



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



In the matter of:)	
)	
-----)	ISCR Case No. 22-02237
)	
Applicant for Security Clearance)	

Appearances

For Government:
Jeff Nagel, Esquire, Department Counsel

For Applicant:
Pro se

October 12, 2023

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted his most recent Electronic Questionnaires for Investigations Processing (e-QIP) on August 10, 2021. (Government Exhibit 1.) On February 16, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCAS CAS) (formerly Department of Defense Consolidated Adjudications Facility) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H (Drug Involvement and Substance Misuse). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended

(Directive); and the Adjudicative Guidelines effective within the Department of Defense after June 8, 2017.

Applicant answered the SOR in writing (Answer) on March 9, 2023, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on April 5, 2023. The case was assigned to me on April 13, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on May 17, 2023. I convened the hearing as scheduled on June 28, 2023. The Government offered Government Exhibits 1 through 4, which were admitted without objection. Applicant testified on his own behalf and submitted Applicant Exhibits A through E, which were all admitted without objection. DOHA received the transcript of the hearing (Tr.) on July 11, 2023. Applicant requested that the record remain open for submission of additional documentation. He submitted Applicant Exhibit F in a timely fashion, and it is admitted without objection. The record closed on July 14, 2023.

Findings of Fact

Applicant is a 35-year-old information systems security officer with a defense contractor (Company A). He has worked for Company A since August 2019. He is single with a partner and has a bachelor of science degree. He has held a security clearance with various defense contractors almost continually since 2011. (Government Exhibit 1 at Sections 12, 13A, 17, and 25; Tr. 20-21.)

Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has used illegal drugs. He admitted the single allegation under this paragraph with explanations.

1.a. Applicant smoked marijuana during two distinct periods of time. He smoked marijuana twice in approximately 2008 when he was in college. He derived no pleasure from it and did not use it again for almost 13 years. He admitted this use during a 2015 investigation. (Government Exhibit 3 at Section 23; Government Exhibit 4; Tr. 19, 29.)

In 2021 Applicant began a relationship with his partner (Ms. One). Ms. One is a cancer survivor who uses marijuana to relieve pain from her treatment. In approximately June 2021, during the Covid pandemic, Applicant used marijuana about four times with Ms. One. He supplied no good reason for using marijuana at this time, particularly given the fact he has held a security clearance for many years. He admitted this use in an August 2021 e-QIP and a subsequent interview. (Government Exhibit 1 at Section 23; Government Exhibit 2; Tr. 22-23, 29, 32, 34-35, 37.)

Applicant has not used marijuana for two years. He states that he understands the proscription against marijuana use while holding a security clearance, and has evinced a

credible intent not to use any illegal drugs in the future. He submitted a signed statement of intent acknowledging that any future use of illegal drugs is grounds for revocation of his security clearance. (Applicant Exhibit E; Tr. 26-28, 38.)

Mitigation

Applicant is a successful performer. Positive statements were submitted by his manager, his Facility Security Officer, and his Industrial Security Representative. He is described by the writers as “honest and trustworthy,” “hard-working,” and “a dedicated and productive member of the [Company A] Cybersecurity team.” The writers stated they are aware of Applicant’s marijuana use and believe this conduct to be an aberration that is in the past. (Applicant Exhibits A, B, and D; Tr. 36-37.)

Policies

When evaluating an applicant’s national security eligibility for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant’s national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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, “Any 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)

The security concern relating to Drug Involvement and Substance Misuse is set forth 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.

I have examined the disqualifying conditions under AG ¶ 25 and especially considered the following:

- (a) any substance misuse (see above definition); and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant smoked marijuana two times in 2008 and approximately three to four times in June 2021. He held a Top Secret security clearance at the time of his use in 2021. Both of the stated disqualifying conditions apply.

The following mitigating conditions under AG ¶ 26 have also been considered:

(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.

In my analysis, I have taken administrative notice of the Security Executive Agent (SecEA) "Clarifying Guidance Concerning Marijuana for Individuals Eligible to Access Classified Information or Eligible to Hold a Sensitive Position," dated December 21, 2021. (Guidance.) In her Guidance, the SecEA noted the increased number of states that have legalized or decriminalized the use of marijuana (including State One) and sought to "provide clarifying guidance." She reaffirmed SecEA's 2014 memorandum regarding the importance of compliance with Federal law on the illegality of the use of marijuana by holders of security clearances. She provided further clarification of Federal marijuana policy, writing that this policy remains relevant to security clearance adjudications "but [is] not determinative." She noted that the adjudicative guidelines provided various opportunities for a clearance applicant to mitigate security concerns raised by his or her past use of marijuana.

Applicant used marijuana in 2008 when in college and again in 2021. He held a security clearance in 2021 and knew his conduct was against security regulations and Federal law. This latter conduct was situational in nature, brought about by his partner's use of marijuana as a result of her cancer treatment and Covid. I have considered the fact that this was repeated conduct, although 12 years apart, and that he is a security clearance holder. This conduct was in the past and he stated convincingly that it will not be repeated. He thoroughly understands the consequences of any future drug use or exposure. Viewing his marijuana use in the context of the whole person, Applicant has mitigated the security significance of his past drug involvement. Paragraph 1 is found for Applicant.

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 national security 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 pertinent facts and circumstances surrounding this case. Applicant has mitigated his drug use. His repeated and forthright disclosures on his e-QIPs, during interviews with OPM investigators, and at his hearing minimized or eliminated the potential for pressure, coercion, or duress, and demonstrated his trustworthiness. Continuation or recurrence of substance misuse is unlikely. Overall, the record evidence does not create any doubt as to Applicant's present suitability for national security eligibility and a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H: FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge