



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



In the matter of:)	
)	
)	ISCR Case No. 23-02582
)	
Applicant for Security Clearance)	

Appearances

For Government: Jenny G. Bayer, Esq., Department Counsel
For Applicant: Carl Marrone, Esq.

10/02/2024

Decision

HALE, Charles 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

On December 11, 2023, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H. Applicant responded to the SOR on March 22, 2024, and requested a hearing before an administrative judge. The case was assigned to me on August 5, 2024. A notice of hearing was issued on August 12, 2024.

The hearing convened as scheduled on September 17, 2024. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. After Applicant's counsel's objection, GE 4 was withdrawn by the Government and was not considered. Applicant testified, called four witnesses, and submitted Applicant Exhibits (AE) A through O, which were admitted without objection. Shortly after the hearing closed, Applicant requested the record remain open. The Government did not object to leaving the record open until

October 1, 2024. AE P was received prior to the record closing and was admitted without objection. I received the transcript on September 27, 2024.

Findings of Fact

Applicant is a 36-year-old employee of a defense contractor. She has worked for her current employer since August 2023. She seeks to retain a security clearance, which she has held since about 2017. She earned a bachelor's degree in 2016. She lives with her partner of ten years and has no children. (Tr. at 19-21; GE 1, GE 2, GE 3)

Applicant admitted she used marijuana while holding a holding a security clearance and acknowledged that marijuana use "is not something that is tolerated under holding a clearance." (Tr. at 19, 25; GE 1; GE 3.) She used marijuana about 6-8 times between about January 2019 and August 2023. (Tr. at 24.) She went to work for a defense contractor (not her current employer) in February 2017. She applied for a security clearance, and it was granted in about February 2017. Applicant stated that on the 2017 Questionnaire for National Security Positions (SF-86) she had not used marijuana. She signed a nondisclosure agreement in April 2017. (GE 2; GE 3.) When she changed companies, she submitted a June 2023 SF-86, and she was interviewed for her background investigation. On her June 2023 SF-86 she reported her marijuana use stating:

[I]n states where it was legal, used marijuana recreationally. I have never bought marijuana, never sold it, and I was not a regular user. I partook of it maybe 3-4 times a year roughly when offered by friends. The last time I had marijuana was in April of 2023. I had stopped using marijuana in 2022 out of concern of maintaining my clearance and had not had any in 2023. (GE 1 at 36.)

In the SF-86 Section 23 narrative, Applicant said she started using marijuana recreationally in 2014. Applicant credibly explained that she had not used marijuana prior to 2019 and how the years were likely misinterpreted by the investigator. This credible testimony is borne out by the other 2019 entries in Section 23 of the 2023 SF-86. (GE 1 at 36-37; Tr. at 34, 37-39.)

Applicant in 2019, at age 31, decided to use marijuana. She estimated she used marijuana two to three times a year, "probably seven or eight times in total" through 2022. (Tr. at 26, 27.) She described using it in three locations where her partner's family and friends hosted a long running fantasy board game. Her partner testified seeing Applicant using marijuana edibles and smoking marijuana at least once. He noted she used marijuana at least once when they were gaming with his family. Applicant testified her partner has a clearance and possibly one other member of the gaming group had a secret clearance. (Tr. at 27, 44.) Her marijuana possession and use do not violate state law in either state she testified using it in. She admitted using it on an out of state trip to visit friends of her partner. (Tr. at 28.) This trip was not taken in state where she met to play the board game. (Tr. at 44.)

Applicant's new employer has a drug-free workplace policy, which was addressed at hiring. (Tr. at 51.) Her new employer was seeking to upgrade her security clearance,

and she would be required to undergo a polygraph. (Tr. at 52.) She cited some stress from the COVID-19 pandemic but acknowledged she made a personal choice to experiment with marijuana. (Tr. at 25.) She knew marijuana use violated federal law. (Answer; GE 1.)

At the hearing in response to why did she use marijuana she stated:

It's a good question. I recognize that regardless of any state legalities, it is federally illegal. It was a bad choice and something that I recognize is inconsistent with me and my clearance. I, at the time, was in a social circle with a couple [of] longtime family friends. There was occasional marijuana use at some of these [role play] games. I never partake in anything. I never had an interest. Around 2019, I did accept an offer and did some experimentation with it. I used it primarily just within that social circle, and infrequently. (Tr. at 24.)

Applicant in her June 2023 SF-86 made a notation about a potentially having illegally used a drug or controlled substance in 2023. She detailed an innocent ingestion situation. She reported this marijuana use for purposes of full disclosure. She fully discussed her illegal drug use without pause or hesitation during the hearing. (Tr. at 38; GE 1, GE 2) There is no evidence of illegally using a drug or controlled substance in 2023 and that portion of SOR ¶ 1.a is resolved for Applicant.

Applicant called several witnesses, and she submitted documents and letters attesting to her excellent job performance and strong moral character. She is praised for her dependability, responsibility, professionalism, loyalty, humility, trustworthiness, work ethic, honesty, reliability, dedication, patriotism, and integrity. She is described as a genius at her profession. (Tr. at 46-72; AE F, AE H-L.) She submitted a pledge to abstain from future marijuana use and provided a negative hair sample test taken in January 2024 to support her pledge. (AE C; AE D.)

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

The security concern 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. 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.

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.

Applicant used marijuana with varying frequency from about December 2019 to 2022. AG ¶¶ 25(a) and 25(c) are applicable. She held a sensitive position and a security clearance when she used marijuana. AG ¶ 25(f) is applicable.

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.

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. 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.

Applicant was granted a security clearance in about February 2017. She signed a nondisclosure agreement as part of receiving her security clearance. She made a deliberate decision to use marijuana between about December 2019 into 2022 while holding a sensitive position, which required her to hold a security clearance. Security clearance eligibility alone does not grant an individual access to classified materials. In order to gain access to specific classified materials, an individual must have not only eligibility (i.e., a security clearance), but also must have signed a nondisclosure agreement and have a “need to know.” See ISCR Case No. 20- 03111 (App. Bd. Aug. 14, 2022). Her testimony that she does not intend to use illegal drugs in the future was sincere and credible. 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.” Her willful conduct is relatively recent, and it casts doubt on her reliability, trustworthiness, and good judgment. The SOR does not allege that she had access to classified information, but it does allege that she held a sensitive position, and the evidence supports that allegation. None of the mitigating conditions are sufficient to mitigate Applicant’s illegal marijuana use while holding a security clearance in a sensitive position.

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 have incorporated my comments under Guideline H in my whole-person analysis. I also considered Applicant's favorable character evidence and her candor on her SF-86 and in her testimony. However, insufficient time has passed since her last use of drugs to overcome the extent, and seriousness of her conduct.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the security concerns under Guideline H.

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:	Against Applicant, except for the language "least April 2023," which is found for Applicant.

Conclusion

It is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Charles C. Hale
Administrative Judge