



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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[NAME REDACTED]) ISCR Case No. 20-02134
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Applicant for Security Clearance)

Appearances

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

09/15/2021

Decision

MALONE, Matthew E., Administrative Judge:

Applicant has used marijuana, a federally-controlled substance, since at least May 2013. Despite stating his intention to stop using marijuana in early 2020, Applicant continued to use it through at least September 2020. Applicant did not mitigate the resulting security concerns about drug involvement and substance misuse. His request for eligibility for access to classified information is denied.

Statement of the Case

On January 30, 2020, 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 the ensuing background investigation, adjudicators for the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA 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 December 30, 2020, DCSA CAF sent Applicant a Statement of Reasons (SOR) alleging facts and security concerns addressed under Guideline H (Drug Involvement and Substance Misuse). The adjudicative guidelines (AG) applied throughout the adjudication of this case were issued by the Director of National Intelligence (DNI) on December 10, 2016, and have been applied in all adjudicative actions taken on or after June 8, 2017.

Applicant timely responded to the SOR (Answer) and requested a decision without a hearing. As provided for by paragraph E3.1.7 of the Directive, Department Counsel for the Defense Office of Hearings and Appeals (DOHA) issued a File of Relevant Material (FORM) that was received by Applicant on April 12, 2021. The FORM contained four exhibits (Items 1 – 4) on which the Government relies to support the SOR allegations. Applicant was informed he had 30 days from receipt of the FORM to submit additional information; however, he did not submit additional information or object to the admission of any of the Government's documents into the record. The record closed on May 12, 2021, and I received the case for decision on July 20, 2021.

Findings of Fact

Under Guideline H, the SOR alleged that Applicant used marijuana between May 2013 and at least September 2020 (SOR 1.a). It was further alleged that Applicant intends to use marijuana in the future. In response to the SOR, he admitted with explanation the allegation at SOR 1.a, but denied SOR 1.b, also with explanation. (FORM, Items 1 and 2)

Applicant is a single, 35-year-old employee of a defense contractor. He was hired for his current position in January 2020, and he requires a security clearance for his assigned duties. Applicant graduated from college in May 2009. Since October 2010, he has worked in the information technology (IT) field; however, his current employment is the first to require access to sensitive information. (FORM, Item 3)

In his January 2020 e-QIP, Applicant disclosed he had used marijuana with varying frequency between May 2013 and December 2019. He also stated therein that he did not intend to use marijuana in the future. On March 20, 2020, Applicant completed a personal subject interview (PSI) with a government investigator as part of Applicant's background investigation. During the PSI, he discussed his use of marijuana and disclosed additional marijuana use as recently as earlier that month. He stated that he had purchased small amounts of marijuana for personal use, and that he has never grown or sold marijuana. (FORM, Items 3 and 4)

In 2018, Applicant was diagnosed with epilepsy. He stated in his PSI that using marijuana helps with co-occurring anxiety and helps him calm down. When asked to explain why he continued to smoke marijuana after declaring in the e-QIP his intention to abstain from further use, Applicant stated that he would stop using marijuana when and if he received a security clearance. (FORM, Item 4)

Later in 2020, DOHA Department Counsel presented Applicant with interrogatories seeking, in relevant part, to update information about Applicant's use of marijuana. In response to the interrogatories, Applicant disclosed that, after his March 2020 PSI, he continued to use marijuana through at least September 2020. (FORM, Item 4)

In response to the SOR, Applicant disclosed that he suffered from epilepsy and anxiety. For those conditions, in November 2020, he applied for authorization in his state to use marijuana for medicinal purposes. His request was endorsed by a neurologist. (FORM, Item 2)

Sua sponte, I take administrative notice of the fact that marijuana is a Schedule I controlled substance, the use and possession of which is a criminal violation of federal law. Guidance issued by the Office of the Assistant Secretary of Defense (OASD) in February 2013 makes clear that changes in the laws pertaining to marijuana by the various states, territories, and the District of Columbia do not alter the current National Security Adjudicative Guidelines. Because federal law supersedes state laws on this issue, Applicant's use of marijuana, regardless of location or medical justification in his state of residence, 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.

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 AG ¶ 2(d). 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 has illegally purchased, possessed, and used marijuana since May 2013. After stating in his e-QIP that he did not intend to use marijuana in the future, he continued to use the drug to at least September 2020. 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) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

By contrast, available information requires consideration of the following pertinent 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: (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.

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 the aforementioned mitigating conditions. His use of marijuana occurred within the past year and while his background investigation was being conducted. As for future intent, he has reneged on past statements that he would abstain after December 2019. Further, he stated in his PSI that he would continue to use marijuana but would stop if and when he received a security clearance. Finally, Applicant has applied for permission in his state to use marijuana for medicinal purposes. Although potentially legal under certain state laws, Applicant's use of marijuana is 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). Nonetheless, Applicant's past use of marijuana, as well as the likelihood he will continue to use marijuana, conflict with federal government policies against such conduct. His response to the Government's information strengthens the doubts raised 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 and 1.b: 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