



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



In the matter of:)
)
-----) ISCR Case No. 21-00914
)
Applicant for Security Clearance)

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: *Pro se*

02/22/2022

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 drug involvement and substance abuse, which includes using marijuana after he was granted a security clearance and while he was employed by a large company in the defense industry. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Standard Form (SF) 86, Questionnaire for National Security Positions, the official form used for personnel security investigations, in December 2020. (Exhibit 3) The automated version of the SF 86 is the e-QIP. More plainly, the SF 86 is commonly known as a security clearance application.

Applicant was interviewed during the course of a 2021 background investigation. (Exhibit 6) Thereafter, on May 28, 2021, after reviewing the available information, the DoD Consolidated Adjudications Facility (CAF), 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 purpose 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. Here, 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 June 7, 2021 one-page memorandum. He admitted the four SOR allegations and provided brief explanations. He did not provide supporting documentation. He elected a decision based on the written record in lieu of a hearing before an administrative judge.

On November 16, 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 December 9, 2021. He replied to the FORM with a one-page memorandum, along with another copy of his answer to the SOR, which was timely received. The case was received in the Washington Hearing Office on January 11, 2022, and assigned to me February 3, 2022.

Findings of Fact

Applicant is a 35-year-old employee who is seeking to retain a security clearance. (Exhibit 3 at Section 25) He is employed as a senior financial analyst for a large company doing business in the defense industry. He has had this job since about January 2020. Before that, he worked in the banking industry as loan-document specialist and then an operational-risk consultant during 2013-2020. He earned a bachelor's degree in 2009. He is married with three minor children.

Applicant disclosed a history of drug involvement and substance misuse in his initial security clearance application of November 2019. (Exhibit 4 at Section 23) His drug of choice was marijuana, for which he reported the following: (1) he used marijuana from about July 2008 to September 2018; (2) he described the nature, frequency, and numbers of time used as recreational use, rarely used, and only used in social settings; and (3) he stated that he had no intention of using marijuana in the future. In light of this information, the DoD CAF made a favorable eligibility determination and granted Applicant a security clearance at the secret level on February 27, 2020. (Exhibit 5)

Applicant completed a December 2020 security clearance application as part of a request for a top-secret security clearance. (Exhibits 3 and 5) Concerning marijuana, he reported the following: (1) his marijuana use extended to September 2020; (2) he described the nature, frequency, and number of times used as "sleep aid, very rare use;" (3) he admitted using marijuana while possessing a security clearance; and (4) he stated that he did not intend to use marijuana in the future, as he was focused on making healthy choices for him and his family. (Exhibit 3 at Section 23)

Applicant confirmed the accuracy of his marijuana use from July 2008 to September 2020 during the 2021 background investigation. (Exhibit 6) He stated that his marijuana usage was rare, estimated at two to three times annually, and he used marijuana as a sleep aid. He explained that as a resident of a certain state, he purchased marijuana from a dispensary under state law. Before that, he obtained marijuana from a friend that he no longer associates with. He stated that he used marijuana to help him sleep and for relaxation even while having a security clearance because he found traditional sleep aids ineffective. He no longer associates with people with whom he used marijuana in the past. And he stated there is no likelihood of recurrence because he did not intend to use marijuana in the future.

In his answer to the SOR, Applicant emphasized the infrequency of his marijuana use and that his primary use of marijuana was as a sleep aid. He stated that he decided to quit using marijuana in September 2020 to promote a healthy lifestyle for himself and his family. He stated he is focused on doing what is right for his family and his career. In his job or role as a financial analyst, he denied having access to classified information when he used or purchased marijuana between February 2020 and September 2020.

In his reply to the FORM, Applicant repeated the main themes from his answer. He also provided more detail about actions taken in quitting marijuana. He stated that he eliminated his seldom marijuana use as a sleep aid by adapting his daily routine to include regular exercise and a reformed diet. He also incorporates other activities, such as reading and meditation, which allow him to relax before going to bed. As a result, he stated that he has seen an overall improvement to his mental and physical state. He further stated that his family is his biggest inspiration, and he appreciates the importance of being a role model and leading by example for his children. He explained that the positive changes in his personal life have flowed through to his employment, where he has excelled and received a promotion. In conclusion, he provided a signed statement of intent to abstain from all drug involvement and substance misuse, and he acknowledged that any future involvement or misuse would be grounds for revocation of national security eligibility.

