



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



In the matter of:)	
)	
)	ISCR Case No. 22-02341
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel O'Reilly, Esq., Department Counsel
For Applicant: Carl Marrone, Esq.

11/15/2023

Decision

BENSON, Pamela, C., Administrative Judge:

Applicant successfully mitigated the security concerns under Guideline H (Drug Involvement and Substance Misuse) and Guideline J (Criminal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 1, 2022. On December 19, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H and Guideline J. The action was taken 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, he admitted all of the SOR allegations, and he requested a Defense Office of Hearings and Appeals (DOHA) judge

issue a decision based upon the administrative record. (Answer). A letter from Applicant's counsel dated April 12, 2023, requested to convert the written submission to a hearing before a DOHA judge, to allow Applicant an ample opportunity to present his case. (See Hearing Exhibit (HE) 3.) The case was assigned to me on May 26, 2023. DOHA issued a notice of hearing on July 18, 2023, setting the hearing for August 17, 2023. The hearing was conducted as scheduled using Microsoft Teams.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through 4; Applicant submitted 12 documents labeled as Applicant's Exhibits (AE) A through L. I admitted all proffered exhibits into evidence without objection. Applicant testified and four witnesses testified on his behalf. DOHA received the hearing transcript (Tr.) on August 24, 2023.

Findings of Fact

Applicant admitted all of the allegations in his Answer to the SOR. (¶¶ 1.a-f, and 2.a). After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 36 years old. In May 2022, he earned a bachelor's degree in computer science. He has not married and does not have any children. Since early 2022, he has been employed by a federal contractor as a software engineer. This is Applicant's first application for a DOD security clearance. (Tr. 20-; GE 1, AE G, I, J)

Drug Involvement and Substance Misuse:

SOR ¶ 1.a alleged Applicant used marijuana from September 2006 to March 2022. Applicant first used marijuana in 2006 in high school with friends. After graduating, he moved into a house with three of his high school friends who also used marijuana. He stayed in that home until 2008 and moved out shortly after his 21st birthday. He stated that his marijuana use was at least weekly while living in the home with his friends. From 2008 to about 2012, he moved back home to live with his parents and his 20-year-old-brother. He used marijuana at his parents' home approximately daily. This was his heaviest use of marijuana. He used it out of loneliness and boredom. At that time, he felt like he did not have any friends, and he did not like his current career path. He moved out of his parents' home in approximately 2012. (Tr. 21-32; GE 1, 2)

In 2012, Applicant moved into a one-bedroom apartment by himself. He initially used marijuana, but he then met a girlfriend, and he felt his life changed in a positive manner. He started to make goals about going to school, and he started socializing with friends again. His use of marijuana decreased, and he was more productive with his time. In early 2016, he enrolled into a community college. He applied himself to his studies and decided he wanted to pursue his bachelor's degree in computer science and software engineering. Applicant testified, "Smoking marijuana was essentially

incompatible with my life at that time.” If he did smoke marijuana, it occurred about once every two months. (Tr. 32-36, 57)

Applicant last used marijuana in March 2022, near the end of his senior year, during a celebration at his parents’ home. He was also busy applying for jobs, and he decided that he no longer wanted marijuana to be a part of his life. After making his decision, he informed his friends and family members that he no longer uses marijuana. He was hired by a DOD contractor, and he understands how important it is to be placed in a position of trust and responsibility by his employer and the federal government. Since March 2022, he has not used marijuana or any other illegal drug, and he does not intend to use any illegal substances in the future. (Tr. 37-40; AE F; GE 1, 2)

SOR ¶ 1.b alleged Applicant used mushrooms from February 2020 to August 2021. Applicant testified that he used hallucinogenic mushrooms on two occasions, once in February 2020 and the second time in August 2021. The first time he was on a camping trip, his brother made tea with the mushrooms, and everyone drank the tea. The second time Applicant and his girlfriend purchased mushrooms from a dispensary and used it together before saying their goodbyes as he left for his senior year in college. He has no interest or future intentions to use hallucinogenic mushrooms. (Tr. 42-48, GE 1, 2)

SOR ¶ 1.c alleged Applicant used opiates in 2012. He stated he used a prescription pill that is considered an opiate, but he actually took these pills with his friends in 2007, not 2012. He used it on two or three occasions over the course of the year. His friends provided the pills, and he did not like the nauseating effect from using this drug. He has not used opiates since 2007, and he does not intend to use opiates in the future. (Tr. 49-54; GE 2)

SOR ¶ 1.d alleged Applicant used cocaine in 2012. He explained that he did not list opiate or cocaine use on his SCA because it had occurred outside the scope of the question. He told the investigator that he had not used these drugs “within the last ten years,” and he now believes that is how the date “2012” was calculated. He actually used cocaine on a few occasions in 2007 with these same friends, due to curiosity and a desire to fit in with his friends. He never purchased cocaine. He has not used cocaine since 2007, and he does not intend to use cocaine in the future. (Tr. 54-57; GE 2)

