



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



In the matter of:)
)
) ISCR Case No. 23-02901
)
Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: *Pro se*

08/01/2024

Decision

Dorsey, Benjamin R., Administrative Judge:

Applicant did not mitigate the drug involvement and substance misuse or criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On February 2, 2024, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement and substance misuse and Guideline J, criminal conduct. On February 15, 2024, Applicant responded to the SOR and requested a decision based on the written record in lieu of a hearing.

The Government’s written case was submitted on March 12, 2024. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was given 30 days to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on March 20, 2024, but he did not respond to it. The case was assigned to me on July 17, 2024. The Government exhibits included in the FORM (Items 1-4) are admitted in evidence without objection.

Findings of Fact

Applicant is a 43-year-old employee of a defense contractor for whom he has worked since February 2023. He earned a general education diploma (GED) in 2006. He has been married since 2008 and has two children, ages 23 and 13. (Items 3, 4)

From about July 2007 through July 2023, Applicant purchased and used marijuana and products containing THC with varying frequency. He smoked marijuana between 2007 and 2010. After 2010, he consumed marijuana edibles and applied a topical cream that contains THC. He claimed that he only used marijuana and THC for medicinal purposes to help manage pain while acting on the advice of his medical doctor. His doctor had originally prescribed opiates for his pain management, but he wanted to avoid them because of their addictive properties. (Items 2-4)

Applicant has arthritis. He had surgery on neck vertebrae and has at least two artificial disks in his neck. From February 2016 until February 2024, he held a medical marijuana card (MMC) issued to him pursuant to the laws of State A, where he has resided since October 2011. At all times relevant to this investigation, regardless of its legality pursuant to the laws of State A, marijuana possession (including products containing more than .03 percent THC) has been illegal pursuant to federal law. Applicant has not claimed that the THC cream he used contained less than .03 percent THC. (Items 2-4)

In November 2022, while he was involved in the hiring process for his current employer, he tested positive for marijuana on a drug test. He claimed that in response to this positive drug test, he showed his employer the MMC and his employer took no disciplinary action against him. This positive drug test was not alleged in the SOR and cannot be used for purposes of disqualification, but I will use it for evidence of mitigation and whole-person analysis. During his July 2023 security interview, the summary of which he authenticated in January 2024 (PSI), he told the DOD investigator that he does not want to use marijuana edibles or the THC topical cream in the future, but if his pain becomes too severe, he may not have a choice but to do so. While it is not alleged in the SOR, Applicant used a topical cream containing THC after the PSI. Except for this post PSI use of the topical cream, he does not distinguish the dates he used the topical cream versus marijuana edibles. (Items 2-4)

As required, Applicant disclosed his July 2007 through July 2023 marijuana and THC cream use in his June 2023 Electronic Questionnaires for Investigations Processing (SF 86). He also discussed his illegal drug involvement with a DOD investigator during the PSI and related it again when he provided his responses to the Government's interrogatories (Interrogatory Response) in January 2024. There is no evidence that the DOD investigator explained to Applicant the distinction between the legality of marijuana and products containing THC pursuant to state law versus federal law. In the Interrogatory Response, he answered a question about his understanding of the legality of the use of marijuana or products containing THC by stating, "[i]t is legal in [State A], and I have a medical card." However, his statement to the DOD investigator indicating he does not want to use the topical cream or marijuana unless it's necessary

tends to show that Applicant knew the use of either was detrimental to his security clearance eligibility. In the Interrogatory Response, when asked if he intended to use marijuana, any product containing THC or any illegal drug in the future, he responded, “[y]es.” Paradoxically, in the Interrogatory Response, he also provided a signed statement of intent to abstain from all drug involvement and substance misuse, that he would seek alternative pain management medications, and that he understood the consequences of the misuse of any drugs. (Items 2-4)

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

¶ 24: The security concern for drug involvement and substance misuse is set out in AG

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.

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.

Appellant purchased and ingested marijuana and products containing THC from about July 2007 until July 2023. The above listed disqualifying conditions are established.

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.

As the evidence is equivocal whether Applicant knew the distinction in legality between state and federal law, I have not considered his use of the topical THC cream after the PSI as a *per se* indictment of his judgment, trustworthiness, or reliability. Regardless of that post PSI use, it has only been a year since Applicant last purchased or used marijuana. This period of abstinence pales in comparison to the 16 years over which he was involved with marijuana. While he provided a statement of intent to abstain from all drug involvement in the Interrogatory Response, in that same response, he also indicated that he will continue to use marijuana in the future. For these reasons, I find that he has not proven that his drug involvement is unlikely to recur. I also find that he has not established a sufficient pattern of abstinence. AG ¶ 26(a) and AG ¶ 26(b) do not apply.

Guideline J, Criminal Conduct

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

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

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

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

The SOR crossed-alleged Applicant's Guideline H illegal marijuana purchase and use (SOR ¶ 1.a) under Guideline J. Under Guideline J, the SOR also purported to cross-allege SOR ¶¶ 1.b through 1.d. However, the SOR alleged only ¶ 1.a under Guideline H. Therefore, there are no ¶¶ 1.b through 1.d to cross-allege, so I have found for Applicant with respect to those cross-alleged paragraphs.

Appellant possessed marijuana between July 2007 and July 2023. In doing so, he engaged in criminal conduct. The evidence is sufficient to establish the above disqualifying condition, thereby shifting the burden to him to provide evidence in mitigation.

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

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

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

In relation to his many years of criminal activity, the mere year that has elapsed since Applicant engaged in criminal behavior is insufficient to show successful rehabilitation or that it is unlikely to recur. His equivocal declaration to stop that activity in the Response to Interrogatories also means he has failed to show that his illegal behavior is unlikely to recur. For these reasons, I also do not find that he provided evidence of successful rehabilitation. AG ¶ 32(a) and AG ¶ 32(d) do not 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 in light of all the facts and

circumstances surrounding this case. I have incorporated my comments under Guidelines H and J in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude he did not mitigate the drug involvement and substance misuse or the criminal conduct security concerns.

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
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraphs 2.b-2.d:	For Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Benjamin R. Dorsey
Administrative Judge