



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



In the matter of:)	
)	
)	ISCR Case No. 23-00344
)	
Applicant for Security Clearance)	

Appearances

For Government: Patricia M. Lynch-Epps, Esq., Department Counsel
For Applicant: *Pro se*

07/09/2024

Decision

MURPHY, Braden M., Administrative Judge:

Applicant used marijuana on three occasions during and shortly after college, in 2022. He provided sufficient evidence to mitigate resulting security concerns under Guideline H, drug involvement and substance misuse. Applicant’s eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 12, 2022. On March 28, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement and substance misuse. The DOD acted under Executive Order 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 Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective on June 8, 2017.

Applicant answered the SOR on April 3, 2023, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on January 22, 2024. On January 31, 2024, DOHA issued a notice scheduling the hearing for March 19, 2024, to occur virtually through an online platform.

I convened Applicant's hearing as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 4. Government Exhibits 1 and 4 were admitted without objection. Government Exhibits 2 and 3 are discussed below. Applicant testified and submitted three documents, which were marked as Applicant Exhibits (AE) A, B, and C, all of which were admitted without objection.

Government Exhibit 2 is an unauthenticated summary of Applicant's November 2022 background interview. He adopted it as accurate subject to one change: he requested that one sentence, "The only drug used is marijuana." be changed to "The only drug used is Delta-8/THC." (GE 2 at 2) This was done without objection and GE 2 was admitted. (Tr. 19-23)

Government Exhibit 3 is an interrogatory response submitted by Applicant to DOD in January 2023. For many of the questions asked, he was supposed to check boxes marked "YES" or "NO" with the opportunity for comment. On the copy of GE 3 submitted by Department Counsel, it appeared that Applicant had not fully done so, as several answers were blank. (GE 3) In fact, as he clarified at hearing, Applicant had answered all the questions, checking various boxes with a yellow highlighter. I construed his clarifying comments as an objection to GE 3 on grounds of completeness. He then submitted a complete copy of GE 3 as Applicant Exhibit A, with the highlights visible. Both GE 3 and AE A were admitted. (Tr. 23-32)

Sua sponte, near the end of the hearing, I took administrative notice of a memorandum issued by the Director of National Intelligence (DNI) (Administrative Notice (AN) I). discussed below and provided it to the parties. (Tr. 92-93; HE III) I left the record open until March 29, 2023, to allow Applicant the opportunity to submit additional evidence but he did not do so. DOHA received the hearing transcript (Tr.) on March 29, 2023.

Findings of Fact

In his SOR response, Applicant admitted the sole allegation (SOR ¶ 1.a). His admission is incorporated into the findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 25 years old. He graduated from high school in 2017. He earned a bachelor's degree in computer science in December 2022, graduating *magna cum laude*. He is not married and has no children. In March 2021, while still in college, he was offered a position as a paid student intern for a research institute of a large state university, through a "co-op" work-study program. He began that position in May 2021.

He submitted an SCA in September 2022, shortly before he was to graduate. (GE 1, AE B, AE C; Tr. 36-38, 67) He remained in the co-op position until he graduated from college, in December 2022. (Tr. 67) Applicant has never held a clearance before. (Tr. 11)

In January 2023, Applicant was offered a temporary, full-time position at the research institute, which he accepted. The position became permanent in August 2023, and he remains there now, at an \$82,000 annual salary. (Tr. 38-41, 45-47, 53-54, 65-66).

