



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



In the matter of:)
)
) ISCR Case No. 22-00764
)
Applicant for Security Clearance)

Appearances

Government: Aubrey DeAngelis, Esq., Department Counsel
For Applicant: *Pro se*

03/01/2023

Decision

Curry, Marc E., Administrative Judge:

Applicant failed to mitigate the security concern generated by his history of drug involvement. Clearance is denied.

Statement of the Case

On June 2, 2022, the Defense Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H, drug involvement. The SOR explained why the CAF was unable to find it clearly consistent with the national interest to grant or continue his security clearance eligibility. The CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) 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 within the DOD on June 8, 2017.

On June 13, 2022, Applicant answered the SOR. He admitted subparagraphs 1.a, 1.c, and 1.f, denied the remaining allegations, and requested a decision based on the

written record rather than a hearing. On August 5, 2022, Department Counsel prepared a File of Relevant Material (FORM) consisting of a brief, together with eight supporting exhibits. In addition, Department Counsel moved to amend the SOR to include three allegations under the Personal Conduct guideline, annotated as subparagraphs 2.a through 2.c. (FORM at 2) Applicant received the FORM on August 22, 2022, and provided a response by August 23, 2022. In his response, Applicant admitted subparagraphs 2.a and 2.b, and denied subparagraph 2.c. (Response at 1) On October 31, 2022, the case was assigned to me.

Findings of Fact

Applicant is a 34-year-old, married man with one child, age nine, He served in the U.S. Navy from 2011 to 2016. He was honorably discharged. Applicant earned a bachelor's degree in information technology in 2019, and a master's degree in information assurance and cybersecurity in 2021. (Response at 3) He has been working for a defense contractor since 2017. (Item 5 at 14)

Applicant has been using marijuana with varying degrees of frequency since 2007. For the first three to four years of his use, he periodically sold marijuana. (Item 6 at 2; Item 8 at 10) Applicant stopped using marijuana while he was in the Navy and resumed use in 2018. Since then, he typically either smokes it or uses it in candy form. He typically uses it with his wife. (Items 7 at 6; 8 at 9) He enjoys using marijuana, contending that it helps him manage anxiety, helped him quit smoking tobacco, and makes him "feel relaxed, like [he] feels when he drinks two beers, but without the weight gain." (Item 7 at 6) Over the years, he has used it approximately 300 times.

Applicant's last use of marijuana was in March 2022, approximately four years after he completed a security clearance application, and four days before he was scheduled for an interview with an investigative agent. (Item 7 at 5) At that time, he was using marijuana approximately once per week. (Item 7 at 5) In response to a question on the March 2022 interrogatories regarding future illegal marijuana use, Applicant responded, as follows:

I have no details, but I figure it's better to err on the side of the affirmative. The national culture is shifting and all but the top seems to be moving with it. 5mg or 2 beers doesn't make much difference since I don't leave my house either way. (Item 7 at 9)

In response to subparagraph 1.c alleging that Applicant intends to continue using marijuana in the future, he denied it, explaining that he does not have a plan in place to continue using marijuana, but was "not against" using it in the future, and "wouldn't use it, at least, for a while." (Item 3 at 2)

Applicant believes the current classification of marijuana under federal law as a Schedule I drug with a high potential for abuse is "ridiculous," and the presumption that use of marijuana constitutes "such a danger that [he] can't be trusted by using it is incorrect[,] and . . . the majority of the developed world would agree" with him. (Item 7 at 11) Moreover,

though he admits that he is disregarding the law by using marijuana, he denies that it reflects negatively on his character. (Response at 1)

Applicant has a medical disability that results in severe neck pain, for which he is prescribed a combination of anti-inflammatory medication and muscle relaxers. (Item 3 at 1) In 2019, his prescription was delayed in the mail. Subsequently, Applicant experienced extreme pain, compelling him to use one of his mother's prescription pain relievers, on one occasion, to get it under control. (Item 3 at 1; Item 6 at 3)

Shortly before Applicant entered the Navy in 2011, he completed a security clearance application. He did not include his purchase, sale, and use of marijuana on the application, as required, and as alleged in SOR subparagraphs 2.a and 2.b. Applicant contends that he told his recruiter who advised him to "keep it to [him]self." (Response at 1)

Applicant completed a security clearance application in 2018. SOR subparagraph 2.c alleges that he underreported his marijuana use by not disclosing his use in 2007 in response to Section 23 of the application requiring disclosure of illegal drugs within the past seven years preceding completion of the application. Applicant answered 'Yes,' to this question, disclosing that his most recent use was approximately seven months before completion of the application.

