



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



In the matter of:)	
)	
-----)	ADP Case No. 21-00713
)	
Applicant for Security Clearance)	

Appearances

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

Decision

10/06/2022

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department’s intent to deny him eligibility for a public trust position. Applicant did not produce evidence sufficient to explain, extenuate, or mitigate the trustworthiness concern stemming from his problematic financial history. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant submitted a public trust position application (SF 86 format) (Application) on April 10, 2020. The Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) on January 17, 2022, detailing security concerns under Guideline H, Drug Involvement and Substance Misuse. The DOD CAF acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

On February 15, 2022, Applicant submitted an answer to the SOR (Answer) and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On March 9, 2022, Department Counsel submitted the Government’s file of relevant material (FORM), including documents identified as Items 1 through 5 (Items). Applicant was sent the FORM on March 15, 2022, and he received it on April 19, 2022. He was afforded 30 days after receiving the FORM to file objections

and submit material in refutation, extenuation, or mitigation. Applicant did not respond to the FORM. The SOR and the Answer (Items 1 and 3, respectively) are the pleadings in this case. Items 2, 4, and 5 are admitted without objection. The case was assigned to me on July 21, 2022.

Findings of Fact

Applicant is 29 years old. He is a December 2016 college graduate. Applicant has never married and has no children. Since October 2018, he has been employed by a defense contractor. (Item 3.)

Under Guideline H, the SOR alleged that Applicant: (1) used marijuana with varying frequency, from April 2011 to about April 2020; and (2) stated he intended to continue using marijuana but would reconsider if he were granted a security clearance. (Item 1.)

Applicant admitted the Guideline H allegations, with explanations. He admitted that he used marijuana from April 2011 to April 2020. Applicant explained that “early in college [he] identified his use as a problem” and took “steps to control [his] use, reduce the frequency, and limit its impact on [his] personal growth.” Applicant “only uses it on Fridays and Saturdays” and can expand those limits. (Item 3.)

In Applicant’s May 29, 2020 Personal Subject Interview (PSI), Applicant stated that he had intended to keep using until he learned it was illegal under federal law. Applicant now intends to stop using “to stay in compliance with federal law and his future security clearance.” He plans to stop using “the day of the [PSI] and feels it will only be a little difficult to stop.” (Item 5.)

In his February 15, 2022 Answer, Applicant said he had used marijuana recently. When he started the position of trust process (April 2020), Applicant stopped his use completely for eight months, anticipating being cleared for a position of trust. In December 2020, however, he became impatient and started using marijuana again. Applicant intended to continue using marijuana on Fridays and Saturdays unless “a Security Clearance ... explicitly forbids it then I would be willing to reconsider.” (Item 3.)

Law and Policies

It is well established that no one has a right to a public trust position. As the Supreme Court held, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

When evaluating an applicant’s suitability for a public trust position, an administrative judge must consider the adjudicative guidelines. These guidelines are flexible rules of law that apply together with common sense and the general factors of the whole-person concept. An administrative judge must consider all available and 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.”

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, then the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion in seeking a favorable security decision.

Guideline H – Drug Involvement and Substance Abuse

Under AG H for drug use, suitability of an applicant may be questioned or put into question a person’s ability or willingness to comply with laws, rules, and regulations. AG ¶ 24 sets forth the concern, 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.

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

AG ¶ 25(a) any substance misuse (see above definition);

AG ¶ 25(c) illegal possession of a controlled substance . . . and

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

The only potentially applicable mitigating factor here is quoted below:

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.

Marijuana is a Schedule I controlled substances, and possession of it is regulated by the federal government under the Controlled Substances Act. 21 U.S.C. § 811 *et seq.* The knowing or intentional possession and use of any such substance is unlawful and punishable by imprisonment, a fine or both. 21 U.S.C. § 844. In an October 25, 2014 memorandum, the Director of National Intelligence affirmed that the use of marijuana is a security concern. James R. Clapper, Director of National Intelligence, Memorandum: *Adherence to Federal Laws Prohibiting Marijuana Use* (October 25, 2014). See also <http://www.dea.gov/druginfo/ds.shtml>

More recently, on December 21, 2021, the Director of National Intelligence signed the memorandum, *Security Executive Agent 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*. It emphasizes that federal law remains unchanged with respect to the illegal use, possession, production and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior medicinal, or recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the “whole-person concept” stated under SEAD 4, to determine whether the applicant’s behavior raises a security concern that has not been mitigated.

Applicant admitted using marijuana with varying frequency from about April 2011 until April 2020, May 2020, or December 2020 (or thereafter). The exact end date is unclear and immaterial. In any event, Applicant was a regular user of marijuana for nine years or more. In addition, if Applicant did stop in April 2020, he had difficulty continuing his cessation, resuming use in December 2020. Furthermore, his history of use shows a failure to control the habit, even when confronted with the potential inability to obtain a qualification that may be necessary for his continued employment or professional advancement. Facts admitted by an applicant in an Application, an answer to an SOR, or in an interview require no further proof from the Government. ISCR Case No. 94-1159 at 4 (App. Bd. Dec. 4, 1995). Applicant’s years of past use of marijuana trigger disqualifying conditions AG ¶¶ 25(a) and (c). In addition, Applicant suggested he would “reconsider” stopping using marijuana, if his position “explicitly forbids it.” Applicant did not “clearly and convincingly commit to discontinue” marijuana use. AG ¶¶ 25(g) applies.

I have considered mitigating factor AG ¶ 26(a). Applicant began using marijuana more than 11 years ago. Therefore, the inception of his use was long ago. Applicant has, however, continued his regular, and not infrequent, use until April 2020, at the earliest. And Applicant may continue to use marijuana, unless it is expressly forbidden by the position of trust for which he has applied. His history of use shows an inability or unwillingness to comply with federal law and casts doubt on his trustworthiness and reliability. Applicant’s use of marijuana is not mitigated by AG ¶ 26(a).

Whole-Person Concept

The record raises doubt about Applicant's reliability, trustworthiness, judgment, and ability to protect 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 gave due consideration to the whole-person concept. AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6). Accordingly, I conclude that Applicant 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 sensitive information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the SOR allegations:

Paragraph 1, Guideline H: AGAINST APPLICANT

Subparagraphs 1.a.- 1.b: Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant access to sensitive information.

Philip J. Katauskas
Administrative Judge