



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



In the matter of:)	
)	
)	ISCR Case No. 23-00750
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: John C. Lynch, Esquire, Department Counsel
For Applicant: Samuel C. P. Baldwin, Jr., Esq.

03/18/2024

Decision

HOGAN, Erin C., Administrative Judge:

On May 24, 2023, 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 (DOD) on June 8, 2017.

On June 11, 2023, Applicant timely answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on July 31, 2023. The case was assigned to me on January 3, 2024. On January 19, 2024, a Notice of Hearing was issued scheduling the hearing on February 28, 2024. The hearing was held as scheduled. During the hearing, the Government offered two exhibits which were admitted as Government Exhibits (GE) 1 – 2 without objection. Applicant testified and offered eight exhibits which were admitted as Applicant Exhibits (AE) A – H, without objection. After the hearing, the Government submitted documents and requested administrative notice pertaining to the [state] cannabis law and [state] medical cannabis law. The documents were marked as Administrative Notice Documents I and 2. Applicant’s counsel did not object. (HE III) The transcript was received on March 6,

2024, and the record closed on that date. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is granted.

Procedural Issue

During the hearing Department Counsel motioned to amend SOR ¶ 1.a in order to conform with the evidence in accordance with paragraph E3.1.17 of the Directive. The proposed amendment read:

1.a. From about May 2018 until at least September 2022, you used marijuana with varying frequency, including while granted access to information or holding a sensitive position.

The SOR amendment added the phrase at the end “. . . or holding a sensitive position.” Applicant’s counsel did not object to the proposed amendment. The motion to amend the SOR was granted. (Tr. 25-26)

Findings of Fact

Applicant is a 30-year-old employee for a DOD contractor who seeks a security clearance. He has been employed with the DOD contractor since November 2022. He previously worked for another DOD contractor from August 2014 to August 2022. He initially received a security clearance in 2014 while working for this DOD contractor. He was unemployed from September 2022 to October 2022. He has some college credits. He is single, has no children, and currently lives with his parents and brother. (Tr.23-29; GE 1) (Note: The facts in this decision do not specifically describe employment, names of witnesses, locations, or other sensitive information in order to protect Applicant’s and his family’s privacy. The cited sources contain more specific information.)

Under the drug involvement concern, the SOR alleged Applicant used marijuana with varying frequency from May 2018 to at least September 2022, including while granted access to classified information or holding a sensitive position. (SOR ¶ 1.a: GE 1, Section 23 at 25-26; Tr. 26)

In his answer to the SOR, Applicant admitted the SOR allegation. He listed his marijuana use in response to Section 23 – Illegal Use of Drugs or Drug Activity of his November 2022 security clearance application. He also indicated he received a medical cannabis card from the state in early 2022. He states he used a marijuana edible in 2018. He indicated he suffered from chronic pain these past few years and believed it would provide some relief. He tried a couple more times after his first use. He recently tried marijuana again in 2022 after receiving the medical cannabis card. He last used marijuana in September 2022. He felt the marijuana did not provide much relief and cancelled his medical marijuana card. (GE 1, section 25-26)

Applicant suffers from a chronic debilitating illness which causes him to endure a significant amount of pain. He has had three major surgeries in January 2017, June 2019, and May 2022. (AE 1, enclosures 1-4) Applicant first tried marijuana in 2018 to see if it would provide him some pain relief. During the hearing he recalled that he used

marijuana twice over a weekend. A friend gave him some THC gummies. He decided that it did not provide him significant pain relief so he stopped using it. (Tr. 14-17)

Applicant's second surgery occurred in June 2019 because his symptoms and issues had returned. The second surgery was successful for a while. He was given pain medication from his doctor. In 2022, his health issues returned and he underwent a third surgery on May 2022. (Tr. 18-19)

On March 30, 2022, Applicant decided to apply for medical marijuana cannabis card. The use of medical marijuana is legal in the state where he resides and works. The card was approved on April 26, 2022. The state advised Applicant to take this card to his provider for certification and then to any state-licensed dispensary to purchase cannabis. (AE A, enclosure 5) Applicant testified that he did not have his cannabis card certified by his medical provider. He was not aware that he needed to do this. His mother also has a state medical cannabis card. She gave Applicant a marijuana capsule in September 2022 after his third surgery. He wanted to try it again to see if marijuana would be a helpful pain management option. He decided the marijuana was not helping his symptom so he turned in his medical marijuana card to the state on October 27, 2022. (Tr. 19-21, 39-41; AE A, enclosure 6)

Under cross-examination, Department Counsel questioned Applicant about his alleged statement during his background investigation interview that he used marijuana a total of five times between May 2018 and September 2022. (GE 2 at 2) Applicant testified that he may have ingested two marijuana edibles on two occasions during the weekend he first used marijuana in May 2018. He indicates he used a marijuana capsule on one occasion in September 2022. While there may be some inconsistencies about the number of times Applicant used marijuana, I do not find them to be material. (Tr. 32-34)

The third surgery really improved Applicant's health. He currently only needs to take Tylenol to treat his pain episodes. He does not intend to use marijuana again. On February 14, 2024, he signed a sworn statement of intent to refrain from marijuana use and other illegal drugs. He acknowledges that any future use of marijuana or other illegal drugs will result in the loss of his security clearance. (Tr. 21-22; AE A, enclosure 8)

Whole-person Factors

Mr. A, Applicant's former Operations Lead and Supervisor, wrote a letter on Applicant's behalf. He has worked closely with him since November 2021. He states Applicant has a strong work ethic and leadership qualities that made a lasting impact on the organization. He has consistently demonstrated an ability to collaborate with team members. He fosters a positive work environment. He is aware of Applicant's health issues. Despite his health issues, he has consistently displayed resilience and maintained a high level of productivity. He has demonstrated a clear understanding of the importance of adhering to workplace policies. He whole-heartedly recommends Applicant for a security clearance. (AE A, section 7 at 1)

Mr. B, has been friends with Applicant for 14 years. They went to high school and college together. They studied and attended many of the same classes together. Applicant was in and out of the hospital during college. His medical condition prevented him from completing his college degree. Applicant is always ready and willing to lend a hand to friends and families. He has assisted people with moving, computer issues, building decks, clearing trees and chopping wood. After major multiple surgeries, his health has improved. He describes his friend as a solid performer, honest, reliable, respectable, loyal and dependable. He is not a security risk. (AE A, section 7 at 2)

Mr. C, another former operations lead, vouches for Applicant's extraordinary performance, professional demeanor, and adherence to handling classified information with absolute accountability. His tenacious work ethic, technical expertise, and ability to lead has a deep-rooted effect on our organization. (AE A, section 7 at 3)

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 Director of National Intelligence signed the memorandum, *Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*. It emphasizes that federal law remains unchanged with respect to the illegal use, possession, production and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the “whole-person concept” stated under SEAD 4, to determine whether the applicant’s behavior raises a security concern that has not been mitigated.

The December 21, 2021, memo also states the use of CBD products may be relevant to adjudication in accordance with SEAD 4. Although the passage of the Agricultural Improvement Act of 2018 excluded hemp from the definition of marijuana within the Controlled Substances Act, products containing greater than a 0.3 percent concentration of delta-9 tetrahydrocannabinol (THC), a psychoactive ingredient in marijuana, do not meet the definition of “hemp.” Accordingly, products labeled as hemp-

derived that contain greater than 0.3 percent THC continue to meet the legal definition of marijuana, and therefore remain illegal under to use under federal law and policy. Additionally, agencies should be aware that the percentage of THC cannot be guaranteed, thus posing a concern pertaining to the use of a CBD product under federal law. Studies have shown that some CBD products exceed the 0.3 percent THC threshold for hemp, notwithstanding advertising labels. Therefore, there is a risk that using these products may nonetheless cause sufficiently high levels of THS to result in a positive marijuana test under agency-administered employment of random drug testing programs. Should an individual test positive, they will be subject to an investigation under specific guidelines established by their home agency.

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 potentially 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(f) any illegal drug use while granted to access to classified information or holding a sensitive position.

The SOR alleges and Applicant admits he used marijuana on several occasions from May 2018 until September 2022. Specifically, he used marijuana several times in 2018 and on one occasion in September 2022. He did not purchase the marijuana, but he possessed it when he used it. He admits he was granted access to classified information, but claims he worked on unclassified tasks. The nature of his work would be considered sensitive. AG ¶¶ 25(a), 25(c) and 25(f) apply.

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 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's use of marijuana was infrequent. He used it no more than five times, several times in 2018 and once in September 2022, more than 18 months ago. His reason for using marijuana was to see if it would alleviate the pain related to his chronic medical condition. In 2022, he was under the mistaken belief that he could use marijuana because he had a state-issued medical marijuana card. The marijuana did not provide much pain relief. He soon surrendered his state-issued medical marijuana card in October 2022. Applicant did not try marijuana in order to get high. He was looking for pain relief. His third surgery has been successful and he does not suffer as much pain. Applicant's decision to use marijuana occurred under unusual circumstances. It is unlikely to recur and does not cast doubt on his current, reliability, trustworthiness or good judgment. He disclosed his marijuana use on his November 2022 security clearance application.

AG ¶ 26(b) applies. Applicant acknowledged his illegal drug use on his most recent security clearance application and during the hearing. He has established a pattern of abstinence. The last time he tried marijuana was 18 months ago. Each time he used marijuana he ingested a THC gummy or capsule. He did not smoke it. He provided a sworn and notarized statement of intent to abstain from illegal drugs. He acknowledged that any future use of illegal drugs may result in the revocation of his security clearance. He was forthcoming about his marijuana use on his security clearance application and during the hearing. He admits he was wrong when he used marijuana between 2018 and 2022 after being granted a security clearance and employed in a sensitive position. His last use of marijuana was in September 2022. He

demonstrated an appropriate period of abstinence. He was never a habitual marijuana user, his intention was to seek pain relief for his chronic medical condition.

Applicant met his burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

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.

There are reasons that support not granting a security clearance to Applicant. Questions are raised about Applicant's judgment because of his admitted history of illegal drug use. I find the mitigating reasons outweigh the disqualifying reasons in Applicant's case. He fully disclosed his marijuana use on his November 2022 security clearance application. He has not smoked marijuana since September 2022. His use was minimal. He signed a statement of intent to refrain from all drug involvement and substance misuse and acknowledged that any future substance misuse could result in the revocation of his security clearance. I considered the letters from two of Applicant's co-workers. He is highly regarded at his place of employment. A close personal friend also attests to his good character.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has learned a significant lesson. While his marijuana use showed poor judgment, especially after being granted a security clearance, he fully disclosed his marijuana use on his most recent security clearance application, and accepted responsibility for his actions. While his search for pain relief for his chronic medical condition does not grant him permission under federal law to use marijuana, one can easily understand his reasons for trying it. He tried marijuana only on a few occasions. He learned from his mistake in judgment and took steps to demonstrate his intent to refrain from illegal marijuana use. Applicant is aware that should he illegally use marijuana in the future, it is likely that his security clearance will be revoked. Concerns raised by Applicant's illegal marijuana use are mitigated.

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

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