



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



In the matter of:)	
)	
)	ISCR Case No. 23-02338
)	
Applicant for Security Clearance)	

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: *Pro se*

08/09/2024

Decision

RICCIARDELLO, Carol G., Administrative Judge:

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

Statement of the Case

On December 14, 2023, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse security concerns and Guideline E, personal conduct. 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 January 11, 2024, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government’s file of relevant material (FORM), and Applicant received it on April 12,

2024. 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 2 through 8 (Item 1 is the SOR). Applicant provided a response to the FORM that is marked Applicant Exhibit (AE) A. There were no objections to any evidence offered and Items 2 through 8 and AE A are admitted in evidence. The case was assigned to me on July 17, 2024.

Procedural Matters

In the Government's FORM, it amended the SOR. It withdrew SOR ¶¶ 2.a, 2.b, and 2.c. It added the following allegations to Guideline H and Guideline E:

SOR ¶ 1.c: In or about at least 2018 through at least May 2021, you used marijuana with varying frequency, while in a sensitive position, i.e., one requiring a security clearance.

SOR ¶ 2.a: You violated company policy as detailed in paragraph 1.c., above, despite being on notice that your employer [XYZ], a U.S. federal contractor, required all its employees to comply with federal law.

SOR ¶ 2.b: On various occasions, at least as recently as October 2023, you violated your current employer's company policy, [ABC], a U.S. federal contractor, that prohibits its employees' use of illegal drugs, including marijuana.

SOR ¶ 2.c: You have expressed an intent to continue to use marijuana, even though it is federally illegal and your current employer, [ABC], a U.S. federal contractor, prohibits its employees' use of illegal drugs.

Findings of Fact

Applicant admitted SOR allegations ¶¶ 1.a and 1.b. He provided a vague response to SOR ¶ 1.c, and it is considered a denial. He essentially made an argument about the SOR allegations in ¶¶ 2.a, 2.b, and 2.c and his response is considered a denial to these 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 47 years old. He earned a bachelor's degree in 1999. He is not married and has no children. He worked for a federal contractor, XYZ, from January 2016 to May 2021. He then worked for other federal contractors from May 2021 until December 2022 before he returned to work for XYZ. He then began working for another federal contractor, ABC, in December 2022, until the present. He has held a security clearance since approximately February 2016. (Item 3)

In February 2016, Applicant completed his initial security clearance application (SCA). He disclosed his marijuana use and provided an explanation regarding his medical

issues, and that he used marijuana for medicinal purposes. The SCA asked if he intended to use marijuana in the future, he responded “no.” He stated: “I don’t intend to use this drug anymore, my current health and fitness situations are much better, and now that I have medical insurance I will only go with the option of what the doctor prescribes for me.” (Item 7) He further stated: “I wouldn’t want to jeopardize this great opportunity with making a poor choice that would hinder me from continuing down this road. Since my interview with [XYZ] I have been clean and have no problems staying drug free.”¹ (Items 4, 7)

Applicant was interviewed by a government investigator in March 2016 as part of the background investigation for his initial security clearance eligibility. He disclosed his marijuana use to the investigator indicating that from 2008 to 2013 he had a prescription for marijuana for its medicinal use for pain. He obtained the marijuana from a dispensary. He told the investigator that he did not intend to use marijuana in the future. He was granted a security clearance. (Item 4)

Applicant completed an SCA for reinvestigation purposes in January 2023. In response to Section 23, which asked about illegal drug use or activity, he disclosed that he had used illegal drugs in the past seven years. He stated:

I have only smoked recreational/state legal marijuana, which I know is still illegal by federal law. I have issues sleeping when stressed/anxiety and sometimes my lower back (compressed discs) or neck (whiplash) get really messed up, when my stress levels rise, the marijuana calms my stress level and allows my spasming muscles to relax. I only use recreational grade to better my quality of life. I don’t use anything stronger than that. I don’t smoke with anyone, only on the weekend if I do, and I have never been under the influence while working. It is used as a pain reliever when I suffer pain and anxiety and need to get to sleep. I have tried prescription suggestions from doctors, but the side effects are worse and can make me too drowsy the next day. (Item 3)

Applicant further explained that from 2008 to 2013, he was prescribed marijuana for medicinal purposes due to pain from injuries suffered in a car accident. He reported in his January SCA that he used marijuana from 1997 to 2022. The frequency was anywhere from a few times a month to once every other month from 2008 to 2013. In 2014, he did not use it at all. He said in the past few years he only uses it if his quality of life is suffering. Since 2016, he estimated he used it 20 times when he was experiencing pain and to help sleep. He admitted in his SCA that he used marijuana while holding a security clearance. (Item 3)

In response to whether Applicant intended to use marijuana in the future, he reported “yes” on his January 2023 SCA. He explained:

¹ The SOR alleges Applicant’s use of Tetrahydrocannabinol (THC) in ¶¶ 1. and 1.b. In SOR ¶ 1.c it alleges the use of marijuana. For consistency, I have used the word marijuana throughout this decision.

I only intend to use marijuana (recreational) if my current health and quality of life situation are at risk, not frequently at all, only on the occasion (weekend evening if any-I will hold out for days to see if the pain will reside and only take it when it gets worse day by day), and only by myself at home-never in social setting. Marijuana (recreation) has less side effects than what the prescribed medication doctors give me and allows me to have a better quality of living. Before I entered the DOD industry, when I worked in the entertainment industry, I had a medical license for it (2008-2012), because of my injuries and anxiety. I would like to say, "I don't intend to use" and I will always do my best to not have to use it, but I've tried doctors prescriptions and I just haven't had anything prescribed yet that works better with less side effects. (Item 3)

Applicant reiterated that he only uses marijuana for medicinal purposes, to better his quality of life. He provided the following statement under the "Additional Comments" section of his SCA. He stated:

I have only been extremely responsible and respected holding a SECRET clearance with my profession(s) over the last 7 years. Never have I ever handled classified material outside of the classified area I was designated to, and only have I handled it if it was needed for the program I was working on-which was only a few times. Mainly I need a clearance to meet with operations and understand their operation process so that I can build a better user experience for government software (Item 3)

Applicant was interviewed by a government investigator in June 2023. He acknowledged his prior marijuana use indicating it was used for health problems. He said he purchased it from "recreational sites" in his state. He first purchased it in 2008 and last approximately in December 2022. He would purchase it about three to four times a year. (Item 4)

Applicant completed government interrogatories in November 2023. He provided corrections and additions to his personal subject interview and then affirmed it. He included with his responses to the interrogatories a "Statement of History of Injuries and Usage of Marijuana" that he hoped would clarify any details or questions regarding his use. He stated: "The main reason I use marijuana is to help allow me a 'Quality of Life', more than just neck [and] back pain, it is more for osteopathic aid then just pain." In this statement he provided a detailed history of his injuries and medical issues. He stated that in 2016 he began work for XYZ and began the security clearance process. He stated: "But on the last interview I did attest that I wouldn't use marijuana, and I would go back to big Pharma prescriptions." He acknowledged that did not work and by 2017 or 2018, due to his quality of life, he resumed using marijuana. He further explained that he did not use large amounts and he does not use it during the day and only on the weekends. (Item 4)

In response to specific questions in the interrogatories, Applicant admitted that he used marijuana after his June 2023 personal subject interview. He estimated about three times and his last use was October 2023. He admitted he used marijuana while employed as a federal contractor about every other month or two on a Friday or Saturday evening and not during the workday. He understood that marijuana use was permissible in his state but not on federal property. He stated that marijuana was illegal under federal law. He did not indicate that he currently has a medical prescription for marijuana because the amount he uses is considered recreational and is sufficient to alleviate his pain.

