



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



In the matter of:)
)
) ISCR Case No. 23-01202
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

02/10/2025

Decision

OLMOS, Bryan J., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H (Drug Involvement and Substance Misuse). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on December 22, 2022. On August 1, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H. The DOD issued the SOR under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4 (SEAD 4), *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

Applicant answered the SOR on September 4, 2023 (Answer), provided supporting evidence and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). Prior to the hearing, Department Counsel amended the SOR to restate allegation ¶ 1.b to clarify that Applicant used marijuana while in a sensitive position. The hearing convened as scheduled on December 10, 2024. Department Counsel offered into evidence Government Exhibits (GX) 1-3. Applicant testified and offered into evidence Applicant Exhibit (AX) A. All exhibits were admitted without objection and the record closed at the conclusion of the hearing. DOHA received the hearing transcript (Tr.) on December 17, 2024.

Findings of Fact

In his Answer to the SOR, Applicant admitted SOR allegation ¶ 1.a, admitted amended SOR allegation ¶ 1.b and provided supporting explanations. His admissions are incorporated into my findings of fact. After a thorough review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 40 years old. He is married but separated from his wife. They live in the same home together while raising their two children. He completed a bachelor's degree in 2006 and a master's degree in 2008. He has been consistently employed for a majority of his career, primarily in electrical and software engineering and has been with his current employer since February 2022. He previously held a security clearance from about 2008 through 2013. More recently, he was granted a security clearance in about June 2020 that is the subject of this proceeding. (GX 1-3; AX A; Tr. 18-25)

Applicant initially purchased and used marijuana from about September 2017 through October 2019. He started using marijuana because he was curious and found that it helped him relax. He primarily vaped marijuana as often as a few times per week to a few times per month, either on his own or with his wife. He obtained the marijuana through a dispensary in State A where marijuana was legal to purchase and use under state law. (GX 1, 3; AX A; Tr. 22-28)

In about October 2019, Applicant decided to stop using marijuana. He did this because there had been a health scare about vaping marijuana, and he was considering looking for work in the defense sector where there was a likelihood that he would need a security clearance. His wife continued to use marijuana. (Tr. 28-32)

Following a job offer in State B where the recreational use of marijuana was illegal, Applicant submitted an SCA in December 2019 and disclosed that he had used marijuana from September 2017 through October 2019 as described above. He further stated in the SCA that he did not intend to use marijuana in the future. During a January 2020 interview with a background investigator, Applicant detailed that he had previously used marijuana because it had a calming effect but understood that it was illegal in State B and at the federal level and could impact his efforts to obtain a security clearance. He reaffirmed his commitment to not use marijuana in the future. (GX 1, 3)

In February 2020, Applicant and his family completed their move to State B and he started with the new company. Following the granting of his security clearance in about June 2020, Applicant worked on sensitive and classified projects. In February 2022, he changed jobs and began to work for his current employer. In his current position, he runs a small team of software engineers. He stated that he does not have daily access to sensitive or classified information, but still receives occasional sensitive and classified briefings and visits sensitive client sites. He is required to maintain a security clearance as part of the contract he is working. (Tr. 20-21, 44-48)

Following their move to State B, Applicant and his wife experienced a steady decline in their relationship. They participated in marital counseling and Applicant began to see a psychiatrist. They eventually agreed to live as separated while sharing the marital home. During this time, Applicant's wife continued to use marijuana. Beginning in June 2022, while trying to spend time with his wife and to relax, he resumed using marijuana. (GX 3; Tr. 30-34)

Applicant submitted another SCA in December 2022 and only disclosed his marijuana use from September 2017 through October 2019. However, he described the process of filling out that SCA as a "wake-up call" to stop using marijuana. (Tr. 34) Nonetheless, he continued to use marijuana through a 2023 New Year celebration. Afterwards, he committed to terminating any future use of marijuana. In the spring of 2023, his wife also stopped using marijuana and there is no marijuana in the house. Neither of them continues to associate with anyone who uses drugs. (GX 3; AX A; Tr. 34-38, 48-49)

Applicant volunteered details of his more recent marijuana use to investigators during a background interview in January 2023. He stated that he failed to disclose the information in his December 2022 SCA because he was embarrassed by his actions. He then acknowledged that he had stopped using marijuana to conform with federal regulations and to maintain his security clearance. (GX 3)

In his September 2023 Answer to the SOR, Applicant confirmed the time periods that he used marijuana, stated his drug use was a mistake and that he understood that it was "incompatible" with holding a clearance. He submitted a statement of intent to abstain from all drug involvement while acknowledging that any future drug use may result in the revocation of his security clearance. (Answer)

Prior to the hearing, Applicant submitted an alcohol and substance use assessment conducted through a mental health counseling center. Applicant confirmed in the assessment that he had last used marijuana during a 2023 New Year celebration. He detailed that he had used marijuana to help with "emotional distress" while he struggled in his marriage. However, he no longer believed that marijuana was helpful, and he felt "foolish" about his previous use. He described being diagnosed with generalized anxiety disorder and receiving benefits to his mental health through treatment with his psychiatrist. The counselor concluded that Applicant did not meet the diagnostic

criteria for a substance use disorder and that substance abuse treatment was not warranted. (AX A)

During his testimony, Applicant was forthcoming about his marijuana use and the circumstances that led to that use over two separate periods of time. He described that, through therapy, he learned that marijuana was “masking or numbing” his feelings instead of helping him emotionally heal from the difficulties of his marriage. (Tr. 40) While he remained separated from his wife, he believed they had resolved their stressors, had established a better living situation, and were focused on raising their children. He also continued to see a psychiatrist and take medication for anxiety. He described how this treatment had been beneficial to his mental health and outlook on life. He also testified that he was excited to advance his career and had no intent to use marijuana in the future. (Tr. 22-30; 47-56)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” 484 U.S. 518, 531 (1988)

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(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.” 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.

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 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.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern relating to the guideline for financial considerations 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 adjudicative guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable:

- (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 admitted to purchasing and using marijuana from September 2017 through October 2019 while in State A. Although he subsequently moved to State B, he

admitted to resuming his use of marijuana from June 2022 through a 2023 New Year celebration. This second period of use occurred after he was granted a security clearance in about June 2020 and was required to access sensitive and classified information as part of his job duties. All of the above disqualifying conditions apply.

Conditions that could mitigate the drug involvement and substance misuse 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.

Applicant is credited with disclosing his initial period of marijuana use in his December 2019 SCA and disclosing his more recent marijuana use during his January 2023 background interview with an investigator. He described how the curiosity and stressors that initially led him to use marijuana had dissipated and that his attitude toward marijuana had changed. He realized it was a mistake to use marijuana after he was granted a security clearance and submitted a statement of intent to not use any drugs in the future. He also submitted an alcohol and substance use assessment which confirmed his reported period of marijuana use and concluded that he did not meet the diagnostic criteria for a substance use disorder. His wife also stopped using marijuana and there is no longer any marijuana in the house. Neither he nor his wife associate with anyone using marijuana. Mitigation under both AG ¶¶ 26(a) and 26(b) must be considered.

Conversely, Applicant disclosed his marijuana use from September 2017 through October 2019 in his December 2019 SCA and it was discussed during his January 2020 interview with a background investigator. At that time, he confirmed his awareness that marijuana was illegal and detrimental to his obtaining work at the federal level or holding a security clearance. He also stated his commitment to not use marijuana in the future. He subsequently received a security clearance in June 2020 and was granted access to sensitive and classified information as required for his work.

Despite his previous affirmations to not use marijuana, he resumed his marijuana use in June 2022 and continued using marijuana for another six months. While he credited the submission of his December 2022 SCA as a “wake-up call” to stop using marijuana, he continued to use at a 2023 New Year celebration. Given his initial inability to terminate his marijuana use as well as his recent use while in a sensitive position, insufficient time has passed to establish that his marijuana use is entirely behind him. None of the mitigating conditions fully apply.

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 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 in my whole-person analysis.

At hearing, Applicant was candid and forthcoming about his history of marijuana use. He described how he had been foolish about using marijuana and was now aware of better means to relax and maintain his mental health. Nonetheless, more time is necessary for him to fully establish that his marijuana use is entirely in his past. At this time, the record evidence leaves me with questions and doubts as to his eligibility and suitability for a security clearance.

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
Subparagraph 1.b (as amended): Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Bryan J. Olmos
Administrative Judge