



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



In the matter of:)	
)	
)	ISCR Case No. 22-02574
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel O’Reilly, Esq., Department Counsel
For Applicant: *Pro se*

12/05/2023

Decision

GARCIA, Candace Le’i, Administrative Judge:

Applicant did not mitigate the personal conduct and drug involvement and substance misuse security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On January 26, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse) and Guideline E (personal conduct). 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) implemented by the DOD on June 8, 2017.

Applicant responded to the SOR (Answer) on February 25, 2023, and elected to have the case decided on the written record in lieu of a hearing. The Government’s written case was submitted on April 29, 2023. A complete copy of the file of relevant

material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on July 18, 2023, and he did not respond. The case was assigned to me on November 6, 2023. The Government's documents identified as Items 1 through 4 are admitted in evidence without objection.

Findings of Fact

Applicant admitted all the SOR allegations in his Answer. He is 45 years old. He married in 1999, divorced in 2020, and he has two minor children. He has owned his home since December 2019. He earned an associate degree in 2006. He has worked as a design engineering manager for his current employer since May 2022. He has never held a security clearance. (Items 1-4)

Applicant used marijuana, with varying frequency, from approximately April 1996 to at least December 2022. (SOR ¶ 1.a) He used marijuana after completing his security clearance application in June 2022. (SOR ¶ 1.b) He intends to use marijuana in the future. (SOR ¶ 1.c) He first used marijuana in April 1996, and he used marijuana sporadically thereafter. Since December 2019, he used marijuana monthly to sporadically, at home with friends. It made him feel relaxed. Initially, his friends purchased the marijuana but since December 2019, he has purchased marijuana for his own consumption. He likened his use of marijuana to the way that people consume alcohol socially. He indicated that his marijuana use has not had a negative impact on him, and he would not rule out if he would continue to use marijuana. He indicated that recreational marijuana use is legal in his state. (Answer; Items 1-2, 4)

Applicant did not disclose the information about his marijuana use during his first background interview on August 11, 2022. He contacted the investigator and disclosed this information during his second background interview on August 24, 2022. He stated in his January 2023 response to interrogatories that he intended to use marijuana in the future, and that his employer's policy is to abstain from illegal drug use. In his Answer, he stated that his recreational use of marijuana is during his personal time, and he reiterated the possibility that he might continue using marijuana in the future. (Answer; Items 1-2, 4)

Applicant did not disclose his drug involvement in response to section 23 of his 2022 SCA, which inquired about illegal use of drugs or drug activity. He marked "No," and did not disclose his marijuana use in response to a question that inquired whether he had illegally used any drug or controlled substances in the last seven years, and to a question that inquired whether he had been involved in the illegal purchase, manufacture, cultivate, trafficking, production, transfer, shipping, receiving, handling or sale of any drug or controlled substance in the last seven years. (SOR ¶ 2.a; Items 1-3) He indicated during his second background interview that he did not disclose his marijuana use on his 2022 SCA because he did not feel comfortable disclosing it. He stated in his Answer that he later regretted this false answer and corrected it. (Answer; Item 4)

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

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

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 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant: "(a) any substance misuse . . . ;" "(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;" and "(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse."

Applicant used marijuana from 1996 to 2022. He used marijuana after he completed his SCA in June 2022. He also intends to use marijuana in the future. AG ¶¶ 25(a), 25(c), and 25(g) apply.

AG ¶ 26 provides the following potentially relevant mitigating conditions:

(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; and

(2) changing or avoiding the environment where drugs were used.

Applicant used marijuana from 1996 to 2022, he used marijuana after he completed his SCA in June 2022, and he intends to use marijuana in the future. I find that none of the above mitigating conditions are established.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions

about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant marked "No" and failed to disclose his marijuana use and purchase in response to relevant questions in section 23 of his 2022 SCA. He admitted that he did not disclose this information because he did not feel comfortable doing so. AG ¶ 16(a) is established.

AG ¶ 17 provides the following potentially relevant mitigating condition:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

When Applicant was initially interviewed by a background investigator in August 2022, he did not disclose information regarding his marijuana involvement. He did contact the investigator and disclose this information during his second interview in August 2022. As such, he made prompt, good-faith efforts to correct his omission regarding his relevant drug use on his 2022 SCA. AG ¶ 17(a) is established for SOR ¶ 2.a. However, although he disclosed his marijuana use during his second background interview in August 2022 background interview, he lied about it on his 2022 SCA and during his first background interview in August 2022. His omissions are not minor, and they occurred recently, in 2022. While he expressed his regret over his false answers,

his deliberate omissions in his SCA raise questions about his reliability, trustworthiness, and judgment. As such, I find that AG ¶¶ 17(a), 17(c), 17(d), and 17(e) are not established.

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 Guideline H and Guideline E in this whole-person analysis. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal conduct and drug involvement and substance misuse 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 - 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Candace Le'i Garcia
Administrative Judge