



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



In the matter of:)	
)	
[Name Redacted])	ISCR Case No. 23-02906
)	
Applicant for Security Clearance)	

Appearances

For Government: Dan O’Reilly, Esq., Department Counsel
For Applicant: *Pro se*

08/21/2024

Decision

HOGAN, Erin C., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H, Drug Involvement and Substance Misuse. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on April 12, 2023. The Defense Counterintelligence & Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR) on April 1, 2024, detailing security concerns under Guideline H. DCSA CAS acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

Applicant timely answered the SOR and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On May 14, 2024, Department Counsel submitted the Government’s File of Relevant Material

(FORM), including documents identified as Items 1 through 4. Applicant received the FORM on May 23, 2024. He was afforded 30 days after receiving the FORM to file objections and submit material in refutation, extenuation, or mitigation. He did not submit additional matters in response to the FORM. The case was forwarded to the Hearing Office on July 15, 2024, and assigned to me on August 2, 2024.

Several names and other facts have been modified to protect Applicant's privacy interests. More detailed facts can be found in the record.

Findings of Fact

In Applicant's SOR response, he admitted all SOR allegations. Applicant's admissions are accepted as findings of fact. (Item 3)

Applicant is 26 years old. He has been employed by a DOD contractor since October 2022 and is applying for a security clearance for the first time. His highest level of education is a bachelor's degree. He is single and has no children. (Item 3)

The SOR alleges under Guideline H that Applicant used and purchased marijuana (THC) with varying frequency from approximately September 2018 to about March 2023. (SOR ¶ 1.a: Item 4 at 5, 8-9); and Applicant intends to use marijuana in the future. (SOR ¶ 1.b: Item 4 at 5, 8-9)

Applicant did not list his marijuana use on his April 2023 SCA in response to Section 23 - Illegal Use of Drugs or Drug Activity. (Item 3) He volunteered his marijuana use during his background investigation interview on May 26, 2023. He has ingested marijuana using a vape pipe since May 2019. He stopped using marijuana from September 2019 to May 2020 in order to focus on school. He uses marijuana recreationally on a weekly basis. He intends to use marijuana in the future because he is an introvert and it helps him with his anxiety. From March 2018 to March 18, 2024, he purchased about ½ gram of liquid marijuana per week. Where he currently resides, he purchases medical marijuana which is legal in the state. While at college, he purchased marijuana from a state dispensary. Marijuana was legal under state law where he went to college. (Item 4)

In response to DOHA interrogatories, dated March 21, 2024, the Government attached a copy of the October 25, 2014, memorandum issued by the Director for National Intelligence, titled, "Adherence to Federal Laws Prohibiting Marijuana Use" and a copy of the December 21, 2021, Director of National Intelligence memorandum, titled "*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.*" In his response to interrogatories, Applicant acknowledged that he read both memorandums. In response to the interrogatory questions about future illegal marijuana use, he states that "unless otherwise directed, I intend to continue recreational use of Marijuana with my current amount of use as described in [my] interview." He describes himself as "a young professional who is honest, hardworking, and committed to maintaining my security clearance . . ." He claims he is

not dependent on marijuana and he would have no problem stopping marijuana use. He uses marijuana at home alone. Marijuana relaxes him and helps with his anxiety. (Item 4)

In his Answer to the SOR, dated April 8, 2024, Applicant mentions that unless directed otherwise, he intends to continue marijuana use. He mentions he disposed of his marijuana paraphernalia and is abstaining from marijuana use until he receives his final adjudicative decision as an intended sign of good faith. (Item 2)

Applicant did not submit a Statement of Intent to abstain from all drug involvement and substance misuse that acknowledged any future illegal drug involvement may be grounds for revocation of national security eligibility. Department Counsel suggested this option to him in the FORM. He did not answer the FORM.

Policies

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

The adjudicative 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(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 access to classified information 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. 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 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.

DOD and Federal Government Policy on Marijuana Use

On October 25, 2014, the Director for National Intelligence, issued a memorandum titled, “Adherence to Federal Laws Prohibiting Marijuana Use” addressing concerns raised by the decriminalization of marijuana use in several states and the District of Columbia. The memorandum states that changes to state and local laws do not alter the existing National Security Adjudicative Guidelines. “An individual’s disregard for federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations.”