Applicant disclosed on his September 2022 SCA that he had used marijuana or THC between March 2022 and September 2022, as alleged. (GE 1 at 27; SOR ¶ 1.a) He said he did not buy or sell marijuana, he “only” smoked it when invited by friends and in moderation. (GE 1 at 27) He also said, “it is good to use as a relaxant,” similar to tobacco. He asserted his understanding that THC has “less impact on health than tobacco” and he does not smoke cigarettes. He said, “I believe that THC has less impact on cognitive impairment than alcohol” and as long as it is used in moderation, there would be no “repercussions.” He said, “I am willing to cease use as long as it is banned while I have my clearance but I would like to continue use if at all possible.” (GE 1 at 28; Tr. 41-42)

Applicant had a background interview in November 2022. He confirmed the information he disclosed on his SCA. He said he used Delta-8/THC at his residence and with his friends. (As noted above, in adopting GE 2 as an accurate summary of his interview, he said “The only drug used is Delta-8/THC,” not “marijuana.”). He said the drug was obtained from his friend, B. He said his last use of the drug was in September 2022. He used the drug to relax and socialize. He had not had any drug counseling, treatment, counseling, or education classes. He did not socialize with anyone who uses marijuana other than his friend, B. He said, “this is likely to occur again, though [Applicant] clarified he would stop usage if required to obtain a security clearance.” (GE 2 at 2)

In January 2023, Applicant responded to an interrogatory from DOD about his history of drug use and his future intentions. (GE 3, AE A) He said his last use of marijuana at that point was on December 30, 2022, when he “smoked a blunt at a New Year’s party. He said he stopped using marijuana “in order to obtain a security clearance and maintain job integrity.” He checked or highlighted “NO” when asked if he intended to illegally use marijuana in the future. (AE A at 3; Tr. 42)

Applicant did not list any “current” use of illegal drugs. He checked or highlighted “YES” when asked whether he had ever used marijuana “based upon a state law ‘legalizing’ or ‘decriminalizing’ marijuana use either for medicinal or recreational purposes. (AE A at 4)

When asked for details, Applicant reported that he used marijuana in State 1 (where he lives), and that he did so:

only twice after I found out they decriminalized recreational use. First time with friends, [I] took a hit of Delta 8, which is had been [sic] legalized, around October 2022. Second time someone had brought marijuana to a New Years party and I partook of a blunt. (AE A at 5)

Applicant also reported that his employer has a drug policy but does not require random drug tests. (AE A at 7) He said he was aware that “marijuana remains illegal under Federal law and that any future use of marijuana may affect [his] security clearance eligibility.” (AE A at 8) He checked or highlighted “NO” when asked if he intended to illegally use drugs or controlled substances in the future. (AE A at 8) He closed his interrogatory response with the statement, “I intend to stop any further recreational use of this drug in order to faithfully uphold the responsibility entrusted to me with this clearance.” (AE A at 9)

Government Exhibit 4 is the drug policy of Applicant’s employer, a large state university. The policy cites and notes its compliance with the federal Drug-Free Workplace Act of 1988. The policy applies to faculty, staff, full-time, part-time, student, temporary, intermittent, and contract employees. Much of the policy concerns drug involvement on campus, drug-related criminal charges, arrests and convictions, drug testing, and an employee assistance program (EAP). Applicant understood the policy to prohibit use at work, “not outside recreational use.” (GE 4; Tr. 35, 48)

Applicant had not seen the university’s drug policy (GE 4) until he looked it up in January 2023 while responding to DOD’s interrogatory. Before then, he was generally aware of it. He believed the policy only concerned a ban on “on-premises” drug use. He believed that employees who were working on DOD or other federal contracts were banned from any drug use; however, he was not one of those employees. He said his previous work as a “co-op” employee was not on DOD or other government contracts, though he does work on such contracts now. As a co-op intern, he had worked in the research institute’s information technology (IT) department. (Tr. 49-53, 63-64, 75, 79)

Applicant signed GE 4 in January 2023. (GE 4 at 5; Tr. 62-63) He acknowledged that he may have received prior trainings when he began working as a university co-op employee, including, perhaps, “a slide or two” on illegal drug use. (Tr. 62-64) He believed he was allowed to use illegal drugs under the policy as long as it was not on campus. (Tr. 63-64)

