



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



In the matter of:)	
)	
)	ISCR Case No. 23-02066
)	
Applicant for Security Clearance)	

Appearances

For Government: William H. Miller, Esq., Department Counsel
For Applicant: *Pro se*

03/19/2024

Decision

BORGSTROM, Eric H., Administrative Judge:

Applicant did not mitigate the security concerns triggered by his drug offenses, frequent marijuana use, and his expressed intent to continue to use marijuana. Eligibility for access to classified information is denied.

Statement of the Case

On November 15, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse) and Guideline J (criminal conduct). The CAS acted 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.

In Applicant’s November 24, 2023 response to the SOR (Answer), he admitted all of the allegations except SOR ¶ 1.e. He attached a one-page technical certification. He requested a decision by a Defense Office of Hearings and Appeals (DOHA) administrative judge based upon the written record in lieu of a hearing. (Answer)

On January 8, 2024, Department Counsel submitted a file of relevant material (FORM) and provided a complete copy to Applicant. Department Counsel's FORM includes six Items, which I have identified as Government Exhibits (GE) 1 through 6. In the FORM, Department Counsel provided Applicant notice that failure to respond to the FORM may be considered a waiver of any objections to the admissibility of GE 1 through 6.

On January 15, 2024, Applicant received the FORM and its attachments. On January 22, 2024, he submitted a six-page response (FORM Response), consisting of handwritten notations to the four-page FORM and Appellant's supplemental two-page statement. He did not raise any objections to the admissibility of any of the FORM exhibits. He did not attach any exhibits. This case was assigned to me on March 8, 2024. GE 1 through 6 are admitted without objection.

Findings of Fact

Applicant is 32 years old. He graduated from high school in 2011, and he attended college from August 2012 to March 2013. He resides with his girlfriend and one of his two minor children. Since June 2022, he has worked for a company that customizes automobiles, and his employment with the sponsoring DOD contractor is contingent upon his clearance eligibility. (GE 3, 4)

In July 2016, Applicant was pulled over while returning from a social gathering. A law enforcement officer smelled marijuana in the vehicle, and Applicant was arrested and charged with possession of marijuana (SOR ¶ 1.b.). The charge was later dismissed, but he was fined approximately \$150 or \$250. Applicant reported this charge in his September 6, 2022 Electronic Questionnaire for Investigations Processing (e-QIP), and he admitted this conduct during his security interview and in his Answer. (GE 2-4)

In August 2017, Applicant was waiting in a hotel parking lot in a borrowed vehicle, when a law enforcement officer approached and asked to search his vehicle. The search revealed marijuana, and Applicant was charged with (1) possession of marijuana with intent to sell (SOR ¶ 1.c.); and (2) misdemeanor possession of marijuana (SOR ¶ 1.d.). These charges arose from the same incident but are alleged separately in the SOR. Applicant reported this incident on his e-QIP and explained that he was "doing a favor for [a] friend." In February 2018, he was found guilty of Charge (2), and Charge (1) was dismissed. He was sentenced to one year in jail, of which one year was suspended. He was placed on probation for two years. He admitted this incident in his e-QIP, during his security interview, and in his Answer. (GE 2-6)

In his September 2022 e-QIP, under Section 23 – Illegal Use of Drugs and Drug Activity, Applicant admitted using marijuana from April 2011 until August 2022. He explained that he used it for pain management, and he admitted that he intended to use marijuana in the future (SOR ¶ 1.e). (GE 3)

During his December 13, 2022 security interview, Applicant admitted that he used marijuana almost daily between April 2011 and the date of the interview (SOR ¶ 1.a.). He explained that he had a state-issued medical marijuana card, which he used to purchase marijuana vape cartridges. He typically used marijuana at night to manage back pain. He claimed that he did not associate with individuals who used illegal drugs. During the interview, Applicant stated that his marijuana use would likely recur, and at no time during the interview did he express his intent to discontinue his marijuana use (SOR ¶ 1.e.). In his October 12, 2023 response to DOHA interrogatories, Applicant verified the accuracy of the security interview summary with no corrections, revisions, or additions. In his response, Applicant reported that he had not used marijuana or any controlled substances since his December 2022 security interview; however, he did not express his intent to abstain from marijuana possession and use in the future. (GE 4)

In his November 2023 Answer, Applicant stated that he last used marijuana in December 2022. He admitted possessing marijuana on his person at the time of his July 2016 arrest. As to the August 2017 arrest, he explained:

[A] friend ask me to do him a favor and drop something off for him. So I was young and dumb and did so. The worst mistake of my life.

In his Answer, Applicant denied any intent to use marijuana in the future. (Answer)

In his response to the FORM, Applicant acknowledged that he was aware that he was delivering marijuana when he was arrested in August 2017. He claimed that he “found out that [marijuana] wasn’t allowed even with a medical card” in December 2022 and discontinued his use. (FORM Response)

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(a), 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive 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 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

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

Marijuana is a Schedule I controlled substance under Federal law pursuant to Title 21, Section 812 of the United States Code. Schedule I drugs are those which have a high potential for abuse; have no currently accepted medical use in treatment in the United States; and lack accepted safety for use of the drug under medical supervision. Section 844 under Title 21 of the United States Code makes it unlawful for any person to knowingly or intentionally possess a controlled substance not obtained pursuant to a valid prescription.

On October 25, 2014, the then Director of National Intelligence (DNI) issued guidance that changes to laws by some states and the District of Columbia to legalize or decriminalize the recreational use of marijuana do not alter existing federal law or the National Security Adjudicative Guidelines, and that an individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security eligibility determinations.

Moreover, on December 21, 2021, the current DNI issued clarifying guidance concerning marijuana, noting that prior recreational use of marijuana by an individual may be relevant to security adjudications, but is not determinative in the whole-person evaluation. Relevant factors in mitigation include the frequency of use and whether the individual can demonstrate that future use is unlikely to recur.

Applicant's possession (through his use) of marijuana from April 2011 until December 2022 violated Federal drug laws. He has not provided any evidence to corroborate if and when he was issued a medical marijuana card by the state. More importantly, Applicant violated state drugs laws when he knowingly possessed marijuana in 2016 and knowingly delivered or distributed marijuana in 2017. AG ¶¶ 25(a) and 25(c) apply.

In his August 2022 e-QIP and during his December 2022 security interview, Applicant expressed his intent to use marijuana in the future. In his October 2023 response to DOHA interrogatories, he did not state that he would abstain from marijuana in the future. After the issuance of the SOR, he expressed his intent to abstain from marijuana possession and use. Given the timing of Applicant's recent expressed intent to abstain, he has failed to "clearly and convincingly commit to discontinue" his marijuana use. AG ¶ 25(g) applies.

Conditions that could mitigate the drug involvement security concerns are provided 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 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 bears the burden of production and persuasion in mitigation. The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *[Department of the Navy v. Egan, 484 U.S. 518, 528 (1988)]*, *supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b). (ISCR Case No. 10-04641 at 4 (App. Bd. Sep. 24, 2013))

Applicant's 11-year history of drug involvement includes frequent marijuana use and two drug offenses involving the police or courts. He knowingly violated state drug laws when he possessed marijuana in 2016 and when he distributed or delivered marijuana in 2017. There is no evidence in the record as to when Applicant was issued a medical marijuana card.

While his recent marijuana use may have complied with state drug laws, his marijuana possession violates Federal drug laws and any marijuana use violates DOD policies for clearance holders. There is no waiver or exception for medicinal marijuana use. Applicant indicated that he was unaware that his medicinal marijuana possession violated Federal drug laws until December 2022. His ignorance or uncertainty about whether marijuana possession was prohibited under Federal law does not excuse his

conduct. See ISCR Case No. 19-00540 at 3 (App. Bd. Dec. 13, 2019) (citing *Rhode Island v. Massachusetts*, 45 U.S. 591, 613 (1846)). More importantly, even after he was made aware of the Federal drug laws, he did not express his intent to abstain from future possession and use during his security interview or in his interrogatories.

There is no evidence in the record corroborating any of Applicant's claims as to his changed lifestyle and his discontinued involvement with marijuana users. During his security interview, he stated that he did not associate with individuals who used illegal drugs; however, until that interview, he did not believe his medicinal use was illegal. There is no evidence as to whether any of his associates use medicinal marijuana. Even accepting Applicant's uncorroborated testimony that he last used marijuana in December 2022, I must consider that he admitted using marijuana almost daily for over 11 years. Applicant's statement of intent to abstain from marijuana possession and use following the issuance of the SOR is undercut by its timing. Given the frequency and span of Applicant's marijuana use, his two drug offenses, and his repeated and recent statements of intent to use marijuana in the future, it is too soon to conclude that Applicant has established a pattern of abstinence and changed environment. Applicant has not mitigated the drug involvement and substance misuse security concerns.

Guideline J: Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant's three drug offenses (SOR ¶¶ 1.b.-1.d.) were cross-alleged under Guideline J. Applicant knowingly violated drug laws when he illegally possessed marijuana in 2016 and illegally delivered or attempted to sell marijuana in 2017. AG ¶ 31(a) applies. Applicant's illegal use of marijuana, in violation of Federal drug laws, was not alleged in the SOR and was not considered disqualifying conduct.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and

does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

In 2016 and 2017, Applicant knowingly violated state drug laws by his conduct precipitating the drug offenses. Although it has been over six years since Applicant's drug charges, it is necessary to consider evidence of Applicant's uncharged criminal behavior. Because there is no evidence as to when he was issued a medical marijuana card, it is unclear when he sought to comply with state drug laws. As noted above, Applicant's ignorance of Federal drug laws – prohibiting possession of marijuana – does not excuse this criminal behavior. Applicant has not provided any evidence showing successful rehabilitation, such as a good employment record or constructive community involvement. He did not mitigate the criminal conduct security concerns.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of trust 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 position of trust 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, Guideline J, and the factors in AG ¶ 2(d) in this whole-person analysis.

Applicant admitted his drug offenses, his marijuana use, and his intent to use marijuana in the future in his e-QIP and during his security interview. Notwithstanding his candor, it is too soon to conclude that he has established a pattern of abstinence and changed environment, given the frequency and span of Applicant's marijuana use, his

two drug offenses, and his repeated and recent statements of intent to use marijuana in the future. He has not mitigated the drug involvement and substance misuse and criminal conduct security concerns. With a longer period of abstinence from illegal drug use and evidence showing his successful rehabilitation and changed circumstances, Applicant may be able to mitigate these security concerns in the future.

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.e.:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant

Conclusion

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

Eric H. Bergstrom
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Administrative Judge