



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
)
[NAME REDACTED]) ISCR Case No. 19-02592
)
)
Applicant for Security Clearance)

Appearances

For Government: Mary Margaret Foreman, Esq., Department Counsel
For Applicant: *Pro se*

08/10/2020

Decision

MALONE, Matthew E., Administrative Judge:

Applicant did not provide sufficient information to overcome the security concerns raised by his illegal purchase and use of marijuana and cannabidiol (CBD) since 2017 while holding a security clearance. Applicant's request for eligibility for access to classified information is denied.

Statement of the Case

On December 12, 2017, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain eligibility for access to classified information as part of his employment with a defense contractor. After reviewing the results of a subsequent background investigation, adjudicators at the Department of Defense Consolidated Adjudications Facility (DOD CAF) could not determine that it was clearly consistent with the interests of national security for Applicant to have access to classified information, as required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive).

On October 28, 2019, the DOD CAF issued a Statement of Reasons (SOR) alleging facts that raise security concerns addressed under Guideline H (Drug Involvement and Substance Misuse). The adjudicative guidelines (AG) cited in the SOR were issued by the Director of National Intelligence on December 10, 2016, to be effective for all adjudications on or after June 8, 2017. Applicant responded to the SOR (Answer) and requested a decision without a hearing.

On April 24, 2020, as provided for by paragraph E3.1.7 of the Directive, Department Counsel for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a File of Relevant Material (FORM). The FORM contained six documents (Items 1 – 6) on which the Government relied to establish the facts alleged in the SOR. The Government also included documents from the Director of National Intelligence (DNI) (Item 7), the Office of Personnel Management (OPM) (Item 8), and the Department of Justice (Item 9) that present policy guidance germane to issues in this case. Items 7 – 9 are not evidence pertaining to issues of fact in this case and I have not considered them for that purpose; however, I have taken administrative notice of the information and policy guidance presented therein.

Applicant received the FORM on May 18, 2020. He was informed therein that he had 30 days from the date of receipt to object to the use of the information included in the FORM and to submit additional information in response to the FORM. Applicant did not submit any additional information or file any objections to the use of any of the Government's exhibits within the time allotted. The record closed on June 17, 2020, and I received this case for decision on July 21, 2020.

Findings of Fact

The SOR alleged that between October 2017 and at least April 2019, Applicant used CBD with varying frequency (SOR 1.a); that he purchased and used marijuana in October 2017 (SOR 1.b); and that he illegally purchased and used both substances while holding a security clearance (SOR 1.c). In response to the SOR, Applicant admitted all three SOR allegations. He also stated that he chose to use CBD and marijuana as natural alternatives to chemical medications prescribed by his doctors. (FORM, Items 1 and 2) In addition to the facts established by Applicant's admissions, I make the following findings of fact.

Applicant is a 35-year-old employee of a defense contractor, for whom he has worked as a technical support specialist since October 2008. He served on active duty in the United States Air Force from May 2005 until he was honorably discharged for medical reasons in November 2007. Applicant first received a security clearance when he entered on active duty in the Air Force. Since October 2011, he has held an industrial security clearance as part of his current defense contractor employment, and he is now applying to renew his clearance eligibility. (FORM, Items 3 and 5)

Applicant was born and raised in State A. After leaving the military, he returned to live and work there in July 2008. He has been married since April 2018. A previous marriage began in April 2011 and ended by divorce in February 2018. While he and his

ex-wife were separated and going through his divorce in 2017, Applicant lived with a girlfriend in State A, where marijuana is illegal, but CBD containing less than 0.3 percent tetrahydrocannabinol (THC), the federally-controlled substance in marijuana, is legal. On October 13, 2017, police responded to a domestic disturbance at Applicant's house involving his girlfriend and his estranged wife. During that incident, police found a small amount of marijuana. Applicant was not present when the police arrived, but when he arrived at the house, Applicant told police the marijuana was his. He subsequently disclosed this incident to his facility security officer (FSO) at work and stated the drugs actually belonged to his girlfriend, but that he had lied to the police so his girlfriend would not get in trouble. (FORM, Items 3 – 6)

Applicant started using marijuana and CBD to relieve stress from his divorce and to help him deal with seizures he experienced after suffering a stroke in June 2017. He believes the stroke was brought on by the stress of work and his pending divorce. Applicant started using marijuana while visiting his brother in State B, where marijuana and CBD use are legal. He purchased the marijuana and CBD at a dispensary licensed by State B. As part of his background investigation, Applicant was interviewed in April 2019 by a government investigator. In discussing the October 2017 domestic incident and his use of marijuana, Applicant stated that he would continue to use CBD in State A, where it is legal as long as it contains less than 0.3 percent THC, the active ingredient in marijuana that makes marijuana a controlled substance. Applicant further stated his intent to resume using marijuana in State A if that state makes it legal. (FORM, Items 3 – 6)

I take administrative notice of the information presented by the Government in Items 7 – 9 to find that marijuana is a Schedule I controlled substance, the use and possession of which is a criminal violation of federal law. Those exhibits, along with guidance issued by the Office of the Assistant Secretary of Defense (OASD) in February 2013, make clear that changes in the laws pertaining to marijuana by the various states, territories, and the District of Columbia do not alter the existing National Security Adjudicative Guidelines. Because federal law supersedes state laws on this issue, Applicant's purchase and use of marijuana, regardless of location, is illegal. Further, illegal drug use is prohibited in all federal workplaces and on all military installations by civilian federal employees and by persons employed for work on federal contracts.

Because the Government did not specifically address in the FORM the allegation of CBD use, I note *sua sponte* that CBD is not uniformly regulated in the United States and many CBD products contain more than 0.3 percent THC. Accordingly, just as with marijuana, use of CBD is prohibited throughout the federal workplace and in the military. The only exceptions to this ban are for rare instances involving medical prescriptions. In his April 2019 interview, Applicant stated that he does not use products containing THC; however, in response to the SOR and the FORM, he has not produced any information to show what he has been using does not contain THC, or that establishes he has a medical exemption from the DOD ban on CBD use. (FORM, Item 4)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). (See Directive, 6.3) Decisions must also reflect consideration of the factors listed in ¶ 2(d) of the guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest for an applicant to either receive or continue to have access to classified information. (*Department of the Navy v. Egan*, 484 U.S. 518 (1988))

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion. (See *Egan*, 484 U.S. at 528, 531) A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. (See *Egan*; AG ¶ 2(b))

Analysis

Drug Involvement and Substance Misuse

Applicant illegally purchased and used marijuana in October 2017. Between then and at least April 2019, he also has used CBD in contravention of federal prohibitions against its use. He purchased and used these substances while he held a security

clearance. This information reasonably raises a security concern that is stated at AG ¶ 24 as follows:

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.

More specifically, available information requires application of the following AG ¶ 25 disqualifying conditions:

- (a) any drug abuse (see above definition);
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

I also have considered the following mitigating conditions under 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;
- (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: . . .
 - (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.

Department Counsel presented sufficient evidence to support the SOR allegations and raise security concerns under this guideline. It thus fell to Applicant to present information that warrants application of any pertinent mitigating conditions. In response to the SOR and the FORM, Applicant did not present information that would support any of these mitigating conditions. His use of marijuana occurred almost three years ago, but he has continued to use CBD despite federal workplace prohibitions against it. As to whether it occurred under unusual circumstances and is unlikely to recur, he claimed that he uses these substances to deal with a medical condition. Applicant did not establish that he is

entitled to any medical exemption that would allow him to use CBD. Instead, available information shows Applicant is using illegal substances as a means of self-medication when proven, legal methods are readily available to him. If he was not satisfied with those legal methods, he could have engaged legitimate medical professionals to come up with an acceptable regimen for dealing with whatever medical issues Applicant has. Finally, Applicant stated his intent to continue using CBD and, if legalized in the state where he lives and works, to resume using marijuana.

Although potentially legal under certain state laws, Applicant's use of marijuana and CBD are still impermissible under federal controlled substances laws as well as DOD industrial security policy guidance. On balance, Applicant did not mitigate the security concerns established by the Government's information.

In addition to my evaluation of the facts and my application of the appropriate adjudicative factors under Guideline H, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). I note that Applicant served in the Air Force and that there is no other indication of misconduct presented in this record. Nonetheless, Applicant's use of marijuana and CBD while holding a security clearance, and despite government policies against such conduct, now raises doubts about his judgment, reliability, and willingness to follow rules and regulations regarding the protection of sensitive information. Because the protection of the national interest is the principal goal of these adjudications, those doubts must be resolved against the Applicant.

Formal Findings

Formal findings 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 – 1.c:	Against Applicant

Conclusion

In light of all available information, it is not clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for security clearance eligibility is denied.

MATTHEW E. MALONE
Administrative Judge