On May 26, 2015, the Director of the United States Office of Personnel Management (OPM) issued a memorandum titled, “Federal Laws and Policies Prohibiting Marijuana Use.” The Director of OPM acknowledged that several jurisdictions have decriminalized the use of marijuana, allowing the use of marijuana for medicinal purposes and/or for limited recreational use but states that Federal law on marijuana remains unchanged. Marijuana is categorized as a controlled substance under Schedule I of the Controlled Substances Act. Thus, knowing or intentional marijuana possession is illegal, even if the individual has no intent to manufacture, distribute, or dispense marijuana.

On December 21, 2021, the Director of National Intelligence signed the memorandum, *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 emphasizes that federal law remains unchanged with respect to the illegal use, possession, production and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the “whole-person concept” stated under SEAD 4, to determine whether the applicant’s behavior raises a security concern that has not been mitigated.

Analysis

Guideline H: Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern for drug involvement:

The illegal use of controlled substances . . . 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.

I have considered the disqualifying conditions for drug involvement and substance misuse under AG ¶ 25 and the following are potentially applicable:

AG ¶ 25(a) any substance misuse;

AG ¶ 25(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The record evidence shows Applicant has a history of habitual recreational marijuana use from September 2018 to at least March 2024. He admits to using marijuana on a weekly basis during his last two years of college. He continued to use marijuana on a weekly basis after he graduated from college and during his current employment with a DOD contractor. He purchased marijuana on numerous occasions in liquid form from a dispensary in the state where he went to college and from a dispensary in the state where he currently resides. Marijuana is legal in both states. The use of marijuana remains illegal under federal law and he was informed of this fact when he was sent DOHA Interrogatories. Despite this information, he intends to use marijuana in the future unless he is told to abstain from marijuana use. AG ¶¶ 25(a), 25(c), and 25(g) apply.

On October 25, 2014, the Director of National Intelligence (DNI) issued a memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

The Government's substantial evidence and Applicant's admissions raise security concerns under Guideline H. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 22, 2005))

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement and substance misuse. The following mitigating conditions under AG ¶ 26 potentially apply:

AG ¶ 26(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

AG ¶ 26(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence on 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.

Neither mitigating condition applies pertaining to Applicant's use and purchase of marijuana. (SOR ¶ 1.a) His last use of marijuana occurred in March 2024, only five months ago. While he claims in his Answer to the SOR that he stopped using marijuana pending the outcome of the adjudication of his security clearance, he did not submit a Statement of Intent to abstain from all drug involvement and substance misuse and with an acknowledgment that any future illegal drug involvement may be grounds for revocation of national security eligibility. Department Counsel raised this issue in the FORM. In other words, Applicant was fully informed that the purchase and use of marijuana remains illegal under Federal law and it is not compatible with holding a security clearance. He did not take the security clearance standards and processes seriously. Not enough time has passed to conclude his marijuana use is behind him.

Questions about Applicant's judgment remain. He continued to use marijuana on a weekly basis after submitting a security clearance application in April 2023. He mentioned that he was willing to cease his marijuana use if told to do so by the Government. While his use of marijuana was legal in the state where he resides, the Government made him aware that marijuana use is not compatible with handling access to classified information. He did not get the message. At this time, he did not mitigate the concerns raised under Drug Involvement and Substance Misuse.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position 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 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 Guideline H and the AG ¶ 2(d) factors in this whole-person analysis.

I considered that Applicant has been an employee with a DOD contractor since May 2022. I considered he did not list his marijuana use on his April 2023 SCA but provided full disclosure during his background investigation interview in May 2023. While his marijuana use was legal under the state laws where he used it, it remains illegal under federal law and raises security concerns. Applicant's failure to realize his marijuana use was an issue during the security clearance process and his continued marijuana use after submitting a security clearance application raise questions about his judgment and reliability. Questions about his judgment are also raised because of his expressed intent to use marijuana in the future unless someone tells him not to even after he was provided sufficient information that marijuana use remains illegal under Federal law and is not compatible with someone who holds a security clearance. Concerns under Drug Involvement and Substance Misuse are not mitigated.

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 – 1.b:	Against Applicant

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

Erin C. Hogan
Administrative Judge