



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



In the matter of:)
)
) ISCR Case No. 23-01035
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: Jeffrey S. Gard, Esq.

05/10/2024

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the security concerns under Guideline H (drug involvement and substance misuse). Eligibility for access to classified information is granted.

Statement of the Case

On June 9, 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 4, 2023, and requested a decision based on the written record in lieu of a hearing. The Government’s written case consisted of a file of relevant material (FORM). Applicant responded to the FORM on December 18, 2023, and changed his request to a hearing before an administrative judge.

The case was assigned to me on February 1, 2024. The hearing convened as scheduled on April 4, 2024. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. Applicant testified and submitted Applicant Exhibits (AE) A through H, which were admitted without objection. He submitted a memorandum and case law that I have marked collectively as Hearing Exhibit (HE) I and considered without objection.

Findings of Fact

Applicant is a 48-year-old employee of a defense contractor. He has worked for his current employer since January 2023. He previously worked for the same employer and held a security clearance from 2004 to 2014. He earned a bachelor's degree in 1999 and a master's degree in 2007. He is married with two children. (Tr. at 17-18, 28-30, 35; GE 1, 2)

Applicant lives in a state where recreational marijuana possession and use do not violate state law. Cultivation and sale of marijuana are also not against state law but are strictly regulated. After he was laid off in 2014, Applicant worked in a business owned by his father. They were approached by a marijuana grower about using their product in the business. They decided their existing product was not right for the cannabis industry, but they saw opportunities in that field. They developed software and hardware products that enabled marijuana growers to better comply with the state's regulations. They took their company public, with Applicant and his father the major shareholders. Applicant was also a senior executive in the company. (Tr. at 17-22, 30-34; Applicant's response to SOR; GE 1-3; AE B, C, G)

Applicant's company sold their products to the growers, but his company's owners and employees never came in contact with marijuana. They had to register with the state as a cannabis company. Cannabis growers, even ones licensed by a state, are considered illegal companies by the federal government and the IRS. Applicant's company is not treated by the IRS or the federal government as an illegal company. (Tr. at 22-23, 32-33; Applicant's response to SOR; GE 1-3; AE B, C, G)

Applicant never used illegal drugs of any kind before his business became involved in the cannabis industry. He became more aware of its properties and how many view it as having medicinal properties. He did not intend to return to working in a job that required a security clearance, and he started using marijuana edibles in about 2017. The marijuana was obtained from state-regulated dispensaries. He used marijuana recreationally and to help him sleep about four times a year until August 2022, which is the last time he used any illegal drug. (Tr. at 18, 24-25, 36-37; Applicant's response to SOR; GE 1, 2)

Applicant saw an opportunity to return to work for the same defense contractor he worked for until 2014. He submitted a Questionnaire for National Security Positions (SF-86) in December 2022. He reported his use of marijuana. He indicated he did not intend to use marijuana in the future so that he "can get and keep a security clearance." He also reported his company's involvement in the marijuana business. He wrote: "At this time and upon hire, I will stop my daily activities and tasks with the company. However, I am a shareholder in the company. Additionally, my father is the CEO." He fully discussed his marijuana use and his company's business during his background interview in February 2023. (Tr. at 23-26, 38; GE 1, 2; AE A)

Applicant terminated his position with his former company in December 2022. He sold his shares in the company to his father and uncle in July 2023 for \$500. He 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. (Tr. at 23-26, 34-35, 38; Applicant's response to SOR; AE E, H)

Applicant submitted documents and letters attesting to his excellent job performance and strong moral character. He is praised for his judgment, reliability, dedication, and trustworthiness. (AE A, D, F)

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.

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 (*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 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.

* * *

Finally, with regard to the topic of investments, agencies should note that an adjudicative determination for an individual’s eligibility for access to classified information or eligibility to hold a sensitive position may be impacted negatively should that individual knowingly and directly invest in stocks or business ventures that specifically pertain to marijuana growers and retailers while the cultivation and distribution of marijuana remains illegal under the Controlled Substances Act. Under [the adjudicative guidelines’] guidance for personal conduct (Reference B, Guideline E), a decision to invest in an activity, including a marijuana-related business, which the individual knows violates federal law could reflect questionable judgment and an unwillingness to comply with laws, rules, and regulations. That is, it is appropriate for adjudicative personnel to consider whether an individual is knowingly facilitating violations of the Controlled Substances Act by engaging in such investments. On the other hand, if the marijuana-related investment is not direct, such as an investment in a diversified mutual fund that is publicly-traded on a United States exchange, adjudicators should presume that individual did not knowingly invest in a marijuana-related business; thus, the indirect investment should not be considered relevant to adjudications.

In some instances, the investment itself may be illegal, which is also relevant to [the adjudicative guidelines'] guidance for criminal conduct (Reference B, Guideline J), which by its very nature calls into question an individual's ability or willingness to comply with laws, rules, and regulations. However, under the whole-person concept, any mitigating factors should be considered. For example, if an individual holds direct stock investments pertaining to marijuana growers and retailers, divestment of such activity or disassociation of such activity should be considered a mitigating factor when rendering an adjudicative decision.

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); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant possessed and used marijuana. AG ¶¶ 25(a) and 25(c) are applicable. The question of whether his involvement with his company generates any drug involvement disqualifying conditions is more difficult. His company provided hardware and software products to the cannabis industry. His company and its employees never directly handled or possessed marijuana, but it facilitated its distribution in a state where the cannabis industry was legal under state law, but heavily regulated and illegal under federal law. I considered the tax case law provided by Applicant. While the federal government would never seek to prosecute Applicant, his company, or any of its employees, I find that they technically violated federal law as a principal (aider and abettor, accomplice, accessory, co-conspirator). AG ¶ 25(c) is 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.

Applicant lives in a state where recreational marijuana possession and use do not violate state law. Cultivation and sale of marijuana are also not against state law but are strictly regulated. He and his father developed software and hardware products that enabled marijuana growers to better comply with the state's regulations. His former company was never directly involved with the marijuana product.

Applicant was never a marijuana user, but through his former company, he became more aware of its properties and how many view it as having medicinal properties. He started using marijuana edibles obtained from state-regulated dispensaries in about 2017. He used marijuana recreationally and to help him sleep about four times a year until August 2022, which is the last time he used any illegal drug.

Applicant realized that marijuana use and involvement in the cannabis industry were inconsistent with holding a security clearance. He terminated his position with his former company in December 2022, and he sold his shares in the company in July 2023. He 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.

I conclude that Applicant's conduct no longer casts doubt on his reliability, trustworthiness, and good judgment. I find that he has abstained from illegal drug involvement for an appropriate period, and that illegal drug involvement is unlikely to recur. AG ¶¶ 26(a) and 26(b) are applicable.

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 without questions or doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated 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: For Applicant

Subparagraphs 1.a-1.b: For Applicant

Conclusion

It is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Edward W. Loughran
Administrative Judge