



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



In the matter of:)	
)	
)	ISCR Case No. 23-01241
)	
Applicant for Security Clearance)	

Appearances

For Government: Mark D. Lawton, Esq., Department Counsel
For Applicant: *Pro se*

04/03/2024

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Guideline H, drug involvement and substance misuse security concerns, Guideline E, personal conduct, and Guideline J, criminal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On August 2, 2023, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H, E, and J. The action was taken 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) effective on June 8, 2017.

Applicant answered the SOR on August 10, 2023, and elected to have his case decided on the written the record in lieu of a hearing. Department Counsel submitted the Government’s file of relevant material (FORM), and Applicant received it on November 20, 2023. He was afforded an opportunity to file objections and submit material in

refutation, extenuation, or mitigation within 30 days of receipt of the FORM. The Government's evidence is identified as Items 1 through 3. Applicant did not provide a response to the FORM. There were no objections to any of the evidence and Items 1 through 3 are admitted in evidence. The case was assigned to me on February 27, 2024.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a through 1.c under Guideline H, drug involvement and substance misuse. SOR ¶ 1.c was cross-alleged under Guideline E, personal conduct, and SOR ¶¶ 1.b and 1.c were cross-alleged under Guideline J, criminal conduct. Applicant did not admit or deny the Guideline E or Guideline J allegations. In the FORM, the Government requested he provide a response to these allegations. He did not respond to the FORM. Because Applicant admitted the factual allegations in Guideline H, I will consider those admissions when analyzing the Guidelines E and J allegations. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 36 years old. He graduated from high school in 2006. He married in 2015 and has two children, ages 10 and 8. He has been employed by a federal contractor since September 2022. (Item 2)

In November 2022 Applicant completed a security clearance application (SCA). He disclosed he was terminated from his job in July 2020. He had worked for this employer since April 2013. He was terminated because the employer had a zero-tolerance drug policy, and he tested positive marijuana on a random drug test. (Item 2)

In Applicant's SCA he admitted he used marijuana from December 2018 to May 2022. He disclosed that he used it frequently from 2018 to 2020, and on and off after then until May 2022. He disclosed he was given a prescription for marijuana to help with depression after he and his wife separated. He disclosed that he did not intend to use it in the future because "I have no desire to go back to it. Things are good at home and work again." He further disclosed he was happy with his current life situation and things that "were bringing me down are no longer in my life/limited." (Item 2)

Applicant was sent government interrogatories, which he responded to in July 2023. He affirmed the accuracy of his interview and statements he made to a government investigator in January 2023 and adopted them as true and correct. (Item 3)

During Applicant's interview with the government investigator, he stated he was terminated from his employment after he tested positive for marijuana. He said he used marijuana almost daily from 2018 to July 2020 and then weekly or monthly after his termination until May 2022. He said he used it to help his overall mood and depression and to help him relax. He used marijuana by himself or with his wife. They would put the children to bed and smoke marijuana to relax. He said from approximately 2019 to May 2022, he obtained marijuana from a medical dispensary in his state. Before then he would

obtain it from friends. He told the investigator that he felt dependent on marijuana as a means to relax and help him sleep. It helped with his depression. He did not participate in any drug education classes or receive any type of drug treatment.

The government interrogatories provided the following inquiry and requested Applicant respond. It stated:

Marijuana use remains illegal under Federal law and therefore use is prohibited for individuals who hold a security clearance with the Department of Defense. Please provide an update on your marijuana use and your future intentions regarding marijuana use. Will you submit to ceasing all use of marijuana to possess a Department of Defense security clearance and understand that any future use of illegal drugs will result in an immediate revocation of your clearance?

Applicant checked the “yes” response, but he did not provide an update as to his use of marijuana. (Item 3). He did not provide evidence that he had a prescription for marijuana use issued by his state. No other evidence was provided. (Item 3) As noted above, Applicant did not respond to the FORM, so he provided no more recent information about any drug involvement.

Policies

When evaluating an applicant’s national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 an applicant may deliberately or inadvertently fail to 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).

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, 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.

AG ¶ 25 provides conditions that could raise security concerns. The following are potentially applicable:

- (a) any substance misuse;
- (b) testing positive for an illegal drug; and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia.