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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 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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Section 7 of EO 10865 provides that 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

Guideline H: Drug Involvement and Substance Misuse

Under AG ¶ 24, “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.” Applicant used a prescription painkiller not prescribed to him on one occasion after his prescription was delayed in the mail, leaving him in extreme pain. Under these circumstances, 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,” applies.” I resolve subparagraph 1.c in Applicant’s favor.

Conversely, Applicant’s longstanding and habitual use of marijuana, including his occasional purchase of it over the years, and his failure to unequivocally stop using marijuana triggers the application of 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,” and AG ¶ 25(g), “expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.” Applicant was smoking marijuana habitually as recently as four days before his subject interview. He is nonchalant about the fact that it remains illegal under federal law, contending that it does not reflect negatively on his character. Under these circumstances, none of the mitigating conditions apply. I conclude Applicant has failed to mitigate the drug involvement and substance misuse security concern.

Guideline E: Personal Conduct

Under this guideline, “conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified or sensitive information.” (AG ¶ 15) Moreover, “[o]f special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.” (*Id.*)

Applicant admits falsifying a 2011 security clearance application by failing to disclose his drug involvement. This triggers the application of AG ¶ 16(a), “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.” Applicant completed this application as part of the enlistment process for joining the Navy. He told his recruiter about his drug involvement and was told not to include it on the security clearance application. This explanation potentially triggers the application of the following mitigating conditions under AG ¶ 17(b):

The refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

Applicant’s explanation triggers the first prong of AG ¶ 17(b). However, he never shared this information until he answered the amended SOR in response to the FORM. Consequently, the second prong of AG ¶ 17(b) is inapplicable.

Applicant falsified this information more than 12 years ago. Since then, he has completed another security clearance application, disclosing his marijuana use. Moreover, he has been forthcoming about how often he has used marijuana, the likelihood that he will continue using it, and how much he enjoys it. In addition, he has readily shared his opinion about the current federal marijuana law and his belief that there is no nexus between character and illegal marijuana use. Under these circumstances, I conclude lack of candor and dishonesty are not at issue, and that although Applicant falsified his 2011 security clearance application at the behest of his recruiter, it no longer generates a current security concern. I resolve subparagraphs 2.a and 2.b in Applicant’s favor.

Subparagraph 2.c alleges that Applicant answered ‘yes’ on a 2018 security clearance application requiring applicants to disclose any drug use within seven years of completing the application, but that he deliberately underreported the amount of use by failing to discuss the number of times he used marijuana between 2007 and 2011. The question only requires applicants to disclose drug use within seven years of the

application's completion. Consequently, Applicant was not required to list any drug use during that time frame. I conclude that his response to this question does not generate a security concern. I resolve subparagraph 2.c in Applicant's favor. In reaching this conclusion, I also considered the candor with which he has discussed his involvement with marijuana throughout the investigative process, as discussed in my analysis on subparagraphs 2.a and 2.b. In sum, I conclude that Applicant has mitigated the personal conduct security concerns.

Whole-Person Concept

In assessing the whole person, the administrative judge must consider the totality of Applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). 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.

Although marijuana use has been decriminalized in several states, it remains illegal under federal law. As such, Applicant's opinion that marijuana should be legal has no bearing on whether his longtime use should be mitigated. To the contrary, it reflects a willingness to pick and choose which law to obey based on opinion. As such, it disqualifies Applicant from security clearance consideration.

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, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraphs 1.d – 1.f:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a -2.c:	For Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge