



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



In the matter of:)	
)	
)	ISCR Case No. 23-02639
)	
Applicant for Security Clearance)	

Appearances

For Government: Karen Moreno-Sayles, Esq., Department Counsel
For Applicant: Christopher Snowden, Esq.

09/12/2024

Decision

BENSON, Pamela, C., Administrative Judge:

Applicant mitigated the security concerns arising under Guideline H (Drug Involvement and Substance Misuse), and he refuted the security concerns under Guideline E (Personal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on December 15, 2022. On January 29, 2024, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H and Guideline E. The action was taken under Executive Order (EO) 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 the adjudicative guidelines (AG) effective on June 8, 2017.

Applicant answered the SOR on March 14, 2024, and requested a hearing before an administrative judge (Answer). The case was assigned to me on May 8, 2024. The

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 11, 2024, setting the hearing for July 9, 2024. The hearing was held as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through 4; Applicant testified and offered Applicant Exhibits (AE) A through L. I admitted all proffered exhibits into evidence without objection. I held the record open for two weeks so that both parties could supplement the record. Department Counsel timely submitted an email communication, GE 5, for clarification purposes. Applicant timely submitted his employer's workplace drug policy, AE M. All proffered post-hearing exhibits were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on July 16, 2024. The record closed on July 23, 2024.

Findings of Fact

Applicant admitted, in part, and denied, in part, SOR ¶¶ 1.a and 2.a, in his Answer to the SOR. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 31 years old. He has never married and has no children. He earned a bachelor's degree in May 2015. He has worked for multiple federal contractors since September 2015, when he was issued his first DOD security clearance. He signed a non-disclosure agreement as a federal contractor in October 2015. Since 2022, he has been employed by his current federal contractor, and his job title is software engineer. Applicant was granted an interim DOD top secret security clearance on January 7, 2023, after he was sponsored by his employer. However, after the SOR was issued and the interim security clearance was cancelled, Applicant currently possesses a secret security clearance. He requires a top-secret security clearance to perform specific duties for his employer. (Tr. 8, 19-20, 22-24, 33-34, 43-44; GE 1, 4)

SOR ¶ 1.a alleges that Applicant used and purchased marijuana with varying frequency, from 2021 to about May 2023, while holding a sensitive position, i.e., while he possessed a security clearance. Applicant stated in his Answer:

I deny that I used and purchased marijuana with varying frequency. I purchased marijuana during the specified time frame approximately every three (3) to four (4) months, and consumed marijuana occasionally on some weekends or certain occasions during the indicated time frame. I purchase marijuana exclusively at a dispensary in (state) while I was not on duty at my job and in my own home. I was mistaken in that belief, and now understand the supremacy of federal law, even in a state where there is a conflict between state and federal law. (Answer)

In his December 2022 SCA, Applicant failed to disclose that he had previously used and purchased marijuana from late 2021 to at least December 2022. During his June 2023 background interview, he voluntarily reported to the investigator that marijuana use is legal in his state, and since late 2021, he has purchased and used marijuana legally in his state. He purchased the marijuana from a dispensary on approximately six occasions, and he either consumed marijuana in the form of

gummies, or he inhaled marijuana. His last use of marijuana occurred the previous month, in May 2023. He used marijuana due to curiosity, to relax, and for recreation. Applicant told the investigator that he did not intend to use illegal drugs in the future since he now understands the security significance. He would like to continue his work for the government. (GE 1, 2, 3)

During the hearing, Applicant stated that he stopped using marijuana in May 2023, after he reviewed his December 2022 SCA a few days before his June 2023 background interview. During the review, he saw that the SCA drug section included language that read, **“The following questions pertain to the illegal use of drugs or controlled substances...in accordance with Federal laws, even though permissible under state law.”** He then realized that he had misread the question by answering “no” to the illegal use and purchase of marijuana. It was at this time he understood that even though using marijuana was legal in his state, it was still considered illegal under federal law. At the hearing Applicant stated, “When I was reviewing the [SCA], I reread the drug use section and came across the last sentence in the opening paragraph that mentioned specifically that it's still prohibited, regardless of state law.” During the June 2023 interview the investigator reported, "Subject volunteered that he misread the question and thought since marijuana is legal in [state], he did not have to list his marijuana use." (Tr. 22-27, 30-31, 46; GE 2)

SOR ¶ 2.a alleges that Applicant falsified his December 2022 SCA in response to the following questions: “Section 23 – Illegal Use of Drugs or Controlled Substances - Illegal Drug Activity In the last seven (7) years, have you illegally used any drugs or controlled substances?”; “In the last seven (7) years, have you been involved in the illegal purchase, manufacture, cultivation, trafficking, production, transfer, shipping, receiving, handling or sale of any drug or controlled substance?”; and “While Possessing a Security Clearance Have you EVER illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed?” The SOR alleged that Applicant answered “no” to each question and thereby deliberately failed to disclose that information set forth in SOR ¶ 1.a, above.

