



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



In the matter of:)	
)	
)	ISCR Case No. 22-00658
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
 For Applicant: *Pro se*
 10/06/2023

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to deny his eligibility for a security clearance to work in the defense industry. Applicant has failed to mitigate his history of marijuana use and drug-related criminal conduct. He also failed to credibly establish that he will abstain from future use. Accordingly, Applicant’s access to classified information is denied.

Statement of the Case

On December 14, 2022, the DOD issued a Statement of Reasons (SOR) detailing security concerns under the drug involvement and substance misuse guideline. This action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated 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*, implemented on June 8, 2017. DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant’s security clearance and recommended that the case be submitted to an administrative judge for a determination whether to deny his security clearance.

Applicant answered the SOR and requested a decision without a hearing. (Government Exhibit (GE) 2) The Government submitted its written case on February 7, 2023. Applicant received a complete copy of the file of relevant material February 16, 2023. He provided response, which DOHA received on March 22, 2023. The documents appended to the FORM are admitted as GE 1 through 5, without objection. Applicant's submission is admitted to the record as Applicant's Exhibits (AE) A through B. Applicant's signed FORM receipt is appended to the record as Appellate Exhibit (App. Ex. I)

Findings of Fact

Applicant, 36, has worked for his employer, a federal contracting company, as a software engineer since August 2008. He completed his first security clearance application in March 2021, disclosing marijuana use from July 2005 to March 2021. He also disclosed obtaining a medical marijuana license from his state of residency in 2018, so that he could use the drug legally under his state's law. Applicant also disclosed two drug related criminal incidents: a December 2008 for possession of marijuana and possession of drug paraphernalia, and December 2017 citation for possession of marijuana and possession of drug paraphernalia. The SOR alleges Applicant's history of marijuana use as well as his 2008 and 2017 drug-related arrests. (GE 2; AE A)

Applicant began using marijuana in July 2005, the summer before he entered college. He used the drug recreationally in social settings while in college. He estimated that he used the drug at least twice per month. When he moved out on his own in 2010, after graduating, his use of marijuana increased. He reported that between 2010 and 2012, he used marijuana at least four times a month either in social settings or alone. Between 2012 and 2019, he estimated that his marijuana use increased to once per week in social settings. He obtained a medical marijuana license in December 2018. From 2019 and 2021, he used marijuana twice per week, using one-third of a gram from a vape pen before bed. He no longer uses the drug recreationally, but for pain management and as a sleep aid. He reported having a medical condition that benefits from his use of marijuana as well as lingering pain from an unspecified car accident. (GE 3)

In December 2008, Applicant was arrested and charged with driving under the influence of drugs, possession of marijuana, and possession of marijuana paraphernalia. Applicant parked his car a short distance away from his parent's home where he was living at the time, to smoke marijuana. He was observed by a police officer, who approached the car. Upon smelling marijuana coming from the car, the officer asked Applicant if he was under the influence of marijuana, which he denied. Applicant consented to a search of his car, which revealed drug paraphernalia. The officer administered a breathalyzer test, but it did not detect any alcohol. Applicant was arrested and transported to the police station where he gave a blood sample, which came back positive for marijuana. He entered into a plea agreement in which he pleaded guilty to possession of marijuana and the other charges were dropped. He was sentenced to ten days in jail, with nine suspended, fined \$1,000, and ordered to take a

substance abuse awareness class. He was also placed on probation for one year and ordered to install an interlock device on his vehicle. (GE 3-5)

In December 2017, he received a citation for possession of marijuana and possession of marijuana paraphernalia. During a traffic stop for speeding, the officer smelled marijuana coming from Applicant's car. Upon questioning from the officer, Applicant admitted to having the drug in the vehicle. He had a vaporizer pen, containing less than one gram of marijuana inside. He pleaded guilty and was sentenced to complete a pre-trial diversion program. The court also ordered him to complete a substance abuse class. During the class, he tested positive for marijuana, which was permitted because he had a valid a medical marijuana license. He completed the diversion program in June 2019 and the charges were dismissed. (GE 3)

In his November 2022 response to DOHA interrogatories, Applicant reported that between 2019 and 2022, he continued to use marijuana one or two times per week. In response to the FORM, Applicant reported that in June 2022 he filed a motion to expunge the 2017 charges from his record. He also claims that he has discontinued marijuana use but did not provide a date of last use. He also acknowledged that his effort to stop smoking marijuana proved more difficult that he expected. He did not provide a sobriety plan or indicate his participation in a sobriety support program. He did not provide a statement of intent to abstain from future use. (GE 3; AE A-B)

Policies

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 to be 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, administrative judges apply the guidelines 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(c), 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 the 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 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.

Section 7 of EO 10865 provides that adverse 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

The record contains evidence to support the Government’s *prima facie* case that Applicant engaged in disqualifying conduct under the drug involvement and substance misuse guideline. He did not provide any evidence to mitigate any of the alleged concerns.

Drug Involvement and Substance Misuse

Applicant admits using marijuana from at least 2005 to at least November 2022, as well as pleading guilty to drug-related criminal offenses in 2009 and 2018. The illegal use of controlled substances can raise questions about an individual’s reliability and trustworthiness 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. (AG ¶ 25) The following disqualifying conditions apply:

AG ¶ 26(a) any substance misuse; and

AG ¶ 26(c) illegal possession of a controlled substance, including cultivation, processing manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

None of the relevant mitigating conditions apply. Although the medical use of marijuana may be decriminalized in Applicant’s state of residency, this does not alter federal law or existing National Security Guidelines. No state can authorize the violation of federal law. Applicant’s marijuana use violates the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Under the Intelligence Reform and

Terrorism Prevention Act (IRTPA), as amended, federal agencies remain prohibited from granting a security clearance to an unlawful user of a controlled substance. (See Director of National Intelligence Memorandum, *Adherence to Federal Laws Prohibiting Marijuana Use*, dated November 17, 2014). The Agency clarified its guidance concerning marijuana for individuals eligible to access classified information in a memorandum dated December 21, 2021:

With regard to the first topic, agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The [Security Executive Agent (SecEA)] has provided direction in SEAD 4 to agencies that requires them to use a "whole-person concept." This requires adjudicators to carefully weigh a number of variables in an individual's life to determine whether that individual's behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate litigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.

Applicant has a long history of marijuana use both recreational and medicinal. Since at least 2019, he has used marijuana to self-medicate to alleviate medical issues. He continued to use marijuana after applying for access to classified information. He has not provided credible information to support a finding that he will abstain from future marijuana use.

Whole-person Concept

Based on the record, Applicant is not a suitable candidate for access to classified information at this time. This decision is not changed by a consideration of the facts under the whole-person factors listed in AG ¶ 2(d). Applicant's use of marijuana, which he believes is the best method of managing the symptoms of his medical condition, violates federal law. Applicant resolved the conflict of interest between treating his ongoing medical issues and violating federal law in favor of his self-interest. In doing so, he casts doubt on his trustworthiness and reliability as potential clearance holder. The evidence suggests that he will resolve other potential conflicts of interests in a similar manner. Applicant's current and ongoing use of marijuana, even for medical purposes, is incompatible with the interests of the national security.

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, Drug Involvement and Substance Misuse: **AGAINST APPLICANT**

Subparagraphs 1.a – 1.c: **Against Applicant**

Conclusion

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

Nichole L. Noel
Administrative Judge