



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



In the matter of:)
)
) ISCR Case No. 23-00834
)
Applicant for Security Clearance)

Appearances

For Government: Brittany White, Esq., Department Counsel
For Applicant: *Pro Se*

03/14/2024

Decision

BORGSTROM, Eric H., Administrative Judge

Since Applicant's August 2012 felony arrest, he has taken tangible steps to focus on his family and his career and to adhere to laws and regulations. He mistakenly believed that he was adhering to drug laws when he applied for, obtained, and used a medical marijuana card to use and purchase marijuana for medical purposes, unaware that his actions violated Federal drug laws. When alerted to this misunderstanding, he immediately ceased all drug involvement. Applicant mitigated the drug involvement and criminal conduct security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On May 23, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse) and Guideline J (criminal conduct). The DCSA CAS acted 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 implemented by the DOD on June 8, 2017.

In Applicant's June 6, 2023 response to the SOR (Answer), he admitted all of the SOR allegations but for ¶ 2.f, which he denied. He requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge.

On August 8, 2023, the Government was ready to proceed to hearing. I was assigned this case on November 3, 2023. On November 13, 2023, DOHA issued a notice scheduling a hearing by video teleconference for November 30, 2023. The hearing proceeded as scheduled. The Government proffered nine exhibits, which I admitted as Government Exhibits (GE) 1 through 9. Applicant objected to GE 5 because the docket record referenced a dismissed criminal charge. I overruled his objection because the docket record was a public record, and I admitted GE 5 into evidence. The remaining exhibits were admitted without objection. Applicant testified and did not submit any documentary evidence. At his request, I held the record open until December 15, 2023, for him to supplement the evidentiary record. DOHA received the hearing transcript (Tr.) on December 11, 2023. On December 13, 2023, Applicant proffered two exhibits, which I admitted as Applicant Exhibits (AE) A and B without objection. The record closed on December 15, 2023.

Findings of Fact

Applicant is 53 years old. He graduated from high school in 1988, and he earned an associate's degree in 1993. Since September 2021, he has been employed as an electronics technician with a DOD contractor. He has been married to his second wife since August 2020, and he has five adult stepchildren. (GE 1; Tr. 31, 33)

The SOR alleges drug involvement security concerns triggered by Applicant's longtime use of marijuana and several drug charges. The SOR cross-alleges criminal conduct security concerns arising from his illegal drug use and possession and alleges a battery charge and multiple alcohol-related offenses.

In 1986, at age 16, Applicant was charged with driving under the influence (DUI) after he failed a roadside breathalyzer test following a traffic stop. (SOR ¶ 2.b.). Upon completion of 10 court-ordered alcohol-education classes, the charge was dismissed. (Answer; GE 2; Tr. 51)

In 1987, at age 17, Applicant was charged with DUI after he failed a roadside breathalyzer test following a traffic stop (SOR ¶ 1.c.). He had consumed approximately three or-four mixed drinks at a bar. He was sentenced to two days in jail for this offense. (Answer; GE 2; Tr. 51)

In February 1989, Applicant was charged with misdemeanor possession of marijuana, after marijuana was found on his person by a police officer. (SOR ¶¶ 1.b., 2.a.). In June 1989, he was found guilty and was fined approximately \$1,000. (Answer; GE 2, GE 9; Tr. 42)

In August 1990, Applicant was arrested for misdemeanor possession of marijuana, after marijuana was found on his person by law enforcement (SOR ¶¶ 1.c., 2.a.). He received a one-year suspended jail sentence, and he was placed on probation for three

years. He was fined approximately \$1,000. He did not use marijuana while on probation. (GE 2, GE 9; Tr. 43-44)

In February 1991, Applicant was charged with DUI after he consumed alcohol and failed a breathalyzer test (SOR ¶ 2.d.). The charge was later dismissed due to a miscalibrated breathalyzer device. (Answer; GE 2; Tr. 51-52)

In June 1995, Applicant was charged with (1) possession of marijuana, a misdemeanor; and (2) possession of drug paraphernalia, a misdemeanor (SOR ¶¶ 1.d., 2.a.). Law enforcement officers discovered a half-burnt marijuana cigarette in his vehicle's ashtray. Applicant admitted it was his marijuana, and he was fined approximately \$250. (Answer; GE 2-3, 9)

In January 1996, Applicant was charged with (1) possession of marijuana, a misdemeanor; and (2) possession of drug paraphernalia, misdemeanor (SOR ¶¶ 1.e., 2.a.). He explained that a police officer discovered a marijuana joint and rolling papers inside his vehicle. Applicant pled *nolo contendere* to the charges. He was found guilty of Charge (2) and was fined approximately \$200. (Answer; GE 2, GE 4)

On January 27, 1996, Applicant was charged with battery, a misdemeanor (SOR ¶ 2.e.). Applicant testified that he had defended himself and his first wife during a bar fight. He later returned and apologized to the bar owner. On March 22, 1996, this charge was dismissed. (Answer; GE 5; Tr. 55)

In December 1997, Applicant was charged with (1) possession of marijuana, a misdemeanor; and (2) possession of drug paraphernalia, a misdemeanor (SOR ¶¶ 1.f., 2.a.). He explained that a marijuana cigarette was found in his pack of cigarettes. He was found guilty of Charge (1), and he was fined approximately \$82. (Answer; GE 2, 6, 9)

In his Answer, Applicant denied the alleged 2012 DUI arrest, and Department Counsel stipulated that there was no record evidence of any such arrest or charge (SOR ¶ 2.f.). (Answer; Tr. 53)

On August 20, 2012, Applicant was charged with (1) possession of marijuana with intent to sell or deliver, a felony; and (2) possession of marijuana over 20 grams, a felony (SOR ¶ 1.g.). Through an associate, Applicant had purchased three pounds of marijuana from someone in another state and had it shipped across the country, with the intent to split the marijuana with his local associate. Applicant credibly testified that the marijuana was for his personal use. In December 2012, Charge (1) was dismissed, and adjudication was withheld on Charge (2). He was placed on probation for 18 months and was ordered to pay approximately \$1,272 in fines and costs. He was required to participate in drug tests during probation. The police records noted that Applicant cooperated throughout the investigation. (Answer; GE 2, 7-9; Tr. 36-37, 46-48, 60)

Applicant credibly detailed his history of marijuana use during his November 2022 security interview and at hearing. He first tried marijuana at age 11 or 12 (circa 1981), and then he did not use marijuana again until age 15. From 1985 (age 15) to 2000 (age 30), he used marijuana daily; however, he abstained from marijuana while on probation

between 1990 and 1993. From 2000 to August 2012, he used marijuana four to five times a week. He recognized that marijuana use, purchase, and possession were prohibited at the time. Following his August 2012 arrest, he was placed on probation and did not use marijuana again until 2015. He relocated to a different state, and he obtained a medical marijuana card in 2015. He maintained and used his medical marijuana card between 2015 and November 2022 to purchase marijuana at state-licensed dispensaries. During his November 2022 security interview, he was alerted by the investigator to Federal drug laws prohibiting marijuana use, purchase, and possession, and Applicant immediately ceased all marijuana use and purchase. He also let his medical marijuana card expire. He has not used or purchased marijuana since his security interview, and he has experienced no withdrawal symptoms or urges to use marijuana. (Answer; GE 2; Tr. 35- 41, 62)

Applicant credibly testified that his alcohol consumption decreased after he married his first wife in 1996. She had three small children, and he was very busy helping care for them. During his November 2022 security interview, Applicant explained that, for the previous 10 years, he typically consumed two alcoholic beverages only twice a year. He explained that he had lost interest in drinking alcohol over the years. Similarly, he quit smoking (tobacco) cigarettes in 2016 and has not relapsed. (GE 2; Tr. 38, 50-54)

Applicant has not been arrested nor charged with any criminal conduct since August 2012. He complied with his probation conditions, and he has adhered to state drug laws by obtaining a medical marijuana card and purchasing marijuana from state-licensed dispensaries. At the hearing, he reiterated his intent to abstain from marijuana in the future, and he has not used any illegal drugs or misused prescription drugs since November 2022. He has never failed a drug test, participated in drug treatment, or been assessed by a substance abuse counselor. (Tr. 48, 56, 58, 65-66)

Applicant's supervisor submitted a character-reference letter praising Applicant's proactive approach, diligence, dedication, and subject-matter expertise. Applicant testified that he has had no disciplinary actions at his current employer, and he has received yearly pay raises and multiple bonuses. Applicant's wife also submitted a character-reference letter lauding his "high moral character" and noting that he quit cigarettes in 2016 and quit marijuana in late 2022. (AE A, AE B; Tr. 70)

Policies

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(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 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 sensitive 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive 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 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); and

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

Marijuana is a Schedule I controlled substance under Federal law pursuant to Title 21, Section 812 of the United States Code. Schedule I drugs are those which have a high potential for abuse; have no currently accepted medical use in treatment in the United States; and lack accepted safety for use of the drug under medical supervision. Section 844 under Title 21 of the United States Code makes it unlawful for any person to knowingly or intentionally possess a controlled substance not obtained pursuant to a valid prescription.

On October 25, 2014, the then Director of National Intelligence (DNI) issued guidance that changes to laws by some states and the District of Columbia to legalize or decriminalize the recreational use of marijuana do not alter existing federal law or the National Security Adjudicative Guidelines, and that an individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security eligibility determinations.

On December 21, 2021, the DNI issued clarifying guidance concerning marijuana, noting that prior recreational use of marijuana by an individual may be relevant to security adjudications, but is not determinative in the whole-person evaluation. Relevant factors in mitigation include the frequency of use and whether the individual can demonstrate that future use is unlikely to recur.

