



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



In the matter of:)	
)	
)	ISCR Case No. 23-00093
)	
Applicant for Security Clearance)	

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

11/30/2023

Decision on Remand

COACHER, Robert E., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline H, drug involvement and substance misuse. Applicant’s eligibility for a security clearance is granted.

Statement of the Case

On February 6, 2023, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse. The DOD acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective June 8, 2017 (AG).

Applicant answered the SOR on March 30, 2023, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the

Government's File of Relevant Material (FORM) on May 2, 2023. The evidence included in the FORM is identified as Items 4-5. (Items 1-3 includes pleadings and transmittal information.) The FORM was mailed to Applicant, who received it on May 9, 2023. Applicant was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He failed to submit any documentary evidence. Items 4-5 are admitted into evidence without objection. The case was assigned to me on August 23, 2023.

On September 15, 2023, I issued a decision denying Applicant's request for a security clearance. Applicant appealed that decision to the DOHA Appeal Board (Appeal Board) and on November 21, 2023, the Appeal Board issued a decision remanding the case back to me "to correct the identified errors and for further processing consistent with the Directive." Pursuant to the Appeal Board's decision, I am issuing this remanded decision.

Findings of Fact

In Applicant's answer, he admitted one of the allegations in the SOR, except that he admitted using marijuana only up until "at least March 2022." (§ 1.a; See SOR Answer at Item 3), and denied the other allegation (§ 1.b). He also provided some explanation for his conduct. I adopt his partial admission to SOR § 1.a as a finding of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact. (Items 1, 3)

Applicant is 25 years old. He is single, never has married, and has no children. He has worked as a network technician for his current employer, a federal contractor, since March 2022. That contractor is subject to the drug-free workplace provisions of 41 U.S.C. 701 *et seq.* Applicant completed his academic requirements for his bachelor's degree, but as of May 2022, it had not been awarded. (Items 4, 5)

The SOR alleged, under Guideline H, that Applicant used and purchased marijuana from May 2015 to at least May 2022 (SOR § 1.a). It also alleged that Applicant used marijuana after completing a security clearance application (SCA) on April 7, 2022 (SOR § 1.b).

Applicant admitted his marijuana use in his April 2022 SCA, his May 2022 personal subject interview (PSI) with an investigator, and in his March 2023 SOR answer. In his SOR answer, he denied using and purchasing marijuana after completing his SCA in April 2022. As noted above, his admissions of marijuana use and purchasing consistently used March 2022 as his cessation date. (Items 3-4)

During Applicant's PSI, he stated that his marijuana use started in approximately 2014-2015 after he fell off a truck and injured his back. He admitted not getting proper medical treatment for his injury and instead started using marijuana for pain management. In approximately June 2015, he began getting marijuana from his friends and smoking it to alleviate his back pain. He used marijuana irregularly from June 2015

to August 2016. He abstained from August 2016 to March 2017. After March 2017, he started using marijuana on weekends sporadically. This frequency of use continued until December 2018 when he stopped again. (Item 5)

In June 2018, Applicant was ticketed for possession of marijuana because his passenger had lit up a marijuana joint just as the police officer arrived. The charge was dismissed when his friend admitted ownership of the marijuana. (Item 5)

The information in Applicant's PSI summary about the end of his marijuana activity is vague and contradictory to his earlier admissions of marijuana use and purchasing from May 2015 to March 2022. The ambiguous language from his PSI is:

Since 03/2020 to present, the Subject no longer uses marijuana on weekends because he works on weekends. He occasionally uses marijuana throughout the week on as [sic] a needed basis to help with pain management particularly at night when the pain causes lack of sleep. (Item 5)

In his earlier SCA, Applicant stated his use frequency was, "Nightly or weekends only. 1-2 joints." The investigator did not clarify the discrepancy between these two statements. Additionally, the investigator did not clarify what the term "to present" meant. Was Applicant saying he used marijuana up through his PSI interview in May 2022? Or was he saying that his use was up until he began working for his current employer in March 2022, which would be consistent with his earlier answers as to when he stopped using marijuana? Because of these ambiguities in his PSI interview summary, which he did not authenticate, I find Applicant's statements that he ended his marijuana use in March 2022 more credible than the information contained in his PSI. (Items 4-5)

Applicant provided medical information, attached to his SOR answer, that described his back pain issues. The doctor performing the most recent examination (sometime in 2021) recommended that Applicant should seek a surgery consult, or if no surgery was recommended, he should start physical therapy. No further information was provided. (Item 3)

To help with his back pain, Applicant avers he now follows his doctor's advice regarding pain management, performs yoga, wears a back brace, uses a massage gun, meditates daily, uses CBD cream, and stretches. He no longer associates with people who are known drug users. (Items 3, 5)

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 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(a), 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under 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 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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

AG ¶ 24 expresses the security concern pertaining to drug involvement and substance misuse:

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Two conditions are potentially applicable in this case:

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

Applicant used and possessed marijuana on multiple occasions between May 2015 and March 2022. I find that AG ¶¶ 25(a) and 25(c) apply to SOR ¶ 1.a.

I find in favor of Applicant regarding SOR ¶ 1.b. That allegation alleges Applicant's use of marijuana "after completing an Electronic Questionnaire for Investigation Processing (e-QIP) on April 7, 2022." Even if that factual information is true, it does not establish any disqualifying condition other than what is stated in SOR ¶ 1.a. Using any controlled substance after completing an SCA may be aggravating conduct, but it does not create a separate disqualifying condition under the AGs. Only use "while granted access to classified information or holding a sensitive position" qualifies as a separate basis for disqualification. There is no evidence in the record to support that Applicant met that criteria. Additionally, I found that Applicant's marijuana use ended in March 2022, before he submitted the SCA.

AG ¶ 26 provides conditions that could mitigate security concerns. Two potentially apply in this case:

- (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.

Applicant's use and purchase of marijuana was frequent and was as recent as March 2022. However, this was before he completed his SCA. He used marijuana to deal with his back-pain issues. Although using marijuana is not a proper or legal treatment plan, his unique circumstances bear some consideration. He listed ways he is now dealing with his back pain without using marijuana. While he did not provide a signed statement of his intent not to use drugs in the future, he has ceased associating with drug users. He documented his appropriate medical treatment and is committed to following his medical treatment to deal with his pain issues. AG ¶ 26(a) and AG ¶ 26(b) both apply.

I also note in accordance with the Director of National Intelligence's clarifying guidance letter concerning marijuana dated December 21, 2021, I have considered that the evidence here supports mitigation in the form of Applicant's stated reason for using and purchasing marijuana, his abstinence since March 2022, and his disassociation with drug users. The guidance also states that violation of federal drug law remains relevant, but not determinative, to adjudications of security clearance eligibility. (See ES 2021-01529)

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 guideline 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 considered his reason for using marijuana and his commitment to treat his medical issues by other means.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guideline H, drug involvement and substance misuse.

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.b:	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 Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Robert E. Coacher
Administrative Judge