In Applicant’s Answer, he admitted that he failed to list his use and purchase of marijuana on the SCA, but he denied that his failure to disclose this information was a deliberate act with an intent to deceive the government. He believed that because the purchase of marijuana was from a legal dispensary in his state, and his use of marijuana occurred in his home when he was off duty and not at work, it was perfectly legal. That is why he did not report any “illegal” drug use or purchase on the SCA. He did not understand at the time that the federal prohibition on marijuana use and purchases superseded state law. (Answer; Tr. 27-29)

Department Counsel questioned Applicant about possessing a DOD security clearance since 2015. He had filled out an SCA in October 2015, and he also filled out an SCA in early 2021. Since 2015, he has worked for five different federal contractors, and each time he started a new employment, he did not recall ever being required to take a pre-employment drug test. In all previous SCAs he completed, with the exception of the December 2022 SCA, he correctly answered the drug questions because he had

never used marijuana until late 2021, after his state of residence had legalized the recreational use of marijuana in 2020. He was never subjected to drug tests before or after marijuana use became legal in his state. Department Counsel sent an email post-hearing verifying that the last sentence under the SCA's drug section, which stated that regardless of state law, the use of marijuana is still considered illegal under federal law, as indicated on his December 2022 SCA, was also listed on his SCA he completed in early 2021. (Tr. 33-43, 50; GE 2, 5)

Applicant admitted that he had annual security training while working for federal contractors, but he denied that any of the briefings covered illegal drug use. He stated, "The trainings cover[ed] cybersecurity, antiterrorism, counterintelligence, human trafficking, and insider threat awareness, things like that." He submitted a signed statement of intent to abstain from marijuana, acknowledging that any future misuse is grounds for revocation of national security eligibility. He also took an online drug course and submitted a negative hair follicle drug test from February 2024, and a negative urine drug test from May 2024. (Tr. 51; AE A, B, J, K)

Character Evidence

Applicant submitted a positive employee evaluation dated October 2023, and he provided three character reference letters. All three references attested to Applicant's admirable character traits, such as his dedication, honesty, and dependability. (AE E, F, G, H)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG 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 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; and

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

Beginning in late 2021, Applicant used and purchased marijuana while holding a sensitive position, and after recreational use became legalized in his state. He used marijuana every three to four months until May 2023, when he became aware that the federal prohibition supersedes state law. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. 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.

Applicant's last use of marijuana was more than a year ago. He was unaware that marijuana use was incompatible with the holding of a DOD security clearance. He filled out his December 2022 SCA and was granted an interim top secret security clearance the following month. Applicant believed he could use and purchase marijuana, as long as he was off duty from work, until just before his background interview when he checked over his responses on the SCA. During this time, he discovered the last sentence under the drug section, and realized that his use of marijuana was still considered illegal under federal law. He immediately stopped all use of marijuana, and voluntarily disclosed his use and purchase of marijuana to the investigator a few days later during his background interview. Applicant has abstained from all marijuana use after his realization of the security significance. He also submitted a signed statement of intent to abstain from marijuana, acknowledging that any future misuse is grounds for revocation of national security eligibility.

I found the Applicant to be candid and sincere. He does not associate with anyone who uses illegal drugs, and I find that future illegal drug use is unlikely to recur. The positive record evidence provides me with confidence as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant successfully mitigated the security concerns arising under Guideline H, drug involvement and substance misuse. AG ¶ 26(a) and (b) apply.

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

AG ¶ 16 lists two personal conduct conditions that could raise a security concern and may be disqualifying as follows:

(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 national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

AG ¶¶ 16(a) and 16(b) are not applicable. Applicant established that he did not deliberately conceal or falsify his use and purchase of marijuana while holding a sensitive position when he completed the December 2022 SCA. As soon as he discovered the security significance, he abstained from using and purchasing marijuana and notified the investigator of this information during his June 2023 background interview.

As mentioned earlier, I found Applicant to be a candid and sincere witness, and he successfully refuted allegations that he intentionally falsified answers to questions on his 2022 SCA.

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. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

Applicant's last use of marijuana in May 2023 is not recent, especially after he learned of the security significance of illegal drug use that same time. The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006). The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006).

Applicant's use of marijuana while holding a sensitive position places a heavy burden on him to establish mitigation. After considering the record as a whole, to include the circumstances surrounding Applicant's limited use of marijuana, his misunderstanding that federal law supersedes state law, his disclosure of his marijuana involvement, and his remorse for his actions, I conclude that Applicant has met his heavy burden of proof and persuasion. Overall, his conduct and abstention of marijuana upon learning of its security significance shows his reliability, trustworthiness, and good judgment. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guideline H, and he refuted the security concerns under Guideline E.

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
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Pamela C. Benson
Administrative Judge