SOR ¶ 1.e alleged in November 2014 Applicant was arrested for (1) possession of 25 grams or less of marijuana and (2) possession of drug paraphernalia. He explained that it was late at night, and he was pulled over by the police for having an expired registration decal on his license plate. The police officer told Applicant he could smell the odor of marijuana coming from his car. His car was searched, marijuana was found, and Applicant was arrested. He was held at the police station for about an hour and released. He was given the option to plead guilty to count (1) and pay the fine in full, which he did. He was not ordered to go to substance abuse counseling or placed on probation. Count (2) was dismissed. (Tr. 62-65; AE B, C; GE 3, 4)

SOR ¶ 1.f alleged in February 2012 Applicant was charged with (1) possession of THC (marijuana) and three counts of possession of drug paraphernalia. He explained that this incident took place while he was living with his parents, so it actually happened between 2009-2011. This incident was not found during his criminal background check, and he voluntarily provided this information during his July 2022 background interview. His parents were having a verbal argument, and Applicant intervened and told his father that he was being rude to his mother. The father said something to the effect that if you are so concerned about your mother, why don't you call the police? The father dialed 911, they heard the dispatcher come on the line, and then his father disconnected the phone. The police arrived at the house, they searched Applicant's bedroom and found a small amount of marijuana, a pipe, and a grinder. They confiscated everything and gave Applicant a citation. Applicant appeared in court and was told that if chose the option to pay the fine in full, he would not have to go through a hearing and this incident would not be reported on his criminal record. He paid the fine in full. (Tr. 57-62)

Applicant provided a drug specimen result certificate showing that in August 2023, a drug test analysis of Applicant's hair did not detect the presence of marijuana, cocaine, amphetamines, methamphetamine, opiates, or PCP. Applicant also provided a signed statement of intent to refrain from using any and all illegal drugs, and any future involvement with drugs would be grounds for revocation of his security clearance. (AE E, L)

Paragraph 2 of the SOR alleged Guideline J (Criminal Conduct) security concerns, and it cross-alleged SOR ¶¶ 1.e and 1.f. Applicant admitted both SOR allegations. He did not list his drug-related charges on the May 2022 SCA because he thought these offenses were limited to a seven-year period. He voluntarily disclosed both incidents during his July 2022 background interview without the investigator confronting him with this adverse information. (SOR response)

Four witnesses testified on Applicant's behalf. Applicant also provided his work achievements, a current employer peer review, and numerous character reference letters from his college professors, co-workers, team manager, previous supervisor, family, and friends who described Applicant as an effective leader, honest, trustworthy, and intelligent. All of his colleagues had no reservations about Applicant's character, responsibility, or patriotism. Applicant also submitted two awards from his employer - "recognizing exceptional performance," and a positive employer peer review that was completed in November 2022. (AE H, I, K)

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); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant used marijuana from September 2006 to March 2022, he used hallucinogenic mushrooms two times in 2020 and 2021, and he used both opiates and cocaine a few times in 2007. He was charged with drug-related offenses between 2009 and 2014. The record establishes AG ¶¶ 25(a) and 25(c).

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;
 - (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.

Applicant was completely candid about his illegal drug use on his May 2022 SCA. He understands marijuana use is against federal law, and it is unacceptable for

individuals possessing DOD security clearances to smoke marijuana, even if the state law makes it legal to do so. He signed a letter of intent declaring his decision to not use any illegal drug in the future. I find he is sincere in his commitment to remain drug-free, and he is unlikely to resume his use of marijuana or any other illegal substance. He recently graduated from college, matured, and is dedicated to his new career with a DOD contractor. He either stopped associating with individuals who use illegal drugs, or he informed them of his wishes to remain abstinent. Applicant's last use of marijuana occurred about 19 months ago and is unlikely to recur. Mitigating conditions AG ¶¶ 26(a) and 26(b)(1)(2) and (3) apply. Drug involvement and substance misuse security concerns are mitigated.

Guideline J: 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's admissions and the record evidence show that Applicant was charged in approximately 2009 and arrested in 2014 for possession of marijuana and possession of drug paraphernalia. 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; 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 evidence of rehabilitation and mitigation. He has an excellent employment history with his employer, and he is considered by many associates to be an effective leader, honest, and trustworthy. Given the passage of time since he engaged in these criminal acts, I conclude that he is unlikely to engage in criminal conduct in the future. His behavior no longer casts doubt on his current reliability and good judgment. Based on these facts, Applicant qualifies for mitigating conditions AG ¶¶ 32 (a), (b), and (d).

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.

The 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 government can consider 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 and other controlled substances occurred predominantly during his high school and college years. He has matured and he is remorseful about his past involvement with illegal drugs. He was forthright about his drug-related offenses during his background interview, and he provided full details about his illegal drug-use history on his May 2022 SCA. He has made positive changes in his life and is aware that future illegal drug use may jeopardize his career. Given the entirety of the record evidence, I conclude that Applicant mitigated 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:	FOR APPLICANT
Subparagraphs 1.a-1.f:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.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 security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Pamela C. Benson
Administrative Judge