



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



In the matter of:)	
)	
[Name Redacted])	ISCR Case No. 22-01645
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Erin Thompson, Esquire, Department Counsel
For Applicant: *Pro se*

12/20/2023

Decision

HOGAN, Erin C., Administrative Judge:

On October 24, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H, Drug Involvement. The action was taken under Executive Order (EO) 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 (AG) implemented within the Department of Defense on June 8, 2017.

On November 17, 2022, Applicant answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on August 11, 2023. On September 15, 2023, a Notice of Hearing was issued, scheduling the hearing on September 27, 2023. The hearing was held as scheduled. During the hearing, the Government offered two exhibits which were admitted without objection as Government (GE) Exhibits 1 - 2. Applicant testified. He offered no exhibits. The record was held open until October 13, 2023, to allow Applicant the opportunity to submit additional exhibits. Applicant timely submitted three exhibits marked as AE A - C, which were admitted without objection. The transcript was received on October 11, 2023. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is granted.

Findings of Fact

In his answer to the SOR, Applicant denies all allegations in the SOR with explanations as mentioned below.

Applicant is a 23-year-old employee of a DOD contractor who seeks a security clearance. This is his first time applying for a security clearance. He has been employed with his current employer full-time since graduating from high school in 2019. In high school, he interned during summers for his employer. He initially worked at a location where a security clearance is not required. He transferred to a new duty position and location which requires a security clearance. He has some college credits, but no degree. He is single and has no children. (GE 1, Tr.9, 14-17)

(Note: The facts in this decision do not specifically describe employment, names of witnesses, or locations in order to protect Applicant's and his family's privacy. The cited sources contain more specific information.)

The SOR alleges Applicant used marijuana with varying frequency from January 2017 to September 2022. (SOR ¶ 1.a: GE 1; GE 2) The SOR also alleges Applicant intends to continue using marijuana. (SOR ¶ 1.b: GE 1 at 22; GE 2 at 7)

In his answer to the SOR, Applicant denies the allegation under SOR ¶ 1.a because he did not start using marijuana until 2019. He obtained a medical marijuana card on January 25, 2000. It expired on August 22, 2022. (AE A) He used medical marijuana for anxiety. He suffers from post-traumatic stress disorder (PTSD) related to an incident that happened when he was a child. He would use marijuana while alone about three evenings a week if he could not sleep. (Tr. 23; GE 1, GE 2 at 7)

On his March 3, 2022 security clearance application, in response to section 23-Illegal Use of Drugs or Drug Activity, "In the last seven (7) years, have you illegally used any drugs or controlled substances?," Applicant listed he used marijuana from January 2017 to March 2022. He indicated his use was related to a "medical card." Applicant also mentioned that when he was 19, he was pulled over and the police discovered 3.5 grams of marijuana in his car. (GE 1 at 21-22) During the hearing, Applicant testified that he put the incorrect date of when he began using marijuana on his security clearance application. It was his first time applying for a security clearance and he made mistakes on the security clearance application. He had a difficult time completing the application and no one was very helpful while he was completing it. He actually began using marijuana in 2019. (Tr. 20-21)

In May 2019, Applicant and his friend were driving to a concert. The police pulled them over. The police searched his car and discovered 3.5 grams of marijuana in the car. The police confiscated the marijuana and issued Applicant a ticket. He resolved the ticket as soon as he could. He denies that he ingested marijuana before the police pulled him over. (Tr. 27-28)

A follow-up question under section 23 - Illegal Use of Drugs or Drug Activity on his March 2022 security clearance application asked "Provide explanation of why you

intend or do not intend to use this drug or controlled substance in the future?” Applicant answered, “Medical card.” During an interview with the investigator who conducted his security clearance background investigation on March 28, 2022, Applicant told the investigator that he possessed a medical marijuana card and that he used medical marijuana to treat his anxiety and PTSD. He also mentioned that he intended to use medical marijuana in the future. (Gov 2 at 7)

Applicant believed that there was no security issue with using medical marijuana. He did not understand that although his marijuana use was legal under state law, it remained illegal under federal law. He was not made aware of this until his family members, (especially his grandfather) told him that marijuana use remained an issue when applying for a security clearance. He now understands that marijuana remains illegal under federal law. He stopped using marijuana about a month before his medical marijuana card expired (July 2022) because he felt he did not need it anymore. He did not reapply for a medical marijuana card when it expired in August 2022. He now deals with his anxiety by running and fishing. He does not intend to use marijuana in the future. He submitted a statement indicating he will abstain from all drug involvement and substance misuse. He acknowledged any future involvement or misuse may result in the revocation of his security clearance. (Tr. 23-31; AE B)

Whole-Person Factors

Mr. J.P. wrote a letter on Applicant’s behalf. He has known him for 11 years. He describes him as hard-working. He is interested in cars and machinery. He likes to know how things work. Mr. J.P. says Applicant is capable and has the work ethic to make him successful. (AE C at 1)

Mrs. T. B. has been Applicant’s step-grandmother since 2019. She has known him since 2017. She is aware Applicant used marijuana and had a medical card. She thought it was a poor decision on his part and marijuana use had no place when working for a defense contractor. In the summer 2022, he assured her that he had stopped using marijuana. She has observed a change in his judgment, clarity, and presence since that time. She has talked with Applicant about his future and he is committed to following rules and regulations.

Applicant occasionally takes his younger siblings on outings and drives them to after school activities. Mrs T.B. describes him as trustworthy and responsible for the safety of the children while in his care. Mrs. T.B. is writing a Letter of Recommendation for Applicant because he has “successfully overcome obstacles” and “demonstrated good choices and judgment for well over a year.” (AE C at 2)

Policies

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

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 applicant or proven by Department Counsel. . . ." The applicant 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 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 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).

DOD and Federal Government Policy on Marijuana Use

On October 25, 2014, the Director for National Intelligence, issued a memorandum titled, "Adherence to Federal Laws Prohibiting Marijuana Use" addressing concerns raised by the decriminalization of marijuana use in several states and the District of Columbia. The memorandum states that changes to state and local laws do not alter the existing National Security Adjudicative Guidelines. "An individual's disregard for federal law pertaining the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations."

On May 26, 2015, the Director of the United States Office of Personnel Management (OPM) issued a memorandum titled, "Federal Laws and Policies

Prohibiting Marijuana Use.” The Director of OPM acknowledged that several jurisdictions have decriminalized the use of marijuana, allowing the use of marijuana for medicinal purposes and/or for limited recreational use but states that Federal law on marijuana remains unchanged. Marijuana is categorized as a controlled substance under Schedule I of the Controlled Substances Act. Thus knowing or intentional marijuana possession is illegal, even if the individual has no intent to manufacture, distribute, or dispense marijuana.

On December 21, 2021, the Security Executive Agent (SecEA) promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications. It states in pertinent part:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a “whole-person concept.” This requires adjudicators to carefully weigh a number of variables in an individual’s life to determine whether that individual’s behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.

Guideline H, Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription drug 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 disqualifying conditions that could raise security concerns. I find the following drug involvement disqualifying conditions apply to Applicant's case.

AG ¶ 25(a) any substance misuse;

AG ¶25(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant admits he started using marijuana in 2019. He admits he applied for and received a medical marijuana card which was initially granted in 2020. (His recently expired medical marijuana card was granted on August 22, 2021.) While Applicant's marijuana use was legal under the state law where he resides, it remained illegal under federal law. Applicant indicated he intended to continue using medical marijuana in response to section 23 on his March 2022 security clearance application and to an investigator who interviewed him on March 28, 2022, during his security clearance background investigation. There is sufficient evidence to conclude that Applicant used and possessed marijuana. AG ¶ 25(a) and AG ¶ 25(c) apply. The Government also established a prima facie case that Applicant expressed an intent to continue using marijuana in the future. AG ¶ 25(g) applies.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline H, Drug Involvement. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions potentially apply to the Applicant's case:

AG ¶ 26(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 26(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.

AG ¶ 26(a) applies because Applicant stopped using marijuana around July 2022, approximately one month before his medical marijuana card expired. He sincerely believed that there was no issue with him using medical marijuana. He was not aware that marijuana use remained illegal under federal law. Once he was told by family members, his grandfather in particular, that marijuana use remains illegal under federal law and remains a security concern, he stopped using marijuana. More than 16 months have passed since he stopped using marijuana. He is focused on building a successful career. While initially, he could have used better judgment, once he learned that marijuana remained illegal under federal law he stopped using marijuana.

AG ¶ 26(b) applies because Applicant acknowledged his illegal drug use and signed a statement of intent indicating he will not use marijuana in the future. He acknowledged any future illegal use could result in the revocation of his security clearance. Once he learned that medical marijuana use remained illegal under federal law, he stopped using it and did not renew his medical marijuana card. He has not used marijuana since July 2022. He no longer intends to use marijuana.

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(a):

- (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 Applicant's favorable character references and his years of favorable employment with his employer. I considered his honesty during the security clearance process. He admitted he used medical marijuana on his security clearance application and during his background investigation interview. Once he discovered that marijuana use remained illegal under federal law, he stopped using marijuana and has abstained from marijuana use for over 16 months. I find Applicant mitigated the security concerns under Guideline H.

I considered the potentially disqualifying and mitigating conditions as well as the facts and circumstances surrounding this case. The security concerns under Drug Involvement are mitigated. Applicant has learned a valuable lesson. He is also aware that any future illegal marijuana use may result in the revocation of his security clearance.

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 eligibility for a security clearance. Eligibility for access to classified information is granted.

ERIN C. HOGAN
Administrative Judge