



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



In the matter of:)	
)	
)	ISCR Case No. 24-00258
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

11/27/2024

Decision

BENSON, Pamela C., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline H (drug involvement and substance misuse). National security eligibility for access to classified information is not granted.

Statement of the Case

On April 13, 2023, Applicant submitted a security clearance application (SCA). On May 23, 2024, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline H. The action was taken 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) effective within the DOD on June 8, 2017.

Applicant admitted SOR ¶¶ 1.a and 1.b. (Answer) He requested a hearing before an administrative judge, and the case was assigned to me on July 18, 2024. On July 29, 2024, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing

for a video teleconference scheduled for August 26, 2024. The hearing was convened as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through 3. Applicant testified and did not offer any documents. There were no objections, and the Government's proffered documents were admitted into evidence. The Government's July 2024 disclosure letter is marked Hearing Exhibit (HE) 1 and is appended to the record. DOHA received the transcript (Tr.) on September 3, 2024.

Findings of Fact

Having thoroughly considered the evidence in the record, I make the following findings of fact:

Applicant is 31 years old. He is married and does not have any children. He earned a bachelor's degree in 2015. He has worked for a DOD contractor since May 2015. Before he started his employment, he was required to pass a drug test. He testified he was aware that illegal drug use was prohibited under his employer's drug policy. This is Applicant's first application for a DOD security clearance. (Tr. 12-14, 17-18; GE 1, 3)

Applicant first started using marijuana after he graduated from college in 2015. He used it in his state of residence, where the use of marijuana has not been legalized. He stated that he realized marijuana is illegal under both state and federal law, but he decided to use marijuana anyway to help him sleep. He regularly used marijuana on an approximately twice weekly basis from 2015 to at least January 2024. (SOR ¶ 1.a.) He purchased his marijuana every three or four months from a dispensary after traveling to a state that had legalized the use of marijuana. (SOR ¶ 1.b.) He used marijuana with his wife, and she also used it in their home at the same frequency as Applicant. (Tr. 14-17; GE 1, 2, 3)

Applicant submitted an SCA on April 13, 2023. Under "Section 23 – Illegal Use of Drugs or Drug Activity," he disclosed that he had used marijuana, to include edible marijuana, 1 to 2 times a week from March 2019 to April 2023. He estimated he used marijuana approximately 100 times during this period and listed, "I have complete control over my use and will gladly quit in support of obtaining this clearance." He continued using marijuana, however, for another nine months after submitting the SCA because he hoped he may be permitted to use marijuana while he also held a security clearance. He stated he "was hopeful that [marijuana use] may transition to be[come] federally legal and, therefore, that [he] would not have to make that transition [to abstain from using marijuana]." Applicant did not seek information from his security manager to verify whether his continued illegal drug use was compatible with possessing a DOD security clearance. (GE 1; Tr. 18-19, 22; GE 1, 2, 3)

Applicant received an interrogatory from DOHA, and he submitted his response in March 2024. He was asked to disclose his illegal drug use within the past seven

years. He listed that he used marijuana one to two times a week from March 2019 until January 2024, when he decided to stop using marijuana. He denied using any other illegal drugs. He was sent a supplemental interrogatory, to which he responded in May 2024 and attached a copy of his employer's drug policy. (GE 2, 3)

Applicant testified that, in January 2024, he made the decision to stop his use of marijuana. He stated that this decision was due to the combination of two considerations: 1) he made lifestyle changes, such as exercise, diet, and a sleep schedule to resolve his insomnia, and 2) it became clear that his total abstention from marijuana was a requirement in order for him to obtain a security clearance. These two factors removed his underlying need for marijuana. He acknowledged that he found it quite easy to give up his marijuana use. He stated, "I intend to not use [marijuana and other illegal drugs] for the indefinite future." He admitted that his wife continues to use marijuana in their home. (Tr. 19-21, 25)

Applicant has a history of service, including his work as a volunteer firefighter for seven years. He was also a volunteer first responder on his college campus for four years. He stated, he "thrives on challenges," and he works diligently to support his company, which in turn, supports our country." He is honest and transparent. He readily admitted his mistake by not abstaining from marijuana immediately after submitting the SCA, and by his continued use during the following nine months. (Tr. 23-24)

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 forth at 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.

The guideline at AG ¶ 25 contains three conditions that could raise a security concern and may be disqualifying:

(a) any substance misuse; and

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

The record evidence and Applicant's admissions support the disqualifying conditions listed above.

The burden shifted to Applicant to rebut or prove mitigation of the resulting security concerns. AG ¶ 26 provides conditions that could mitigate security concerns in this case:

(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.

Applicant admitted that he used marijuana, despite knowing it was illegal under federal law, from approximately 2015 through January 2024. He submitted an SCA in April 2023, after his employer of almost eight years sponsored him for a DOD security clearance. Despite being aware that marijuana use was illegal and against his employer's drug policy, Applicant continued to use it for another nine months while his security clearance investigation was underway. Although I appreciate Applicant's transparency and candor, I find it concerning that he was hopeful marijuana use would become federally legal within the time period that his security clearance investigation was in process. Although he stopped all use of marijuana in January 2024, less than a year ago, he admitted that his wife continues to use marijuana in their home. As such, I am unable to find that Applicant's use of marijuana happened under such circumstances that it is unlikely to recur or does not cast doubt on his current reliability, trustworthiness, or good judgment. None of the mitigating conditions fully apply. Drug involvement and substance misuse security concerns are not mitigated.

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.

Applicant is an honest individual, however, with his continued exposure to marijuana in his home followed by a short period of abstention, I am not convinced that future use is unlikely to recur. I find not enough time has passed to support a finding of rehabilitation. As such, the record evidence leaves me with questions and doubts about his eligibility and suitability for a security clearance.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more time passed without any security concern, and a track record of constructive actions he has taken to overcome this continuing problem and a longer period of abstinence, he may be able to demonstrate persuasive evidence of his security clearance worthiness. I have carefully applied the law, as set forth in Egan, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate the drug involvement and substance misuse consumption 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:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge