



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



In the matter of:)	
)	
)	ISCR Case No. 23-01784
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

02/21/2024

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H (drug involvement and substance misuse). Eligibility for access to classified information is denied.

Statement of the Case

On August 16, 2023, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H. Applicant responded to the SOR on August 23, 2023, and requested a hearing before an administrative judge. The case was assigned to me on November 28, 2023.

The hearing convened as scheduled on January 17, 2024. Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. Applicant testified, called four witnesses, and submitted Applicant Exhibits (AE) A through H, which were admitted without objection.

Findings of Fact

Applicant is a 61-year-old employee of a defense contractor. He has worked for his current employer since August 2021. He seeks to retain a security clearance, which he has held since about 2019. He earned a bachelor's degree in 2007 and a master's degree in 2010. He is married for the third time. He has an adult child. (Tr. at 32-33; GE 1, 2; AE F)

Applicant used marijuana when he was young, and then did not use it again for an extended period. He started smoking marijuana again in 2015 in a state where marijuana possession and use did not violate state law. He used marijuana about 10 to 12 times between about January 2015 and August 2017. He did not work for a defense contractor, and he did not hold a security clearance at the time. (Tr. at 34-35; Applicant's response to SOR; GE 1, 2)

Applicant went to work for a defense contractor (not his current employer) in February 2018. He applied for a security clearance, and it was granted in about May 2019. The Questionnaire for National Security Positions (SF-86) he submitted to obtain his clearance is not in evidence, but Applicant stated that he submitted one, and he was interviewed for his background investigation. He reported his marijuana use and discussed it during his background interview. He admitted at his hearing that he likely told the investigator that he would not use marijuana while holding a security clearance. (Tr. at 33-34, 39-41; GE 1)

Applicant moved to another state to accept his current job with a defense contractor in 2021. Marijuana possession and use does not violate state law in this state. His security clearance transferred with him. His employer has a drug-free workplace policy. He used marijuana about six times between about January 2022 and June 2022. He held a security clearance at the time, but he did not have access to classified information. He was going through a stressful time with the move to a new state, attempting to buy a new house, and the COVID-19 pandemic. He knew marijuana possession violated federal law, but he justified the use to himself by the fact that it did not violate state law. (Tr. at 30-31, 36-42; Applicant's response to SOR; GE 1, 2; AE H)

Applicant became an active member of a new church in June 2022. He stopped smoking marijuana. His participation in the church and its activities gave him a better way to deal with stress and problems. He is working on his physical fitness. He is remorseful for his actions. He has not used any illegal drugs since he joined the church, and his testimony that he does not intend to use illegal drugs in the future was sincere and credible. (Tr. at 30-32, 37-39, 44, 47-48; GE 1, 2; AE H)

Applicant submitted another SF-86 in December 2022. He reported his marijuana use. He fully discussed his illegal drug use during his background interview in February 2023. (Tr. at 38; GE 1, 2)

Applicant called witnesses, and he submitted documents and letters attesting to his excellent job performance and strong moral character. He is praised for his

dependability, responsibility, professionalism, loyalty, humility, trustworthiness, work ethic, honesty, reliability, dedication, patriotism, and integrity. He is recommended for a security clearance. (Tr. at 16-28; AE A-E, G)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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 for drug involvement and substance misuse is set out in AG ¶ 24:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant possessed and used marijuana from 2015 to 2017 and again from about January 2022 to June 2022. AG ¶¶ 25(a) and 25(c) are applicable. He held a security clearance when he used marijuana in 2022, but he did not have access to classified information. AG ¶ 25(f) is not applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. 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 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.

On October 25, 2014, the Director of National Intelligence (the Security Executive Agent (SecEA)) issued DNI Memorandum ES 2014-00674, "*Adherence to Federal Laws Prohibiting Marijuana Use,*" which states:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

On December 21, 2021, the 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.

Applicant was granted a security clearance in about May 2019 after divulging marijuana use between about January 2015 and August 2017. He admitted at his hearing that he likely told the investigator during his background interview that he would not use marijuana while holding a security clearance. As a result, he was justifiably granted a security clearance.

Applicant's marijuana use from 2015 to 2017 is mitigated. However, he did not keep his part of the bargain, and he used marijuana between about January 2022 and June 2022 while holding a security clearance. His testimony that he does not intend to use illegal drugs in the future was sincere and credible. However, I believe he was also sincere in 2019 when he told the background investigator that he did not intend to use illegal drugs in the future. His conduct casts doubt on his reliability, trustworthiness, and good judgment. None of the mitigating conditions are sufficient to mitigate Applicant's illegal marijuana use while holding a security clearance.

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 have incorporated my comments under Guideline H in my whole-person analysis. I also considered Applicant's favorable character evidence.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the security concerns under Guideline H.

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
Subparagraph 1.a:	Against Applicant, except for the language “while granted access to classified information,” which is found for Applicant
Subparagraph 1.b:	For Applicant

Conclusion

It is not clearly consistent with the national interest to continue Applicant’s eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge