



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



In the matter of:)	
)	
)	ISCR Case No. 23-00518
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

08/23/2024

Decision

WHITE, David M., Administrative Judge:

Applicant has used marijuana on a daily basis for more than eight years and forthrightly declared his intention to continue doing so. Resulting security concerns were not mitigated. Based upon a review of the full record, national security eligibility for access to classified information is denied.

History of Case

Applicant submitted an Electronic Questionnaires for Investigation Processing (e-QIP) on July 25, 2022. On March 29, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement and Substance Misuse). 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 Security Executive Agent Directive (SEAD) 4 National Security Adjudicative Guidelines (AG), which came into effect on June 8, 2017.

Applicant submitted his written Answer to the SOR on April 12, 2023, admitted the allegations in SOR ¶¶ 1.a through 1.c, and requested a decision based on the administrative (written) record without a hearing. On July 12, 2023, Department Counsel sent Applicant a copy of his File of Relevant Materials comprising the Government's evidentiary submission to the administrative record, and provided him 30 days to respond with any objections or additional evidence. On August 9, 2023, Applicant responded with a written request for a hearing. Department Counsel granted the request and converted the case to provide Applicant a hearing.

The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on September 15, 2023. DOHA issued a Notice of Hearing on October 2, 2023, setting the hearing for October 24, 2023. On that date, Department Counsel offered Government Exhibits (GE) 1 through 4 into evidence. Applicant testified and offered Applicant's Exhibits (AE) A and B into evidence. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on November 1, 2023.

Findings of Fact

Applicant is 54 years old. He married his wife in August 2012, and they have five adult children between them who were born during previous relationships. Applicant's three previous marriages ended in divorce. He earned an Associate of Applied Science degree from a private for-profit career college in June 1989, and has since completed other job-related technical training. He began his current employment as UNIX administrator with a defense contractor in November 2021. He reported no former Federal or military service. In October 2021 he submitted an e-QIP in connection with contract work for a Department of Commerce agency, and was granted what he described as a Confidential clearance. His DoD national security eligibility record indicates that he was granted an interim Secret clearance by the DCSA CAS on August 3, 2022. (GE 1; GE 2; GE 4; Tr. 7-8, 30.)

Applicant testified that he started using marijuana once a month at around age 15, while in high school from 1984 to 1987. He resumed recreational marijuana use in his mid twenties. He obtained a California medical marijuana card in 2008 or 2009. He obtained marijuana from a friend and used it weekly, on average, until about September 2015 when he moved to his current state of residence. Since then, he and his wife grow marijuana on their property and have smoked or otherwise used marijuana on a daily basis. He and his wife both intend to continue their regular use of marijuana. (GE 1; GE 3; Tr. 30-38.)

The evidence in this case confirms that Applicant underwent some type of trustworthiness screening while performing contract work for a Department of Commerce agency, but was not employed in a national security sensitive position and had no access to classified information during that time. He was granted an interim Secret DoD security clearance in August 2022 after submitting his July 2022 e-QIP, and he has continued his daily marijuana use while holding a sensitive position since then. (GE 1; GE 2; GE 3; GE 4; Tr. 8, 27-28.)

Applicant's hearing testimony was forthright and credible. He recognized that drug use violated Federal law and his employer's written no-drug-use policy. He said that he brought up his pending DOHA hearing concerning the security clearance concerns raised by his drug involvement to his manager and his company's security officer. He said that the manager seemed more concerned about losing him as an employee, and that the security officer said that if he elected to proceed working with his company, he would have to go through an exception process. He acknowledged that he would not be able to continue working for that company without being granted national security eligibility. (Tr. 36-38.)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, each guideline lists potentially disqualifying and mitigating conditions. 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 AG ¶ 2 describing the adjudicative process.

The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(b) and 2(c), the entire process is a conscientious scrutiny of several variables known as the whole-person concept. The administrative judge must consider all available, pertinent, and reliable information about the person, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that any doubt concerning personnel being considered for national security eligibility 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. I have avoided drawing inferences grounded on mere speculation or conjecture.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states, "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person who applies for national security eligibility seeks to enter 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 eligibility for access to classified information or assignment in sensitive duties.

Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified or sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of protected information. Section 7 of EO 10865 provides, "Any determination under this order adverse to an applicant shall be a determination 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 concerns under the guideline for drug involvement and substance misuse are 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.

AG ¶ 25 describes three conditions that raise security concerns and may be disqualifying based on the SOR allegations and the evidence in this case:

- (a) any substance misuse (see above definition);
- (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 admittedly has been a daily user of marijuana for many years and intends to continue this conduct. He knew that his marijuana use is illegal under Federal law and violates his company's employee substance abuse policies. On August 3, 2022, the DCSA CAS granted him an interim Secret clearance for access to classified information, as required to hold his national security sensitive position, and he has continued his daily drug use since then. This establishes security concerns under AG ¶¶ 25(a), 25(f), and 25(g). Accordingly, the burden to mitigate the established concerns shifts to Applicant.

AG ¶ 26 provides two conditions that could mitigate the drug-related security concerns raised in this case:

(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.

In my analysis, I have taken administrative notice of the Security Executive Agent (SecEA) *Clarifying Guidance Concerning Marijuana for Individuals Eligible to Access Classified Information or Eligible to Hold a Sensitive Position*, dated December 21, 2021. In her *Guidance*, the SecEA noted the increased number of states that have legalized or decriminalized the use of marijuana. She reaffirmed the 2014 SecEA memorandum regarding the importance of compliance with Federal law on the illegality of the use of marijuana by holders of security clearances. She provided further clarification of Federal marijuana policy, writing that this policy remains relevant to security clearance adjudications, “but [is] not determinative.” She noted that the adjudicative guidelines provided various opportunities for a clearance applicant to mitigate security concerns raised by his or her past use of marijuana.

However, the facts of this case do not fall under the purview of the foregoing administrative clarification of Federal marijuana policy, which discusses the possible discretionary mitigation of national security eligibility disqualification for marijuana abusers. Applicant uses marijuana on a daily basis. He has done so for more than eight years and declared his intention to continue doing so. Accordingly, the determination of Applicant’s national security eligibility is governed by the non-waivable statutory prohibition that precludes the head (or a designated subordinate) of any Federal agency from granting or renewing a security clearance for an unlawful user of a controlled substance or an addict. 50 USC § 3343(b) (the Bond Amendment).

Applicant further failed to mitigate the security concerns raised by his regular marijuana use under the AG. He knew that his drug involvement was illegal under Federal law and contrary to his employer's substance abuse policies, yet it has continued even after he submitted his e-QIP seeking to obtain national security eligibility and was granted an interim security clearance. He freely declares his intention to continue his use of illegal drugs in the future. This evidence establishes that Applicant's daily drug abuse is most likely to continue, and it casts continuing doubt on Applicant's current reliability, trustworthiness, and judgment. No mitigation under AG ¶¶ 26(a) or 26(b) was established.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept, although the AG further acknowledge that the Bond Amendment removes any discretion to waive its prohibition of granting national security eligibility to drug abusers or drug addicts.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is a mature adult, who freely admits his past and ongoing drug abuse, failing to demonstrate either rehabilitation or accountability for his misuse of marijuana before and during the time he was working for a defense contractor and after applying for a security clearance. He has no intention to abstain from further substance misuse. He provided insufficient evidence to demonstrate his trustworthiness, responsibility, and willingness to comply with rules and regulations. The potential for pressure, exploitation, or duress remains undiminished.

Overall, the evidence creates significant doubt, as well as a statutory prohibition, to Applicant's national security eligibility and suitability for a security clearance. He did not meet his burden to mitigate the security concerns arising under the Drug Involvement and Substance Misuse guideline.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline H:

AGAINST APPLICANT

Subparagraphs 1.a -1.c:

Against Applicant

Conclusion

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

DAVID M. WHITE
Administrative Judge