



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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[NAME REDACTED]) ISCR Case No. 22-01347
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Applicant for Security Clearance)

Appearances

For Government: Dan O’Reilly, Esq., Department Counsel
For Applicant: *Pro se*

03/24/2023

Decision

MALONE, Matthew E., Administrative Judge:

Applicant illegally used marijuana between September 1997 and May 2004, and between June 2017 and May 2018. His drug use in 2017 and 2018 occurred while he had a security clearance. Applicant’s drug use is mitigated by the passage of time and his commitment to abstaining from future use. His request for eligibility for access to classified information is granted.

Statement of the Case

On September 28, 2021, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to renew his eligibility for access to classified information as part of his 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, as required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive), that it

was clearly consistent with the interests of national security for Applicant to have access to classified information.

On September 6, 2022, the DOD CAF sent Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed under Guideline H (Drug Involvement and Substance Misuse). This action was taken 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 adjudicative guidelines implemented by the DOD on 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 November 1, 2022. The FORM proffered five exhibits (Items 1 – 5) 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. He did not respond to the FORM, and he did not file any objections to the Government's exhibits within the allotted time. Accordingly, GX 1 – 5 became part of the record, which closed on December 1, 2022. I received the case for decision on January 26, 2023.

Findings of Fact

Under Guideline H, the SOR alleged that between June 2017 and May 2018, Applicant used marijuana approximately 300 times while he had access to classified information (SOR 1.a); and that during the same period, he purchased marijuana with varying frequency while he had access to classified information (SOR 1.b). He admitted without comment both allegations. (FORM, Items 1 and 2) In addition to the facts established by Applicant's admissions, and based on my review of the information presented in the FORM, I make the following findings of fact.

Applicant is a 40-year-old employee of a federal contractor, for whom he has worked since August 2011. He and his wife have been married since July 2010 and they have three children. He was first granted a security clearance in September 2011. (FORM, Items 3 and 5)

Applicant first used marijuana in high school and college between September 1997 and May 2004. During this period, he smoked marijuana as often as daily, and at least weekly, purchasing the drug from people he knew, including his brother. He stopped in 2004 because he felt he no longer needed it. He also did not want to spend money buying marijuana when he also had to pay for his college education. (FORM, Item 4)

In 2017, marijuana became legal in the state where Applicant lives. He decided to start using it again because it was legal under state law and because he felt it may help with his anxiety. During a personal subject interview (PSI) with a government investigator on November 22, 2021, he estimated that he used marijuana about 300 times between

June 2017 and May 2018. He knew at that time that his use of marijuana, while having a security clearance, was “forbidden” and could disqualify him from access to sensitive information. (FORM, Items 3 and 4)

In May 2018, Applicant checked himself into a hospital for treatment of severe anxiety, depression, and related behavioral problems. He believes his extensive use of marijuana over the previous year had altered his brain chemistry and caused him to behave erratically towards his wife. Applicant no longer experiences the behavioral issues that he believes were caused or exacerbated by his marijuana use. He has not used marijuana or any other illegal substance since May 2018. (FORM, Item 4)

The summary of his PSI reported that Applicant did not disclose his drug use to his employer’s security office; however, in response to DOHA interrogatories, he averred that after he was hospitalized in 2018, he was asked to submit “a preemptive SF 86” in which he disclosed his drug use while cleared. He also reported his drug use in his September 2021 e-QIP. (FORM, Item 4)

Applicant no longer associates with the people with whom he used marijuana. In his e-QIP, in his PSI, and in his notarized response to interrogatories, he stated his intention to abstain from any future use of marijuana. (FORM, Items 3 and 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, which was updated by the Director of National Intelligence (DNI) in December 2021, makes 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 his state of residence, was 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 illegally purchased, possessed, and used marijuana in high school and college between 1997 and 2004. As alleged in the SOR, he purchased and used marijuana in 2017 and 2018 while also having access to classified information. Despite the legalization of marijuana at the state level in 2017, his conduct in this regard remained illegal under federal law and was incompatible with his eligibility to access classified information through his employment as a federal contractor. 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
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

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. By contrast, it has been nearly five years since Applicant last used marijuana. He no longer associates with persons who use illegal drugs, and he has clearly expressed his intent to abstain from using marijuana in the future. This information supports application of the cited mitigating conditions.

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). The record evidence as a whole supports a fair and commonsense decision in favor of 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: FOR APPLICANT

Subparagraphs 1.a and 1.b: For Applicant

Conclusion

In light of all available information, it is clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for security clearance eligibility is granted.

MATTHEW E. MALONE
Administrative Judge