



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



In the matter of:)	
)	
)	ISCR Case No. 23-01139
)	
Applicant for Security Clearance)	

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Emily Goeke, Esq.

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 during his background interview, when 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. His omission of marijuana use on his security clearance application (SCA) was unintentional. Applicant refuted the personal conduct security concern, and he successfully mitigated the drug involvement and substance misuse security concerns. National security eligibility is granted.

Statement of the Case

On July 18, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) 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 July 25, 2023, Applicant responded to the SOR (Answer). He admitted, with explanation, SOR ¶¶ 1.a 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. (Items 2 and 5)

On August 18, 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. DOHA provided notice to Applicant that he had 30 days from the receipt of the FORM to provide objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. The notice added that Applicant's lack of response may be considered as a waiver of any objections, and that the Administrative Judge would make a determination based solely on information included in the Government's FORM.

On August 30, 2023, Applicant received the FORM and its attachments. He submitted a response to the FORM within 30 days of receipt through his counsel and provided a statement of intent to abstain from marijuana use, and two letters of recommendation, which I labeled as Applicant Exhibits (AE) A, B, and C. No objections were raised, and I admitted into evidence all proffered exhibits.

Evidentiary Issue

While reviewing the evidence in the case file, I noticed that all but one of the documents in evidence, to include the written arguments provided by Department Counsel and Applicant's counsel, stated that Applicant's last use of marijuana occurred in May 2022. Applicant's statement of intent to abstain from marijuana use, however, listed the date of his last use of marijuana as "December 2022." (AE A) I sent an email for clarification to both attorneys in the case. I asked whether the date of December 2022 was a typo in AE A, or was this the actual date Applicant last used marijuana? Applicant's counsel replied that December 2022 was a typo in AE A, and that she would submit a corrected copy of AE A to show Applicant's last date of using marijuana was in fact May 2022. Applicant submitted the corrected exhibit, which I marked as AE D, and the email communications were marked as Administrative Exhibit I.

Findings of Fact

Applicant is 28 years old. He has never been married, and he does not have any children. In 2018, he earned a bachelor's degree in mechanical engineering. In August 2022, he completed a certificate of engineering leadership, and he is currently pursuing a master's degree in electrical and computer engineering. From April 2019 to October 2022, he worked for a government contractor as a systems engineer. Since November 2022, he has worked for his current employer, also a government contractor, as a signal-processing engineer. (Items 2, 3 and 4)

Drug Involvement and Substance Misuse

The SOR alleges under Guideline H that Applicant had used and purchased marijuana from about November 2021 to about May 2022, after being granted access to classified information by the DOD in 2019. (SOR ¶ 1.a) Applicant admitted the allegation, and stated at the time 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 only used marijuana “a handful of times in 7 months.” He was working full time and attending graduate school, and he had difficulty falling asleep, so he used marijuana as a sleep aid. After the school year ended in May 2022, he stopped his use of marijuana. Applicant has not used marijuana since May 2022, and he provided a statement of intent to abstain from marijuana use in the future. (Items 1-3; AE A)

Personal Conduct

Due to Applicant’s ignorance of state and federal laws, he did not disclose his use of marijuana on the security clearance application (SCA) he completed in December 2022. (SOR ¶ 2.a) He denied that his omission was intentional falsification. During his January 2023 background interview, he was completely candid about his marijuana use when questioned by an investigator. He stated that he did not realize that using marijuana was wrong. He used marijuana once about every one to two months as a sleep aid, and he purchased marijuana from a dispensary spending no more than \$10. He decided to stop using marijuana in May 2022 because he did not believe it was helping him with his sleep issues and because he also did not like the way it made him feel. He has never reported to work under the influence of marijuana, he is not dependent on marijuana, and he has never been arrested or needed counseling for illegal drug use. (Items 2, 3 and 5)

Character Evidence

Applicant submitted two character reference letters from colleagues who have worked with him in a government contractor employment setting. Both colleagues found Applicant to be a person of unquestionable integrity, hardworking, and fully transparent. They 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 and purchased marijuana on occasion between November 2021 to May 2022. I find that AG ¶¶ 25(a) and 25(c) apply to SOR ¶ 1.a.

Although Applicant held a security clearance that was granted in 2019, there is no record evidence that he had access to classified information during the times he used any illegal drugs. 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 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:

(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.

Applicant used and purchased marijuana for a short period of time in a state that had legalized the use of marijuana. He did not know that his use of marijuana violated federal law. He used marijuana as a sleep aid to help him with insomnia. In May 2022, he discontinued his marijuana use altogether. He decided then that he would never use marijuana again because he did not like it. He also signed a statement of intent that he would never use marijuana in the future.

Applicant was candid with his history of marijuana use during his January 2023 background interview. 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 nearly two years. Mitigating conditions AG ¶¶ 26(a) and 26(b)(3) apply. Drug involvement and substance misuse security concerns are mitigated.

Guideline E: Personal Conduct

Applicant admitted that when he completed his December 2022 SCA, he failed to provide complete or accurate information regarding his use and purchase of marijuana. Applicant's confusion about state and federal law cannot be construed as a willful and deliberate attempt to undermine the investigative process. One month after he completed the SCA, he participated in a background interview. It was at this time he learned the significance of federal law and the implications of holding a DOD security clearance. Applicant provided full and complete details about his use and purchase of marijuana from November 2021 to May 2022. I find that he did not deliberately and intentionally fail to disclose his illegal drug involvement with the intent to deceive.

The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission. ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

Applicant refuted the allegation of falsification of his SCA. No disqualifying condition under Guideline E was established in this record, so discussion of potentially mitigating conditions is not warranted.

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 refuted the personal conduct security concerns, and he successfully mitigated the 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:	FOR APPLICANT
Subparagraph 1.a.:	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