



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 22-01212 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

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

04/26/2023

Decision

OLMOS, Bryan J., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H, Drug Involvement and Substance Misuse, regarding his use of marijuana as recently as 2021 and his stated intention to continue using marijuana in the future. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 25, 2021. On November 7, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, Drug Involvement and Substance Misuse. The CAF issued the SOR under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4 (SEAD 4), *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

Applicant submitted an undated answer to the SOR that was received in November 2022. He elected a decision on the written record by an administrative judge from the Defense Office of Hearings and Appeals (DOHA), in lieu of a hearing. On December 30, 2022, Department Counsel submitted the Government's File of Relevant Material (FORM), including exhibits (GX) 1 through 4. Applicant received the FORM on January 11, 2023. 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 case was assigned to me on April 11, 2023. The SOR and the Answer (GX 1-2) are the pleadings in the case. GX 3-4 are admitted without objection.

Findings of Fact

In his Answer, Applicant admitted SOR ¶¶ 1.a - 1.c without further comment. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact:

Applicant is 31 years old. Record evidence reflects that he was engaged to be married in late 2021 and has no children. He graduated college in 2014. Shortly afterwards, he obtained employment as a software engineer and has since been consistently employed. He has been with his current employer as a software engineer since 2021. (GX 3-4)

In his June 2021 SCA, Applicant disclosed that he began using marijuana in 2010, during his first year in college. The frequency of his marijuana use varied from as little as four times per year to as often as four times per week. He stopped using for a period in 2016 when he experienced "bad anxiety and paranoia" after consuming a marijuana edible. However, he later resumed using marijuana and disclosed that his last use was in May 2021, a month before submitting his SCA. He stated he would not use marijuana for the period he held a security clearance. (GX 3)

During his September 2021 background interview, Applicant disclosed that he purchased marijuana from 2010 through 2014. He further disclosed that he had consumed, smoked, and vaped a variety of marijuana products from 2010 into 2021, including after he submitted his SCA. Although Applicant resides in a state where marijuana is legal, he acknowledged his awareness that marijuana was illegal under federal law. Still, Applicant stated that he intends to continue using marijuana in the future because he "enjoys the autonomy to smoke" even though he claimed to not like marijuana. (GX 4)

In his Answer to the SOR, Applicant admitted that he used marijuana from about October 2010 through July 2021, a month after he submitted his SCA and that he purchased marijuana from 2010 through 2014. He further admitted his intention to continue using marijuana in the future. He did not provide any additional information beyond his admissions. (GX 2)

Applicant did not respond to the Government's FORM or otherwise offer any mitigating evidence beyond what he had previously stated.

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials." 484 U.S. 518, 531 (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 used 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 overarching 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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible

extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline H, Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern regarding drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

(a) any substance misuse (see above definition); and

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

The Controlled Substances Act ("CSA") makes it illegal under federal law to manufacture, possess, or distribute certain drugs, including marijuana. (Controlled Substances Act, 21 U.S.C. § 801, et seq. See § 844). All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. §§811, 812. Marijuana is classified as a Schedule I controlled substance, §812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment. §812(b)(1). See *Gonzales v. Raich*, 545 U.S. 1 (2005).

In October 2014, the Director of National Intelligence (DNI) issued a memorandum entitled "*Adherence to Federal Laws Prohibiting Marijuana Use*," (2014 DNI Memo) which makes clear that changes in the laws pertaining to marijuana by the various states, territories, and the District of Columbia do not alter the existing National Security Adjudicative Guidelines, and that federal law supersedes state laws on this issue:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative

Guidelines. . . . An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

The DOHA Appeal Board, which I am required to follow, has cited the 2014 DNI Memo in holding that "state laws allowing for the legal use of marijuana in some limited circumstances do not pre-empt provisions of the Industrial Security Program, and the Department of Defense is not bound by the status of an applicant's conduct under state law when adjudicating that individual's eligibility for access to classified information." ISCR Case No. 14-03734 at 3-4 (App. Bd. Feb. 18, 2016). The current National Security Adjudicative Guidelines went into effect on June 8, 2017, after the 2014 DNI memo was issued. Nevertheless, the principle continues to apply.

Moreover, on December 21, 2021, DNI Avril D. Haynes issued a memorandum entitled, "*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.*" (2021 DNI Memo) The memo incorporates the AGs (at reference B) and the 2014 DNI Memo (at reference G) among various other relevant federal laws, executive orders, and memoranda. I take administrative notice of the 2021 DNI memo here, given its relevance to this case, its reliance on the AGs, and its recency.

The 2021 DNI memo specifically notes that "under policy set forth in SEAD 4's adjudicative guidelines, the illegal use or misuse of controlled substances can raise security concerns about an individual's reliability and trustworthiness to access classified information or to hold a sensitive position, as well as their ability or willingness to comply with laws, rules, and regulations." (The 2021 DNI memo cites Guideline H, alleged in this case, and the AGs for personal conduct and criminal conduct, Guidelines E and J, not alleged in this case). Thus, consistent with these references, the AGs indicate that "disregard of federal law pertaining to marijuana remains relevant, but not determinative, to adjudications of eligibility for access to classified information or eligibility to hold a sensitive position." (2021 DNI Memo)

An applicant's use of illegal drugs after having completed a security clearance application or after otherwise having been placed on notice of the incompatibility of drug abuse and clearance eligibility raises questions about his or her judgment, reliability, and willingness to comply with laws, rules, and regulations. See, e.g., ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019). It has long been held that ignorance or mistake

of law is generally not an excuse for failing to abide by legal obligations. See, e.g., ISCR Case No. 19-00540 at 2 (App. Bd. Dec. 13, 2019).

Applicant began using marijuana when he started college in 2010. He continued using marijuana after graduating college in 2014. He stated in his June 2021 SCA that he would terminate his marijuana use in order to hold a security clearance. However, he continued using marijuana as recently as July 2021. During his September 2021 background interview, Applicant acknowledged his awareness that marijuana was illegal under federal law but stated his intent to continue using marijuana anyway. AG ¶¶ 25(a) and 25(g) both apply.

The adjudicative guideline includes two conditions in AG ¶ 26 that could mitigate the security concerns arising from Applicant's drug use:

(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 is grounds for revocation of national security eligibility.

Applicant's marijuana use was both recent and frequent. He initially used marijuana in 2010 and stopped only for a brief period in 2016 when he experienced bad anxiety and paranoia from his use. Still, despite his claims that he does not like marijuana, he resumed using marijuana for years and continued after he submitted his SCA in 2021. In his September 2021 background interview, he stated his intent to continue using marijuana and admitted this intent in his Answer to the SOR. I find that Applicant has shown a history of conduct that is of a security significance. Further, he has chosen to continue this conduct by continuing his drug use. The circumstances and extent of Applicant's illegal drug use preclude application of mitigation under either AG ¶ 26(a) or AG ¶ 26(b).

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline H in my whole-person analysis.

Applicant did not request a hearing, nor did he respond to the FORM. In so doing, he did not provide any additional evidence in explanation or mitigation beyond his Answer, and I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). The record evidence reflects that Applicant has a long history of marijuana use and has chosen to continue using marijuana despite the potential security ramifications. Overall, the frequency, recency and seriousness of Applicant's conduct leaves me with questions and doubts as to his suitability for a security clearance.

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:

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| Paragraph 1, Guideline H: | AGAINST APPLICANT |
| Subparagraph 1.a - 1.c: | Against Applicant |

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Bryan J. Olmos
Administrative Judge