



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



In the matter of:)
)
) ISCR Case No. 21-00702
)
Applicant for Security Clearance)

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*
12/02/2021

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to deny his eligibility for a security clearance to work in the defense industry. Applicant is a current marijuana user. He intends to use the drug in the future as a means of managing the symptoms of a chronic medical condition. Though legal in his state of residence, marijuana use remains illegal under federal law. Accordingly, Applicant’s access to classified information is denied.

Statement of the Case

On June 18, 2021, the DOD issued a Statement of Reasons (SOR) detailing security concerns under the drug involvement and substance misuse guideline. This action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated 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*, implemented on June 8, 2017. DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant’s security clearance and recommended that the case be submitted to an administrative judge for a determination whether to deny his security clearance.

Applicant answered the SOR and requested a decision without a hearing. (Government Exhibit (GE) 2) The Government submitted its written case on July 21, 2021. Applicant received a complete copy of the file of relevant material July 27, 2021. He did not respond. The documents appended to the FORM are admitted as GE 1 through 4, without objection. Applicant's signed FORM receipt is appended to the record as Appellate Exhibit (App. Ex. I)

Findings of Fact

Applicant, 37, has worked for his current employer since November 2017. He completed a security clearance application, his first, in September 2019. He disclosed marijuana use between 2010 and 2019, to regulate the symptoms of a chronic medical condition. He also indicated his intent to continue using marijuana and briefly explained his attempts to obtain a medical marijuana allowance from his insurance provider. Information developed during the background investigation and adjudication process confirmed his history of marijuana use and his intent to continue to use the illegal drug. These facts form the basis of the SOR allegations in this case. (GE 3 – 4)

During his November 2019 subject interview, Applicant confirmed the information provided in his security clearance application. He disclosed that he used marijuana in October 2019 and that he uses the drug on weekends. He reiterated his intent to use the drug in the future, explaining that he understood that the federal law prohibited marijuana use. He conceded that he would stop using marijuana if directed to do so by his employer. (GE 4)

In his April 2021 responses to DOHA interrogatories, Applicant admitted that he continues to use marijuana on weekends. He now has a medical marijuana card and admits to purchasing the drug at a legally sanctioned medical marijuana dispensary in the state where he lives. He reaffirmed his intention to continue using marijuana in the future and admitted to having unused drugs and a pipe for smoking marijuana in his home at the time he completed the interrogatories. (GE 4)

In his June 2021 answer to the SOR, Applicant admitted the allegation that he purchased and used marijuana between 2005 and April 2021. He also admitted making statements in his November 2020 subject interview and April 2021 interrogatory response that he intended to use marijuana in the future. (GE 2)

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 to be 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, administrative judges apply the guidelines 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 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant 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 EO 10865 provides that adverse 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

The record contains evidence to support the Government's *prima facie* case that Applicant engaged in disqualifying conduct under the drug involvement and substance misuse guideline. He did not provide any evidence to mitigate any of the alleged concerns.

Drug Involvement and Substance Misuse

Applicant admits using marijuana from at least 2005 to at least April 2021. During his background investigation, Applicant stated his intent to continue using marijuana in the future. The illegal use of controlled substances can raise questions about an individual's reliability and trustworthiness 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. (AG ¶ 16) The following disqualifying conditions apply:

AG ¶ 17(a) any substance misuse; and

AG ¶ 17(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

None of the relevant mitigating conditions apply. Although the medical use of marijuana may be decriminalized in Applicant's state of residency, this does not alter federal law or existing National Security Guidelines. No state can authorize the violation of federal law. Applicant's marijuana use violates the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Under the Intelligence Reform and Terrorism Prevention Action (IRTPA), as amended, federal agencies remain prohibited from granting a security clearance to an unlawful user of a controlled substance. (See Director of National Intelligence Memorandum, *Adherence to Federal Laws Prohibiting Marijuana Use*, dated November 17, 2014)

Whole-person Concept

Based on the record, Applicant is not a suitable candidate for access to classified information at this time. This decision is not changed by a consideration of the facts under the whole-person factors listed in AG ¶ 2(d). Applicant's use of marijuana, which he believes is the best method of managing the symptoms of his medical condition, violates federal law. This conflict of interest, which Applicant resolved in his favor, casts doubt on his trustworthiness and reliability. The evidence suggests that he will resolve other potential conflicts of interests in a similar manner. Applicant's current and ongoing use of marijuana, even for medical purposes, is incompatible with the interests of the national security.

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, Drug Involvement and Substance Misuse:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant

Conclusion

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

Nichole L. Noel
Administrative Judge