



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



In the matter of:)	
)	
[Name Redacted])	ISCR Case No. 23-02486
)	
Applicant for Security Clearance)	

Appearances

For Government: Troy Nussbaum, Esq., Department Counsel
For Applicant: *Pro se*

09/26/2024

Decision

HOGAN, Erin C., Administrative Judge:

Applicant mitigated the security concerns under Guideline H, Drug Involvement and Substance Misuse. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on December 12, 2022. The Defense Counterintelligence & Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR) on March 7, 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 answered the SOR on April 16, 2024, and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On April 30, 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 20, 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 23, 2024, and assigned to me on September 3, 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 the sole SOR allegation. Applicant's admissions are accepted as findings of fact. (Item 3)

Applicant is 33 years old. He has been employed by a DOD contractor since November 2022 and is applying for a security clearance. He previously held a security clearance during his employment with another DOD contractor from May 2014 to October 2016. His highest level of education is a bachelor's degree. He is single and has no children. (Item 4)

The SOR alleges under Guideline H that Applicant used marijuana (THC) with varying frequency from approximately January 2017 to about July 2022 (SOR ¶ 1.a: Item 3 at 32-33).

Applicant listed his marijuana use on his May 2023 SCA in response to Section 23 - Illegal Use of Drugs or Drug Activity. He indicated that he used THC recreationally from January 2017 to July 2022. He noted that the use of THC was legal in the state where he resides. He does not intend to use THC while he is applying to and maintaining a security clearance unless the federal law changes. (Item 4 at 32-33)

On May 25, 2023, Applicant was interviewed in conjunction with his security clearance background investigation. He told the investigator that he began using marijuana in 2017. Between January 2017 and January 2020, he smoked marijuana and consumed marijuana edibles a couple times a month. Between January 2020 and July 2022, he estimates his use was a dozen times a month. He would use marijuana at home, and at friends' houses. From January 2017 to 2018, he obtained marijuana from a neighbor. After marijuana became legal in the state where he resides, he purchased marijuana from local dispensaries. He said his marijuana use did not cause any negative effects. He believes he did not use marijuana while possessing a security clearance because he stopped working for the DOD contractor who initially sponsored him for a security clearance in October 2016. (Item 4 at 3)

Applicant told the investigator that he does not intend to use drugs again in the future. He stopped using marijuana and is not dependent on it. He no longer uses marijuana because it is illegal under federal law. (Item 4 at 4)

In his Response to the SOR, Applicant mentions that he has abstained from marijuana use since July 4, 2022. He first stopped using as a precaution while looking for

new employment. Once he was hired in his current position, he was aware his continued abstinence is in accordance with the DOD contractor's rules and expectations of a person who applies for and is granted a security clearance. He states his job and commitment to holding a security clearance is more important to him than future cannabis use. (Item 2 at 2)

Applicant indicates his marijuana use was legal in the state where he resides. He is aware marijuana remains illegal under federal law. He understands he must act in accordance with federal laws. He takes very seriously the covenant he would be making with the government in order to be granted access to classified information. He has no intention of breaking his word. (Item 2 at 2)

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; and

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

The record evidence shows Applicant occasionally used marijuana on a recreational basis from approximately January 2017 to about July 2022. His last known use of marijuana was on July 4, 2022. He used marijuana in a state where marijuana is legal. He is aware the use and possession of marijuana remains illegal under federal law. AG ¶¶ 25(a), and 25(c) 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.

More than two years have passed since Applicant's last use of marijuana. He intends to abstain from marijuana because it is not compatible with his employment with

a DOD contractor and with possessing a security clearance. While Applicant did not submit a signed statement intending to abstain from all drug involvement and substance misuse, he indicated during his background investigation interview and in his response to the SOR that he intends to abstain from marijuana use in accordance with the federal government's policy. He stopped using marijuana in July 2022, while he applied for new employment. He intends to refrain from marijuana in the future. While not a sworn statement, his actions support that he has no intention to use marijuana in the future. AG ¶¶ 26(a) and 26(b) apply.

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 November 2022. I considered he provided full disclosure about his illegal marijuana use on his December 2022 SCA and during his May 2023 background investigation interview. I considered that he used marijuana in a state where marijuana use is legal. I considered that Applicant did not possess a security clearance during the time he used marijuana. I considered he stopped using marijuana more than two years ago and has no intention to use marijuana in the future. He understands the responsibilities of working for a DOD contractor and the standards required to possess a security clearance. He is warned that any future use of illegal drugs while holding a security clearance may result in the revocation of his security clearance. He mitigated the security concerns raised under Drug Involvement and Substance Misuse.

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

Conclusion

In light of all of the circumstances presented, it is 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 granted.

Erin C. Hogan
Administrative Judge