



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



In the matter of:

ISCR Case No. 22-01798

Applicant for Security Clearance

Appearances

For Government: Jeff Kent, Esq., Department Counsel
For Applicant: *Pro se*

11/20/2023

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 is a long-time recreational marijuana user. He intends to use the drug in the future. Clearance is denied.

Statement of the Case

On September 23, 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 March 6, 2023. Applicant received a complete copy of the file of relevant material on March 14, 2023. In the FORM, the Government informed Applicant that it was offering a summary of his January 2022 subject interview with a background investigator into evidence. The Government advised him of his ability to object to, correct, add, delete, or update the information in the subject interview summary. The Government further advised him that failure to respond could result in a determination by the administrative judge that he waived any objection to the document's admissibility. He did not respond. Accordingly, the documents appended to the FORM, including the summary, are admitted as GE 1 through 4, without objection.

Findings of Fact

Applicant, 44, has worked for his employer, a federal contractor, since December 2021, in an information technology position. He submitted a security clearance application, his first, also in December 2021. He disclosed a history of marijuana use and his intent to continue using the drug. He confirmed these disclosures in a January 2022 subject interview with a background investigator. He also admitted to purchasing the drug. The SOR alleges these facts as disqualifying under the drug involvement and substance misuse guideline. He admitted the allegation, SOR ¶ 1.a, without explanation. (GE 2-4)

On his security clearance application, Applicant disclosed that he began using marijuana recreationally in May 1999 and that his use was ongoing at the time he completed the application. He reported using the drug "a few times a month." He also disclosed that he intended use the drug in the future as doing so "doesn't cause any problems in my life or relationships." In his subject interview he admitted to using the drug almost every weekend. He uses the drug alone and in social settings with friends. (GE 3-4)

Applicant lives in a state where marijuana use is legal, and the drug can be purchased at state-sanctioned dispensaries. He has purchased marijuana from dispensaries as well as from a friend who grows the drug in his home. (GE 3-4)

According to Applicant, everyone he knows is aware of his marijuana use, and it cannot be used a source of blackmail or exploitation. (GE 4)

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

Applicant admits to recreational marijuana use for more than 20 years and that he will continue to use the drug in the future. 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 guideline's mitigating conditions apply. The legalization of marijuana use or purchase from state-sanctioned dispensaries in Applicant's state of residency 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 mitigation. 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.

Given his intent to continue using the drug, Applicant has not mitigated the alleged security concerns.

Whole-person Concept

Based on the record, doubts remain about Applicant's current security worthiness. This decision is not changed by a consideration of the facts under the whole-person factors listed in AG ¶ 2(d). Applicant failed to meet his burdens of persuasion and production to mitigate the alleged concerns.

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**

Subparagraph 1.a: **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