Applicant asserted his belief that his use of marijuana was not “illegal” because it was “in accordance with” (i.e., legal under) State 1 law. He understands that he is applying for a federal security clearance and understands that “any sort of marijuana-related use is considered illegal under the U.S. government.” (Tr. 34, 42)

Applicant said he first tried Delta-8/THC in March 2022. He was unsure if his next use was in September 2022, as he said in his background interview (GE 2 at 2) or October 2022, as he said in his interrogatory response. (AE A at 5) He said his fall 2022 use was with B, his friend and now his roommate. (Tr. 61) Applicant also used

marijuana or Delta-8/THC on or about December 30, 2022. (AE A at 5; Tr. 43-45) He said this was with friends he has not seen since then. (Tr. 60-61) He clarified his reference to use in “moderation” by explaining that his use was only a “puff” or “hit” before passing it on to someone else and not a “full blunt” or marijuana cigarette. (Tr. 58)

Applicant said he was not aware whether B uses marijuana, though B has used Delta-8/THC legally under State 1 law. Applicant has not seen B do so in several months, in their apartment. That instance was the last time Applicant was around someone who was using marijuana or Delta-8. Applicant no longer socializes with the other people with whom he used marijuana, in either March 2022 or December 2022. He has never been charged or cited for a drug-related offense. (Tr. 61-62, 74, 76-77)

Applicant said he was asked by his employer to apply for a clearance in September 2022 not through his co-op internship job (which was an unclassified position job in the IT department), but rather for a classified position in the lab, since several people had left employment there. (Tr. 67) He had his background interview about two months later, in November 2022. (GE 2; Tr. 69)

Applicant also explained that his co-op internship at the university research institute ended when he graduated in December 2022, and at that point he had not received a job offer, from them or anyone else. (Tr. 37-38) The university operates on an academic schedule, and he received the offer to return as a full-time employee in mid-January 2023 and he went back to work that month. (Tr. 38-41, 45-47, 53-54, 65-66, 74)

Thus, when Applicant used marijuana in late December 2022, he was unemployed, if briefly. He therefore considered his clearance background investigation “null and void” since he was unemployed and no job offer was pending at that time. He did acknowledge that he was hopeful about a job offer and even expected to hear from them (as he did, weeks later). (Tr. 45-47, 64-65, 71-73, 91-92)

Applicant denied any use of marijuana or Delta-8/THC since late December 2022. He said he stopped because of “this clearance application, more than anything,” since he was now under federal jurisdiction as a clearance applicant. (Tr. 42, 52)

Applicant initially stated that he would not use marijuana or other illegal drugs in the future while he held a clearance. He said he believes that marijuana should not be classified as an illegal substance. However, he clarified that he understands that marijuana is illegal under federal law and said he would comply with the law and not use marijuana in the future. (Tr. 54-56) He affirmed in closing that he did not intend to violate federal law when he used marijuana since when he used it, doing so was legal under State 1 law. (Tr. 90-91)

Near the end of his testimony, Applicant’s attention was drawn to the opportunity to provide a signed statement of intent not to use marijuana or illegal drugs in the future

(citing Guideline H mitigating condition AG ¶ 26(b)(3)), as well as materials for consideration under the whole person concept. (Tr. 80-84) No additional information was received.

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court has held, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

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 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(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.” 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 not drawn 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. Under Directive ¶ E3.1.15, 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 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.

Analysis

Guideline H: Drug Involvement

AG ¶ 24 expresses the security concern for drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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 following disqualifying conditions under AG ¶ 25 are potentially applicable:

- (a) any substance misuse (see above definition); and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The Controlled Substances Act ("CSA") makes it illegal under Federal law to manufacture, possess, or distribute certain drugs, including marijuana. (Controlled Substances Act, 21 U.S.C. § 801, et seq. See § 844). All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. §§811, 812. Marijuana is classified as a Schedule I controlled substance, §812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment. §812(b)(1). See *Gonzales v. Raich*, 545 U.S. 1 (2005).

On December 21, 2021, the DNI issued a memorandum entitled, "*Security Executive 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.*" (2021 DNI Memo) The memo incorporates the AGs (at reference B) among various other relevant federal laws, executive orders, and memoranda. I take administrative notice of the 2021 DNI memo here, and I provided it to the parties after the hearing. (Tr. 92-93; HE III)

The 2021 DNI memo specifically notes that "under policy set forth in SEAD 4's adjudicative guidelines, the illegal use or misuse of controlled substances can raise

security concerns about an individual's reliability and trustworthiness to access classified information or to hold a sensitive position, as well as their ability or willingness to comply with laws, rules, and regulations." Thus, consistent with these references, the AGs indicate that "disregard of federal law pertaining to marijuana remains relevant, but not determinative, to adjudications of eligibility for access to classified information or eligibility to hold a sensitive position." (2021 DNI Memo) (HE III)

Applicant used marijuana or Delta-8/THC on three occasions during 2022. The first two instances (March 2022 and September or October 2022) were alleged in the SOR (SOR ¶ 1.a). He disclosed those uses on his SCA and discussed them in his November 2022 background interview. AG ¶ 25(a) applies to SOR ¶ 1.a. (The third use, in late December 2022, was not alleged in the SOR, though it will be discussed below, under mitigation).

Applicant used the marijuana in 2022 because recreational marijuana use had been legalized in State 1, where he lived and went to school (and where he lives now). He knew that it was illegal under federal law. He suggested on his SCA and in his background interview that he "would like to continue use if at all possible." (GE 1 at 28) and that his use "is likely to occur again," though [he] clarified he would stop usage if required to obtain a security clearance." (GE 2 at 2) This suggests application of AG ¶ 25(g) as well.

However, Applicant's intended future use was not alleged in the SOR. Further, while he believes that marijuana should not be classified as an illegal substance, he confirmed that he understands that marijuana is illegal under federal law and said he would comply with the law and not use marijuana in the future. Thus AG ¶ 25(g) does not apply.

I have considered the mitigating conditions 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 is grounds for revocation of national security eligibility.

During 2022, Applicant used marijuana or THC three times. Each time was brief and his overall use was infrequent. He did so, in part, because recreational marijuana use was recently legalized in State 1, where he was in school. All of his use was either during, or within only days after he graduated from, college. It is true that he was working for the university in their co-op program, and all university employees (including students) were subject to the university drug policy, GE 4. Applicant acknowledged that he knew using marijuana was illegal under federal law at the time.

Nevertheless, I find Applicant's testimony about the circumstances of his December 2022 use credible. He had just graduated from college. His co-op program was over, and, if only for the moment, he was unemployed. Yes, he had submitted his SCA in September 2022 and had a background interview in November 2022. But at that time that he was unemployed, with no guarantee that he would be rehired. While his choice to use marijuana in this circumstance was poor judgment, I do not see it as fatal to his prospects here.

I also credit Applicant's disavowal of future drug use. His brief drug use was either during or very shortly after college. While his use is relatively recent, there is no evidence that he has used it since then. It also occurred before he received his post-college job offer to return to the university, in January 2023. He used marijuana once with B, his friend and roommate. He last saw B use marijuana several months before the hearing and he has disassociated himself from the other people with whom he used marijuana. He is also more clearly aware of his employer's drug policy and his need to abstain from marijuana use under federal law. I find that Applicant's infrequent, college-era drug use is unlikely to recur, and no longer casts doubt on his current judgment, trustworthiness, and reliability. AG ¶¶ 26(a) and 26(b)(1) and (2) apply.

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 considered the

potentially disqualifying and mitigating conditions under all the facts and circumstances surrounding this case, and the record evidence, including Applicant's testimony and other statements, as well as the whole-person evidence from his work references. I have incorporated my comments under Guideline H in my whole-person analysis. Overall, the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance.

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

Considering all of the circumstances, it is clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is granted.

Braden M. Murphy
Administrative Judge