



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



In the matter of:)
)
) ISCR Case No. 23-02599
)
Applicant for Security Clearance)

Appearances

For Government: Brian Farrell, Esq., Department Counsel
For Applicant: *Pro se*

04/02/2025

Decision

BENSON, Pamela C., Administrative Judge:

Applicant mitigated the Guideline H (drug involvement and substance misuse) security concerns arising from his past use of marijuana and controlled substances. He did not fully understand that, although Delta-8 was legal in his state of residence, it was still considered a controlled substance under federal law. Once he became aware of this standard, he made positive changes in his life and has completely abstained from using illegal drugs. National security eligibility for access to classified information is granted.

Statement of the Case

On December 1, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H and 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.

On January 17, 2024, Department Counsel amended the SOR under Guideline H to read as set forth below:

SOR ¶ 1.a. You used marijuana with varying frequency from about 2016 to May 2023.

SOR ¶ 1.b. You purchased marijuana about two times from about 2016 to about May 2023.

SOR ¶ 1.c. You intend to use marijuana in the future.

Paragraph 2 Guideline J (criminal conduct) was deleted from the SOR.

Applicant provided an undated response to the amended SOR (Answer). He admitted SOR ¶¶ 1.a and 1.b, and he denied SOR ¶ 1.c. He requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. I was assigned this case on November 7, 2024. DOHA issued a notice on November 25, 2024, scheduling the hearing for December 17, 2024. The hearing proceeded as scheduled via online video teleconferencing.

Department Counsel submitted Government Exhibits (GE) 1 through 5; Applicant testified and offered two documents, which I labeled as Applicant Exhibits (AE) A and B; and all of the exhibits were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on December 23, 2024.

Findings of Fact

Applicant is 30 years old. He is unmarried and does not have any children. He earned a bachelor's degree in May 2016. Since August 2018, he has been employed full time as a mechanical engineer for a DOD contractor. His employer is sponsoring him for a DOD security clearance. (GE 1; Tr. 24)

Administrative Notice

The U.S. Department of Justice, Drug Enforcement Administration (DEA), dated February 13, 2023, issued information concerning the chemical structures of Delta-9 and Delta-8, and the application of federal law. On my own motion and for the sake of clarity, I took Administrative Notice of the DEA's findings, as set forth below:

The Controlled Substances Act (CSA) classifies tetrahydrocannabinols (THC) as controlled in schedule 1. 21 U.S.C. Section 812, Schedule 1(c)(17); 21 CFR 1308.11(d)(31). Subject to limited exceptions, for the purposes of the CSA, the term "tetrahydrocannabinols" means only those

naturally contained in a plant of the genus cannabis plant... Delta-9 and Delta-8 do not occur naturally in the cannabis plant and can only be obtained synthetically, and therefore do not fall under the definition of hemp. Delta-9 and Delta-8 are tetrahydrocannabinols having similar chemical structures and pharmacological activities to those contained in the cannabis plant. Thus, Delta-9 and Delta-8 meet the definition of tetrahydrocannabinols, and they (and products containing Delta-9 and Delta-8) are controlled in schedule 1 by 21 U.S.C. Section 812(c) Schedule 1; and 21 CFR Section 1308.11(d). (Judicial Exhibit I)

Drug Involvement and Substance Misuse

Applicant disclosed on his June 2023 security clearance application (SCA) his use of marijuana between 2016 and 2022. He used marijuana approximately four to eight times a year, usually at special events with his friends. He purchased marijuana on two occasions. Both purchases occurred in states that had legalized recreational use of marijuana. The last time he used marijuana was around late 2022 or early 2023. He has no problem letting his friends know that he no longer uses any product that contains THC. He has never needed drug treatment, and he has never been charged with a drug-related offense. (Tr. 18-23; GE 1)

Applicant also disclosed on his June 2023 SCA his use of Delta-8, beginning in about 2016. He testified that he would go into a smoke shop and purchase a vape pen that contained Delta-8, which is cannabinoid (CBD) found in cannabis. Delta-8 is a less potent form of THC, often manufactured from hemp-derived CBD. Applicant acknowledged that Delta-8 is sold commercially in his state of residence, noting too that this state has not legalized the recreational use of marijuana. He was uncertain about the legal implication of Delta-8 and holding a security clearance, since it is lawfully sold in his state, as compared to the legal consequences of marijuana use, which he knows is illegal in his state and prohibited under federal law. The last time he used Delta-8 was in approximately June 2023. (Tr. 16-19; GE 1)

Applicant has been very candid about his past use of marijuana and Delta-8, as reflected on his June 2023 SCA. Initially, he did not fully understand that, although Delta-8 was legal in his state of residence, it was still considered a controlled substance under federal law. He testified at the hearing that he now understands that Delta-8 is prohibited under federal law and incompatible with security clearance regulations. He submitted a letter of intent to abstain from all illegal drug involvement and controlled substance abuse and acknowledged that any future involvement or misuse would be grounds for revocation of national security eligibility. (Tr. 23-24, 26-27; AE B)

Character Evidence

Applicant submitted positive employee performance appraisals for the years 2019 through 2023. In his most recent appraisal his supervisor stated, “[Applicant] applies himself to his analysis tasks and does whatever research or learning is necessary to figure out a solution to a problem. He is very willing to dive deep into how something works, even if it’s not something he has any experience with. [Applicant] delivers quality results and presentations.” (AE A)

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 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 access to classified information will be resolved in favor of 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 not drawn inferences grounded on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to 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 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 Executive Order 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

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 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.

Applicant admitted he used and purchased marijuana and Delta-8, with varying frequency, from about 2016 to June 2023. The above disqualifying conditions apply.

I have considered the mitigating conditions under AG ¶ 26. The following are potentially applicable:

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 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 a statement of intent to abstain from all drug involvement or substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant's last use of marijuana occurred approximately two years ago, and his last use of Delta-8 occurred a year-and-a-half ago. He credibly testified that he immediately stopped using Delta-8 upon learning it was illegal under federal law and incompatible for individuals entrusted with DOD security clearances. There is no evidence of more recent use. He acknowledged his drug use on his June 2023 SCA and took action to change his behavior by ceasing all use of marijuana and THC-products. He also provided a signed statement of intent not to use any illegal drug in the future. These actions demonstrate good judgment. Mitigating conditions AG ¶¶ 26(a) and 26(b) apply. Applicant successfully mitigated drug involvement and substance misuse security concerns.

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 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.

The Federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. In deciding whether to grant or continue access to classified information, the Federal government can take into account facts and circumstances of an applicant's personal life that shed light on the person's judgment, reliability, and trustworthiness. Furthermore, security clearance decisions are not limited to consideration of an applicant's conduct during work or duty hours. Even if an applicant has a good work record, his off-duty conduct or circumstances can have security significance and may be considered in evaluating the applicant's national security eligibility.

Applicant made positive changes in his life, which are fully supported by five consecutive years of his positive employee performance evaluations in the record. He is committed to remaining drug-free, and I find his future use of illegal drugs is unlikely to recur. I have no reservations or doubts about Applicant's eligibility and suitability for a security clearance. After evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the drug involvement and substance misuse 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
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Subparagraphs 1.a through 1.c:	For Applicant
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Conclusion

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

Pamela C. Benson
Administrative Judge