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.¹ 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

¹ *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).

side of denials.”² Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be granted eligibility for 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.³ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.⁴

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁵ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁶ An Applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁷ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁸

Discussion

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

[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), acting in his capacity as the Security Executive Agent (SecEA), 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

² 484 U.S. at 531.

³ 484 U.S. at 531.

⁴ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁶ Directive, Enclosure 3, ¶ E3.1.14.

⁷ Directive, Enclosure 3, ¶ E3.1.15.

⁸ Directive, Enclosure 3, ¶ E3.1.15.

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.

The DNI recently updated or clarified guidance for marijuana-related issues in security clearance adjudications via a December 21, 2021 memorandum, which states in pertinent part the following:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a "whole-person concept." This requires adjudicators to carefully weigh a number of variables in an individual's life to determine whether that individual's behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.⁹

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

AG ¶ 25(a) any substance misuse;

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

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

⁹ SecEA Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position, dated December 21, 2021, at page 2.

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 evidence shows Applicant used and purchased marijuana on an infrequent basis for more than a decade during 2008-2020. In particular, I note his continued involvement with marijuana after submitting his November 2019 security clearance application and while holding a security clearance, which was granted in February 2020. His last known use of marijuana occurred in September 2020, approximately two to three months before submitting his December 2020 security clearance application for a top-secret security clearance.

Although the evidence shows Applicant used and purchased marijuana while holding a security clearance during 2020, the same evidence does not establish that he did so while granted access to classified information, as alleged in SOR ¶¶ 1.a and 1.b. (Exhibit 5) Note, eligibility for access to classified information and access to classified information are different concepts, as the latter requires a need to know.¹⁰ In short, eligibility is granted by the central adjudication faculties (e.g., the DoD CAF), and access is granted by the individual agencies. Applicant was granted eligibility in February 2020, he denied having access, and his denial is unrebutted by the record evidence. Accordingly, on this basis, the disqualifying condition at AG ¶ 25(f) does not apply, and the allegations in SOR ¶¶ 1.a and 1.b are resolved in his favor.

I have considered the totality of Applicant's involvement with marijuana as outlined in the findings of fact, including his last known misuse in September 2020. This means he used 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, it is likely that his marijuana use in 2020 was in violation of his employer's drug-free workplace policy.¹¹

¹⁰ Per DoD Manual 5200.02, *Procedures for the DoD Personnel Security Program*, effective April 3, 2017, the term need to know means the following: "A determination made by a possessor of classified information that a prospective recipient, in the interest of the national security, has a requirement for access to, knowledge of, or possession of the classified information in order to perform tasks or services essential to the fulfillment of an official U.S. Government program. Knowledge of, possession of, or access to, classified information will not be afforded to any individual solely by virtue of the individual's office, position, or security eligibility." *Id.* at Glossary, p. 82.

¹¹ 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).

Applicant's evidence of reform and rehabilitation is not persuasive. The one item that stands out in his favor is his candor and willingness to disclose his drug involvement and substance misuse during the security clearance process. But the credit in mitigation is limited due to his continued marijuana use after he received a favorable clearance decision in February 2020.

I considered the two mitigating conditions noted above. Neither applies in Applicant's favor. His marijuana use occurred over a period of years and is recent enough to be of concern. Likewise, Applicant's signed statement of intent is outweighed by his continued marijuana use during 2020 while holding a security clearance. Moreover, his continued use of marijuana in 2020 while holding a security clearance was dreadfully poor judgment. It simply cannot be overlooked, ignored, or explained away. Even under the new clarifying guidance issued by the DNI, Applicant's misconduct continues to raise serious concerns about his reliability, trustworthiness, and good judgment. Although I have no axe to grind with marijuana users, I do have concerns about applicants who affirmatively demonstrate they are unable or unwillingly to follow rules applicable to those granted the privilege of a security clearance. That is the situation here.

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. 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.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline H:	Against Applicant
Subparagraphs 1.a -- 1.b:	For Applicant
Subparagraphs 1.c -- 1.d:	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