Applicant used marijuana with varying frequency from about December 2018 to about May 2022. He possessed and purchased marijuana. He was fired by his employer after testing positive for marijuana during a random drug test. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from drug involvement and substance misuse. The following mitigating conditions under AG ¶ 26 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 to overcome the 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 being 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 used marijuana daily from December 2018 to July 2020. He was fired from his job when he tested positive for marijuana use. His employer had a zero-tolerance drug policy. This did not deter Applicant as he continued to use marijuana after his job termination and until May 2022. He used marijuana with his wife in the evenings to help them relax. The government interrogatories requested he provide an update about his marijuana use. He did not provide an update but indicated his intent to cease using it in the future by checking "yes." He also had an opportunity to provide a response to the FORM to update whether he continued to abstain from marijuana use. He did not respond to the FORM. Therefore, he did not provide updated information about his current use or about whether his wife continues to use marijuana in their home. He stated he was prescribed marijuana for depression but is doing better. He did not provide evidence that he had a medical marijuana card or when he received it. Because Applicant requested a determination on the record without a hearing, I had no opportunity to question him about his illegal drug use or evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). I am unable to conclude Applicant's drug use was so long ago or happened under circumstances that are unlikely to recur. His obvious continued association with his wife continues to raise a concern, since they used marijuana together. None of the above mitigating conditions apply.

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. The following will normally result in an unfavorable national security eligibility determination,

security clearance action, or cancellation of further processing for national security eligibility:

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I find the following potentially applicable:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing . . .

Applicant was fired in 2020 from a job he held for seven years for testing positive for marijuana. His employer had a zero-tolerance drug policy. He disclosed he was using marijuana on a daily basis while employed from December 2018 until his termination. He continued using marijuana after his termination until May 2022. The SOR alleges his termination for testing positive for marijuana under the personal conduct guideline. My analysis under Guideline H, drug involvement and substance misuse also applies under the personal conduct guideline. The above disqualifying condition applies.

The following mitigating conditions under AG ¶ 17 are potentially applicable to the disqualifying security concerns based on the facts:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate the vulnerability to exploitation, manipulation, or duress; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant's employer had a zero-tolerance drug policy. He reported that he used marijuana daily from December 2018 until he was terminated from employment in July 2020. He continued to use marijuana after he was fired. He said he used it to control his moods and depression and also to relax. He has not provided evidence of positive steps

to alleviate his moods or depression. He did not provide a diagnosis from a doctor or evidence that he was later prescribed marijuana for medical purposes. He obviously continues to associate with his wife with whom he used marijuana. It is unknown whether she continues to use marijuana. His conduct was not minor and occurred over a significant period of time while he was employed. None of the above mitigating conditions apply.

Guideline J: Criminal Conduct

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

Criminal activity creates doubt about a person'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.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 31, and the following is potentially applicable:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and
- (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 used marijuana from December 2018 to May 2022. He possessed and purchased marijuana. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from criminal conduct. The following mitigating conditions under AG ¶ 32 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.

Applicant's uses and purchases of marijuana were cross-alleged under Guideline H. The same analysis applies to the criminal conduct concerns. Applicant has not provided an update as to his current marijuana possession and use. He did not provide evidence that he was prescribed marijuana for medicinal purposes. This use is still in violation of federal law but could be considered in mitigation. His failure to follow the rules of his employer by using marijuana daily from December 2018 until he tested positive in July 2020 raises concerns about his willingness to follow rules and regulations. Even after his termination, he continued to use marijuana. He has not provided evidence of successful rehabilitation. He did not provide an update as to his current marijuana possession, use, or abstinence. Insufficient time has passed to conclude future marijuana possession and use is unlikely. There is insufficient evidence to apply the above mitigating conditions.

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 the 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, E, and J in my whole-person analysis.

Applicant failed to meet his burden of persuasion. After weighing the disqualifying and mitigating conditions under Guidelines H, E, and J and evaluating all the evidence in the context of the whole person, I conclude Applicant failed to mitigate the security concerns under Guideline H, drug involvement and substance misuse, Guideline E, personal conduct, and Guideline J, criminal conduct.

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.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge