



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



In the matter of:)	
)	
)	ISCR Case No. 23-00545
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: *Pro se*

02/01/2024

Decision

BENSON, Pamela C., Administrative Judge:

Applicant’s illegal use of marijuana occurred in the past and under circumstances that are unlikely to recur. He was forthright about his illegal drug involvement on his security application (SCA), and he discontinued its use after he became aware that, despite marijuana use being legal under state law in his state of residence, it was still considered illegal under federal law and inconsistent with holding a security clearance. Applicant successfully mitigated the drug involvement and substance misuse and personal conduct security concerns. National security eligibility is granted.

Statement of the Case

On April 21, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H (drug involvement and substance misuse), and E (personal conduct). The CAF took action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines implemented by the DOD on June 8, 2017.

On May 17, 2023, Applicant responded to the SOR (Answer). He admitted, with explanation, SOR ¶¶ 1.a, 1.b, and 2.a. He requested to proceed with a determination on the written record by a Defense Office of Hearings and Appeals (DOHA) administrative judge. (Item 1) On June 22, 2023, Department Counsel submitted a file of relevant material (FORM) and provided a complete copy to Applicant. Department Counsel's FORM includes Items 1 through 5. After the receipt of the FORM, Applicant changed his mind and requested an appearance in person before a DOHA judge to present his case. His request was dated July 4, 2023, and I marked it as Hearing Exhibit (HE) 2 and placed it in the record. DOHA issued a notice of hearing setting the hearing for November 28, 2023. The hearing proceeded as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through 4 and HE 1, and Applicant submitted seven documents, I labeled as Applicant Exhibits (AE) A through G. I admitted all proffered exhibits into evidence without objection. DOHA received the hearing transcript (Tr.) on December 5, 2023.

Findings of Fact

Applicant is 30 years old. He is married and has two young daughters. In May 2017, he earned an associate degree in engineering, and two years later he earned two bachelor's degrees in applied mathematics and physics. In March 2020, he was employed by a government contractor as a laser physicist with a research and development group. In November 2021, he submitted his resignation to his employer. In January 2022, he moved to another state to begin employment with a different government contractor as an optical research engineer. In May 2023, he graduated with a master's degree in optical sciences from a prestigious university. (GE 1 and 3; Tr. 21, 23; Answer; AE B)

Drug Involvement and Substance Misuse

The SOR alleges under Guideline H that Applicant had used marijuana from about Fall 2011 to about June 2022, and after being granted a DOD security clearance in March 2021. (SOR ¶ 1.a) It also alleged that he purchased marijuana with varying frequency from January 2022 until June 2022. (SOR ¶ 1.b) Applicant admitted these allegations with clarification. He testified that he smoked marijuana once in the Fall of 2011; he used marijuana with varying frequency from about 2014 through 2017; and then he used marijuana from about January 2022 through June 2022, while he was living in a state where marijuana use was legal under state law. He was not aware that the state law conflicted with federal law, and, in the context of DOD security clearances, that marijuana use was considered illegal. He purchased marijuana from state-licensed vendors, and he used marijuana occasionally. He stated, "Upon [my employment] resignation, I fully and honestly believed my clearance ended with it." He also noted in his Answer, "I have never once seen or handled a classified document." (Answer; Tr. 24-25)

Applicant explained that he did not undergo a full security clearance investigation or was involved in a background interview by the time he had resigned from his employment in late 2021. He neither knew the definition of a "federal contractor" nor the

rules, laws, and regulations that went along with this concept in the context of DOD security clearances. He indicated in his November 2020 SCA that he never intended to use marijuana again. He was truthful when he wrote that because he was living in a state where marijuana use was illegal, and he assumed he would continue living in that state. After he moved to a different state in January 2022, he was asked by his current employer to reapply for a security clearance. In June 2022, Applicant conducted research and immediately stopped his use of marijuana after he discovered that such use, even in a state where it is legal, is still considered an illegal controlled substance under federal law. He disclosed his marijuana use on his January 2022 SCA. Applicant adamantly denied that he had been put on notice of the security significance of marijuana use when he applied for a security clearance in late 2020. As soon as he became aware of how federal law applied to him in a state where marijuana use is legal, his marijuana use ended. He has not used marijuana since June 2022, and he does not intend to use it in the future. (Answer; Tr. 24-26, 31-33 36, 39-40; GE 1 and 2)

In August 2022, Applicant was interviewed by an authorized DOD investigator about his listed use of marijuana on the June 2022 SCA. Applicant told the investigator that he had used marijuana weekly to monthly from January 2022 to June 2022. He also explained that he stopped his use of marijuana after he learned in June 2022 of the application of federal law and the overall security significance of such use. He told the investigator that he did not know that his initial security clearance could continue from one government contractor to the next. Applicant was remorseful about his recent use of marijuana. (GE 1 and 3)

In August 2023, his employer's facility security officer sent to employees the Office of the Under Secretary of Defense memorandum "Guidance Concerning Marijuana for Agencies Conducting Adjudications." Applicant provided this document as evidence to show that it was sent to employees due to the confusion about marijuana use in a state which had legalized its use and the consequence to DOD security clearance holders living in those states. The Memorandum disclosed that government contractor employees are to refrain from marijuana use upon initiation of the national security and vetting process. Applicant contends that he has followed this guidance because he immediately stopped his use of marijuana in June 2022, while he was under investigation by the U.S. Government. He discontinued his use of marijuana when he became aware of current federal law and the overall security significance. (AE A; Tr. 26-31, 36)

Personal Conduct

SOR ¶¶ 1.a and 1.b were cross alleged under Guideline E.

Character Evidence

Applicant testified that within three years, and just after he turned the age of 30, he received three employment promotions. He is now the senior optical research engineer in his group. He also submitted a character reference letter from a colleague who works with him. This colleague found Applicant to be a person of unquestionable integrity, goal-

oriented, and fully transparent. He also stated he was aware of the general confusion for new hires when they reside in a state where marijuana use is legal while seeking a DOD security clearance. He recommended Applicant be granted national security eligibility.

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

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 . . . 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

- (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 marijuana once in the Fall of 2011; he used marijuana with varying frequency from about 2014 through 2017; and then he used and purchased marijuana from about January 2022 through June 2022, in a state where marijuana use is legal. I find that AG ¶¶ 25(a) and 25(c) apply to SOR ¶¶ 1.a and 1.b.

The SOR alleged he used marijuana after he was granted a DOD security clearance in March 2021. Although Applicant held a security clearance that was granted in March 2021, there is no record evidence that he had access to classified information during the times he used marijuana. He also noted in his Answer, "I have never once seen or handled a classified document." Eligibility for access to classified information and the granting of access to classified information are not synonymous concepts. They are separate determinations. The issuance of a security clearance is a determination that an individual is eligible for access to classified national security information up to a certain level. Security clearance eligibility alone does not grant an individual access to classified materials. In order to gain access to specific classified materials, an individual must have not only eligibility (i.e., a security clearance), but also must have signed a nondisclosure agreement and have a "need to know." See ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022). I find that AG ¶ 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position," is not established.

I have considered the mitigating conditions under AG ¶ 26. The following 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 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 a 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.

The crux of this case is that Applicant used and purchased marijuana from January 2022 through June 2022, in a state that had legalized the use of marijuana. He did not know that his use of marijuana violated federal law. In June 2022, after conducting research, he discontinued his marijuana use altogether once he learned that in the context of DOD security clearances, marijuana is considered illegal under federal law. He decided then that he would never use marijuana again.

Applicant was candid with his history of marijuana use during his security clearance investigation. 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 has abstained from using marijuana for one-and-one-half years. He is doing well in his job and has been promoted three times in the last three years. Mitigating conditions AG ¶¶ 26(a) and 26(b)(3) apply. Drug involvement and substance misuse security concerns are mitigated.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern for 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

My analysis under Guideline H addressed Applicant's use and purchase of marijuana. The same issues were cross alleged under the personal conduct guideline.

No specific personal conduct allegations were raised beyond what was already raised under Guideline H. I have previously addressed the allegations and to do so under personal conduct is redundant and unnecessary. I find for Applicant regarding personal conduct security concerns.

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 Guidelines H and E, to include the factors in AG ¶ 2(d), in this whole-person analysis.

The federal 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 federal government can take into account 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 occurred under circumstances that are unlikely to recur. He has matured and is remorseful about his past involvement with marijuana. He was forthright about his drug-related involvement and provided full details about his marijuana use during his background interview with an authorized DOD investigator. He has made positive changes in his life. Given the entirety of the record evidence, I conclude that Applicant successfully mitigated the drug involvement and substance misuse and personal 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 and 1.b.: For Applicant

Paragraph 2, Guideline E: 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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Pamela C. Benson
Administrative Judge