Applicant admitted using marijuana between 1981 and November 2022; however, he abstained from marijuana from 1990 to 1993 and from August 2012 to 2015. On six occasions, he was charged with drug-related offenses, including a felony possession of marijuana offense in August 2012. He admitted culpability for all of these offenses. AG ¶¶ 25(a) and 25(c) apply.

Conditions that could mitigate the drug involvement security concerns are provided under AG ¶ 26. 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.

Although Applicant's marijuana use spanned 40 years, it is appropriate to consider three stages or periods of use. Between 1985 and August 2012 (Stage 1), Applicant was heavily involved with marijuana, regularly purchasing it and using it between four and seven times a week. Applicant was fully aware that his conduct was illegal. Between August 2012 and 2015, Applicant abstained from marijuana during probation, and he then obtained and used a medical marijuana card between 2015 and November 2022 (Stage 2). He sincerely believed that he was adhering to drug laws, and there is no evidence that he used marijuana after August 2012 without a medical marijuana card or that he purchased marijuana from other than a state-licensed dispensary after August 2012.

Upon learning, during his November 2022 security interview, that his marijuana use violated Federal drug laws, Applicant immediately ceased all drug use, possession, and purchase, and he has abstained from all drug involvement since November 2022 (Stage 3). While ignorance of Federal drug laws does not excuse the security concerns arising from his marijuana use between 2015 and November 2022, Applicant's intent to adhere to laws and regulations is material and relevant. I found Applicant's testimony credible and sincere, and his character and commitment were corroborated by his supervisor and his wife. He has been cooperative throughout the security clearance investigation and adjudication, as well as during his law enforcement encounters decades ago. I have considered Applicant's lengthy involvement with marijuana; however, I see clear changes in the three stages delineated above as he has made a concerted effort to focus on his family and his career and to adhere to drug laws. There is no evidence of any continuing contacts with former drug-using associates or contacts. AG ¶¶ 26(a) and 26(b) apply. Applicant mitigated the drug involvement and substance misuse security concerns.

Guideline J: Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

The guideline notes several conditions that could raise security concerns under AG ¶ 31. The following disqualifying condition is potentially applicable in this case:

- (a) a pattern of minor offenses, any of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

As discussed above, Applicant purchased, used, and possessed marijuana for approximately 40 years, in violation of Federal drug laws (SOR ¶ 2.a.). He also engaged in criminal conduct when he operated a vehicle after consuming alcohol, while underage (SOR ¶¶ 2.b. and 2.c.). AG ¶¶ 31 (a) and 31 (b) apply.

Although Applicant was charged with DUI in 1991, this charge was later dismissed due to a faulty breathalyzer (SOR ¶ 2.d.). Similarly, Applicant credibly testified that he defended his wife during the barfight in 1996 (SOR ¶ 2.e.), and there is no record evidence of a 2012 DUI (SOR ¶ 2.f.). The record evidence did not establish that Applicant engaged in criminal conduct on these three occasions. I find for Applicant as to SOR ¶¶ 2.d.-2.f..

Criminal conduct security concerns may be mitigated under AG ¶ 32. The following are potentially applicable in this case:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

As discussed above within the Guideline H analysis, I have viewed Applicant's history of drug involvement, which mirrors his criminal conduct, in three stages. Prior to August 2012, Applicant knowingly violated drug laws with his use, possession, and purchase of marijuana. Similarly, as a teenager, he was involved in two alcohol-related offenses. After his August 2012 arrest, he adhered to the conditions of his probation, and he relocated out of state. Although Applicant's ignorance of Federal drug laws does not excuse his marijuana use and purchase between 2015 and November 2022, it remains a relevant and material factor. Applicant has excelled at his current position, dramatically reduced his alcohol consumption over the past decades, quit tobacco, and quit marijuana. Upon learning that marijuana use and purchase violated Federal laws, he immediately stopped and has adhered to his intent to abstain from all drug involvement. AG ¶¶ 32(a) and 32(d) apply. Applicant mitigated the criminal conduct security concerns.

Whole-Person Concept

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

Since Applicant's August 2012 felony arrest, he has taken tangible steps to focus on his family and his career and to adhere to laws and regulations. He mistakenly believed that he was adhering to drug laws when he applied for, obtained, and used a medical marijuana card; unaware that his actions violated Federal drug laws. When alerted to this misunderstanding, he immediately ceased all drug involvement. He has excelled with his current employer and has demonstrated a track record of abstaining from tobacco and curtailing his alcohol consumption. Applicant mitigated the drug involvement and criminal conduct 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:	FOR APPLICANT
Subparagraphs 1.a.-1.g.:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraphs 2.a.-2.f.:	For Applicant

Conclusion

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

Eric H. Borgstrom
Administrative Judge