The interrogatories asked if Applicant's federal employer had a policy concerning use of illegal drugs and he responded "yes." He explained it required drug screenings from employees who are suspected of using drugs while working and those involved in workplace accidents or who experience workplace related injuries. He acknowledged he had not reported his drug use to his employer and explained his reason was "it has never come up." (Item 4)

The interrogatories asked Applicant if he intended to use marijuana in the future and he stated "yes." He explained: "Not to any level of abuse, but to only support my "Quality of Life" in a positive and healthy way. (Item 4)

Included with his response to interrogatories, Applicant provided a "Statement of Intent to Abstain." It said:

I [Applicant], am supplying this statement of intent to abstain from all drug involvement and substance misuse, as long as I can without the decline in my "Quality of Life". From my past experiences and actions, I cannot promise 100% that I will never use marijuana again, I can though promise that I will not misuse or put any harm on another living being. I will only use marijuana medicinally if I have no other option that will give me a tolerable "Quality of Life". (Item 4)

In Applicant's response to the FORM, he stated that in 2016 when he indicated he would not use marijuana in the future, he was telling the truth, but he said, "time and reality have [a] way of proving us wrong..." He reiterated that he did not use marijuana at the workplace or while on the job. It was only on the weekends and away from work. (AE A)

Regarding Applicant's use of marijuana, which was prohibited by his federal employers, he stated:

[S]eeing that [XYZ] is not at all proactive in embracing that value, although its in their Standards of Business Conduct, they don't do anything to keep up with being vigilant in doing anything about it. Since my initial induction into the company was the only time I was drug tested. Not once did they conduct a random drug test, nor did they conduct a drug test when I was rehired back to [XYZ] in 2022. There was no "notices" they conducted with

me, if there would there would be some sort of form, signing and accepting being put on notice. ... [XYZ] writes those standards but doesn't enforce them without probable cause, and I never brought any probable cause to be, from my performance. (AE A)

XYZ's "Standards of Business Conduct" states the use of controlled substances are prohibited while at work and on company property. It specifically states:

Keep in mind that, as a U.S. federal contractor, [XYZ] complies with the Drug Free Workplace Act and applicable local laws. Even though marijuana has been legalized in certain U.S. states, it is still considered illegal under federal law. Therefore, our company prohibits its use, even in locations where it is not against state law. (Item 6)

ABC notes in its Code of Business Ethics and Conduct that it is committed to a workplace that is free of illegal drugs, including marijuana, and the abuse of legal drugs and alcohol. (Item 8)

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;

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

- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and

(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used marijuana and purchased marijuana with varying frequency from August 1997 to at least October 2023. He has repeatedly indicated that he intends to continue to use it for his “quality of life.” He disclosed on his January 2023 SCA that he used marijuana while holding a security clearance and was aware it is illegal under federal law. He further stated in the additional comments of the SCA and that he has used it while holding a secret clearance and while handling classified information. 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.

There is insufficient evidence to apply the above mitigating conditions. Applicant qualified his declaration to abstain from future use of illegal drugs by indicating his condition was based on whether he felt his quality of life was impacted, and he could not give 100% assurance that he would not use illegal drugs. He repeated stated his intent to use marijuana in the future. Based on his continued use throughout the security process, I find his drug use is recent and likely to recur. He knowingly continued to use marijuana while holding a security clearance and his actions cast doubt on his current reliability, trustworthiness, and good judgment.

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 . . .

There is sufficient evidence to conclude that Applicant was aware of the prohibition of illegal drug use by both employers ABC and XYZ. He was aware that although his drug use may have been legal in his state, it is prohibited under federal law. Despite being aware of its illegality under federal law and its use is prohibited by his current employer, he used marijuana while employed by both, and he expressed his intention to continue to use it. I did not find his argument that his employers' failure to drug test him or stringently enforce the policy relieved him of complying with the rules. The general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(e) are established. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

(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.

Applicant was aware that his use of marijuana while working for federal contractors was prohibited, yet he continued to do so for years. He was aware it violated his employers' drug free workplace environment. His conduct is not minor, and he has not committed to stop using marijuana while employed. 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). The above mitigating condition does 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 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 and E in my whole-person analysis.

Applicant failed to meet his burden of persuasion. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement and substance misuse and Guideline E, personal 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:	FOR APPLICANT
Subparagraphs 2.a-2.c:	For 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