, and expressed an intent to continue to use marijuana. AG ¶¶ 25(a), 25(c) and 25(f) are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following 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 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 or misuse is grounds for revocation of national security eligibility.

The evidence establishes that Applicant knew throughout the periods of time alleged that his use and purchasing of marijuana was prohibited under Federal law. He continued to purchase and use marijuana after applying for a security clearance and after being placed on notice that such conduct was inconsistent with holding a security clearance. He continued to associate with others who use marijuana. In doing so, Applicant not only knowingly violated Federal drug laws but also disregarded security clearance eligibility standards. This behavior raises substantial questions about Applicant's judgment, reliability, and willingness to comply with laws, rules, and regulations. See ISCR Case No. 20-02974 (App. Bd. Feb. 1, 2022). Applicant's willingness to sign a statement of intent not to use illegal drugs in the future does not mitigate the scope of these security concerns. Nor does the passage of a little over a month between his last use of marijuana and the hearing eliminate those concerns. None of the mitigating conditions are applicable.

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 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.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the security concerns under Guideline H (drug involvement and substance misuse).

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a-c:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Charles C. Hale
Administrative Judge