



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



In the matter of:)	
)	
)	ISCR Case No. 23-01578
)	
Applicant for Security Clearance)	

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: *Pro se*

08/28/2024

Decision

Dorsey, Benjamin R., Administrative Judge:

Applicant mitigated the drug involvement and substance misuse security concerns. He did not mitigate the 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 a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. On January 31, 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 28, 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 April 12, 2024, but he did not respond to it. The case was assigned to me on August 15, 2024. The Government exhibits included in the FORM (Items 1-5) are admitted in evidence without objection.

Findings of Fact

Applicant is a 37-year-old employee of a defense contractor for whom he has worked since May 2023. He earned a bachelor's degree in 2011 and a master's degree in 2013. He has not been married and has no children. (Items 2-4)

From January 2006 to August 2007, Applicant used marijuana approximately five times. In about November 2012, he was granted security clearance eligibility, however, there is insufficient evidence to determine that he had access to classified materials (no evidence of a non-disclosure agreement or a need to know). In about July 2013, while he was granted security clearance eligibility, he used marijuana on one occasion with his grandfather. In June 2014, he completed and certified an Electronic Questionnaires for Investigations Processing (2014 SF 86). As required, he disclosed his 2006 to 2007 marijuana use. Despite being required to do so, he did not disclose his 2013 marijuana use. During a July 2014 security interview (2014 PSI), which he authenticated, he volunteered his 2006 and 2007 marijuana use to a DOD investigator, but he did not volunteer his 2013 marijuana use. In the 2014 SF 86, despite having used marijuana less than a year prior to completing it, when he discussed his 2006 and 2007 marijuana use, he claimed that those instances were his "first and only" experimental use of marijuana. He also claimed that he that he had no intention of being involved with marijuana in the future. (Items 2-5)

Applicant used marijuana once in December 2019, once in July 2020, and once in April 2021. He also potentially transported marijuana in the form of "pre-rolled tubes" in 2021, although it is unclear whether those "tubes" contained marijuana. He claimed that his December 2019 use was unintentional and occurred when he unwittingly consumed marijuana infused butter. With respect to the July 2020 use, he claimed that he received a contact high from his ex-girlfriend when she intentionally blew marijuana smoke in his face. He claimed that he did his best to avoid having her blow the marijuana smoke in his face but was unsuccessful. In April 2021, his marijuana use involved taking a hit from a marijuana cigarette after he and his ex-girlfriend were intimate. He claimed that he made a mistake and got caught up in the moment. In the April 2021 incident, when he potentially transported marijuana in his car, he gave the "tubes" to his ex-girlfriend, who smoked one of them and claimed it was not marijuana. He obtained the "tubes" from his cousin's personal items after his cousin passed away from leukemia, so he theorized that they could have been dietary supplements to help his cousin battle his cancer. (Items 1, 3, 4)

In December 2022, Applicant completed and certified an Electronic Questionnaires for Investigations Processing (2022 SF 86). He disclosed his aforementioned 2013 through 2021 marijuana involvement. He claimed that he disassociated from anyone involved with marijuana and claimed that he would not be involved with marijuana in the future. He volunteered his 2013 through 2021 marijuana involvement to the DOD investigator during his authenticated May 2023 security interview (2023 PSI). He reiterated his intention to not be involved with marijuana in the future, as well as his disassociation from those involved with marijuana. In November 2023, he completed his responses to interrogatories and disclosed his marijuana involvement in 2006 and 2007, and from 2013 until 2021. (Items 3, 4)

In his response to the SOR, Applicant admitted his marijuana use from 2006 until 2007. He also admitted his marijuana use from 2013 until 2021, while he held a security clearance. He admitted that he falsified a material fact on the 2014 SF 86 when he failed to divulge his 2013 marijuana use, but claimed he did so out of “pure ignorance to the process.” He accepted responsibility for his mistake. He again claimed that he has disassociated from those involved with illegal substances and makes it a priority to remove himself from any environment where illegal substances are present. He claimed that he has received individual psychotherapy counseling to help him improve his character and well-being and will uphold all the rules and regulations expected of a clearance holder. (Items 1-5)

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);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Appellant used marijuana with varying frequency from January 2006 until August 2007. He used marijuana with varying frequency from July 2013 until April 2021, while he had been awarded security clearance eligibility. By using marijuana, he would have had to possess it. AG ¶¶ 25(a) and 25(c) are established. AG ¶ 25(f) is not established because there is insufficient evidence that Applicant had access to classified information or held a sensitive position.

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.

It has been over three years since Applicant used or was involved with marijuana. His prior marijuana use, while over an extended time period, was relatively infrequent (approximately nine times over a 15-year period). He does not associate with those involved with illegal drugs. He says that he has learned his lesson and will not use illegal drugs in the future. For these reasons, AG ¶ 26(a) and AG ¶ 26(b) both apply. I find that he has mitigated the drug involvement and substance misuse security concerns.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. The following is potentially applicable in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant omitted his 2013 marijuana use from the 2014 SF 86. His 2013 marijuana use was with his grandfather, and was less than a year before he completed the 2014 SF

86. In the 2014 SF 86, despite the recency of his 2013 use, he specified that that his 2006 and 2007 marijuana use was his only marijuana experimentation. Given the recency of his use and his patently untrue elaborations about the exclusivity of his 2006 to 2007 use, it strains credulity to believe that Applicant merely forgot his 2013 use with his grandfather or made an error in filling out the SF 86. I find that he intentionally omitted this relevant information. AG ¶ 16(a) is established.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. The following mitigating conditions potentially apply in Applicant's case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant arguably corrected his omission or concealment of his 2013 marijuana involvement when he disclosed it in the 2022 SF 86. However, he did so nine years after it occurred. Therefore, his correction was not prompt. AG ¶ 17(a) does not apply.

Deliberately omitting required information during the security clearance process is not minor. Instead, this action strikes at the heart of the process, which relies on candid and honest reporting. In his response to the SOR, Applicant continued to claim that his omission was not intentional and claimed he did not list it because of "ignorance to the process." Therefore, he continues to be untruthful, and he has not shown that his behavior was infrequent, happened under unique circumstances, or is unlikely to recur. AG ¶ 17(c) does not apply. His failure to acknowledge his deceitful behavior and continuation of this behavior mean that, despite his mental-health counseling, AG ¶ 17(d) 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 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 E 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 mitigated the drug involvement and substance misuse security concerns, but he did not mitigate the personal 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:	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against 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