



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



In the matter of:)
)
-----) ISCR Case No. 20-00564
)
Applicant for Security Clearance)

Appearances

For Government: Allison Marie, Esq., Department Counsel
For Applicant: *Pro se*

08/09/2021

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for access to classified information. He did not present sufficient evidence to mitigate his history of marijuana use, which includes using marijuana while his security clearance application was pending. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86), the official form used for personnel security investigations, on March 20, 2019. (Exhibit 4) The automated version of the SF 86 is the e-QIP. Applicant was interviewed during the course of a 2019 background investigation. (Exhibit 5) Thereafter, on May 29, 2020, after reviewing the available information, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information.

The SOR is similar in form and function to a complaint, which is the initial pleading that starts a civil action; in some states this pleading is known as a petition; and in criminal law it is a formal charge accusing a person of an offense. The SOR detailed the factual reasons for the action under the security guideline known as Guideline H for drug involvement and substance misuse.

Applicant answered the SOR in a handwritten response on March 1, 2021. He admitted the three SOR allegations without explanation or elaboration. He did not provide supporting documentation. He stated that he did not wish to have a hearing before an administrative judge, and so his case will be decided based on the written record.

On April 22, 2021, Department Counsel submitted a file of relevant material (FORM). It consists of Department Counsel's written brief and supporting documentation. The FORM was mailed to Applicant who received it on May 10, 2021. Applicant did not reply to the FORM. The case was assigned to me August 3, 2021.

Findings of Fact

Applicant is a 26-year-old employee who is seeking to obtain a security clearance. He is employed as a solution analyst for a company doing business in the defense industry. He has had this job since July 2018. His formal education includes an associate degree awarded in May 2015 and a bachelor's degree awarded in May 2018. He has never married and has no children. This case is the first time the U.S. Government has investigated Applicant's background, and he has not been granted national security eligibility in the past. (Exhibit 4 at Section 25)

Applicant disclosed a history of involvement with marijuana in his March 2019 security clearance application. (Exhibit 4 at Section 23) He reported using marijuana occasionally, for recreation and well-being, beginning in December 2010 to March 2019. He further stated that he intended to use marijuana in the future, explaining that marijuana had been decriminalized where he lives and he preferred not to drink alcohol.¹

In addition to his marijuana usage, Applicant disclosed a police record involving marijuana. (Exhibit 4 at Section 22) He was arrested for felony possession of cannabis in 2013. He was not tried or convicted because the charge against him was *nolle prossed* after he completed a diversion program.

Applicant provided some additional detail about his marijuana involvement during his background investigation. (Exhibit 5) Of note, in a May 2019 interview, he admitted currently using marijuana for his well-being. He also stated that he intended to switch to medical marijuana, again for his well-being.

¹ Although there is local decriminalization in Applicant's state of residence, under state law possession of 20 grams or less is a misdemeanor while possession of more than 20 grams is a felony. See www.norml.org (summary of Florida drug laws and penalties).

Law and Policies

This case is adjudicated under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.

It is well-established law that no one has a right to a security clearance.² As noted by the Supreme Court in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”³ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.⁴ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.⁵

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁶ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁷ An Applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁸ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁹

Discussion

Under Guideline H for drug involvement and substance misuse, the concern as set forth in AG ¶ 24 is that:

² *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

³ 484 U.S. at 531.

⁴ 484 U.S. at 531.

⁵ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

⁶ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁷ Directive, Enclosure 3, ¶ E3.1.14.

⁸ Directive, Enclosure 3, ¶ E3.1.15.

⁹ Directive, Enclosure 3, ¶ E3.1.15.

[t]he illegal use of controlled substances, to include the misuse of prescriptions 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. . . .

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state laws (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions:

AG ¶ 25(a) any substance abuse;

AG ¶ 25(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

AG ¶ 25(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse;

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

The three SOR allegations are established. The record evidence shows the following: (1) Applicant began using marijuana in 2010 (at about age 15), and was still using marijuana as of his May 2019 background investigation; (2) he intends to continue using marijuana in the future; and (3) he was arrested and charged with felony possession of cannabis in 2013 but not tried or convicted. The disqualifying conditions noted above apply.

I have considered the totality of Applicant's involvement with marijuana as outlined in the findings of fact. It includes using marijuana for about a decade and as recently as about May 2019. The latter fact means he smoked marijuana during his employment with a federal contractor engaged in the defense industry. Any illegal drug use is relevant in the context of evaluating a person's security worthiness, but it is particularly egregious if it occurs during the course of employment with a federal contractor. Furthermore, I presume his marijuana use in 2019 was in violation of his employer's drug-free workplace policy.¹⁰

Applicant's case in mitigation is not persuasive. The one item that stands out in his favor is his candor and willingness to disclose his marijuana involvement in his 2019 security clearance application and during his 2019 background investigation. But the credit in mitigation is limited due to his marijuana use after completing his 2019 security clearance application.

I also considered the two mitigating conditions noted above. Neither applies in Applicant's favor. His marijuana use occurred on a regular basis over a period of years and is recent enough to be of concern. It also occurred while his security clearance application was pending. The latter circumstance cannot be overlooked, ignored, or explained away. Moreover, there is a reasonable likelihood that he has continued using marijuana to the present day, given his expressed intent to continue doing so.

Following *Egan* and the clearly consistent standard, I have doubts and concerns about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified or sensitive information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the whole-person concept. In particular, I gave weight to Applicant's relative youth and inexperience in the ways of the world, but those matters are outweighed by his marijuana use while his security clearance application was pending. I conclude that he has not met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

¹⁰ ISCR Case No. 16-00578 (App. Bd. Sep. 26, 2017) at 2 (noting the Drug-Free Workplace Act requires federal contractors with a contract over \$100,000 to establish certain drug-free workplace policies).

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline H: Against Applicant

Subparagraphs 1.a – 1.c: Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. National security eligibility is denied.

Michael H. Leonard
Administrative Judge