



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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[NAME REDACTED]) ISCR Case No. 22-00927
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Applicant for Security Clearance)

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: *Pro se*

12/13/2022

Decision

MALONE, Matthew E., Administrative Judge:

Applicant used marijuana, a federally controlled substance, between September 1986 and at least December 2021, and has stated her intent to use marijuana in the future. Applicant did not mitigate the resulting security concerns about drug involvement and substance misuse. Her request for eligibility for access to classified information is denied.

Statement of the Case

On December 20, 2021, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain eligibility for access to classified information as part of her employment with a federal contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Department of Defense Consolidated Adjudications Facility (DOD 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 July 27, 2022, the DOD 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 Applicant received on September 21, 2022. The FORM contained four exhibits (Items 1 – 4) on which the Government relies to support the SOR allegations. Applicant had 30 days from receipt of the FORM to object to any of the Government's exhibits or to provide other additional information. She did not submit any further information and she did not file any objections to the Government's exhibits within the allotted time. The record closed on October 21, 2022, and I received the case for decision on December 1, 2022.

Findings of Fact

Under Guideline H, the SOR alleged that Applicant used marijuana between September 1986 and December 2021 (SOR 1.a); and that Applicant intends to use marijuana in the future. (SOR 1.b) In response to the SOR, she admitted SOR 1.a and denied, with explanation, SOR 1.b. (FORM, Items 1 and 2) In addition to the facts established by Applicant's admission to SOR 1.a, and based on my review of the information presented in the FORM, I make the following findings of fact.

Applicant is a 48-year-old employee of a federal contractor, for whom she has worked since August 2019 as company vice president. This appears to be her first application for a security clearance. Her employer wants her to fill a position other than the one she now holds. The new position requires she be eligible for access to classified information. (FORM, Items 2 – 4)

Applicant has been married since 1992, the same year she graduated from college with a bachelor's degree. She started using marijuana in 1986, when she was 18 years old. She has used marijuana with varying frequency through at least December 2021. The state where she lives and works legalized the use of marijuana for medical purposes in 2018. In February 2020, a doctor prescribed for her a license to buy marijuana to treat her insomnia. Since then, she smokes "a small bowl" of marijuana two or three times a week in the privacy of her own home. Before receiving her medical marijuana prescription, Applicant bought marijuana illegally from a variety of sources. (FORM, Item 4)

In response to questions in Section 23 (Illegal Use of Drugs or Drug Activity) of her e-QIP, Applicant disclosed her drug use and stated she would continue to use marijuana for medical purposes as allowed by law in her state. On January 24, 2022, during a

personal subject interview (PSI) with a government investigator, she stated she does not plan, and has not tried, to stop using marijuana. She further stated she knows using marijuana is still a violation of federal law. Additionally, she stated that if her drug use is an impediment to being approved for a security clearance, she would ask her employer to find someone else to fill the position that requires a clearance rather than stop using marijuana. However, Applicant also allowed that if her employer insisted that she fill the new position, she would give up her marijuana use, but such would not be her first choice. Her response to SOR 1.b is consistent with her statements on this issue during her PSI. (FORM, Items 2 – 4)

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 and by the Director of National Intelligence (DNI) in December 2021 make 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 her state of residence, is illegal. Further, federal workplaces prohibit illegal drug use 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 for most of the past 35 years. Since February 2020, she has relied on her state's legalization of marijuana for medical purposes as a means of obtaining marijuana; however, between 1986 and 2020, she purchased marijuana illegally. Applicant is aware that marijuana use is still a violation of federal law. This information reasonably raises the security concern about drug involvement 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, I have considered the potential applicability of the pertinent mitigating conditions presented 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; and

(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 these mitigating conditions. Her history of drug use is extensive, occurring as it has for much of the past 35 years. Since 2020, she has used marijuana two or three times a week. Her statements regarding future intent are ambiguous at best. In her clearance application, she stated her unqualified intent to use. She largely repeated that level of intent during her PSI; however, she also indicated then and in her Answer that she would consider abstaining from using marijuana if it would disqualify her from filling the new position. This is hardly a definitive statement of intent to discontinue using illegal drugs.

Finally, while her drug use is legal under the laws of her state, 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 she will continue to use marijuana, conflict with federal government policies against such conduct. Her response to the Government's information strengthens the doubts raised about her 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