



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



In the matter of:)
)
) ISCR Case No. 23-00666
)
Applicant for Security Clearance)

Appearances

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

02/01/2024

Decision

Curry, Marc E., Administrative Judge:

Applicant failed to mitigate the security concerns stemming from his illegal use of marijuana. Clearance is denied.

Statement of the Case

On July 19, 2023, the Department of Defense Consolidated Adjudications Services (DOD CAS) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H, drug involvement, and Guideline E, personal conduct, explaining why it was unable to find it clearly consistent with the national security to grant him security clearance eligibility. The DOD CAS took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Nat. Sec. Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on June 8, 2017.

In an undated answer, Applicant admitted the SOR allegations regarding his history of drug involvement, as alleged in Paragraph 1, and denied intentionally failing to disclose

his drug involvement on his security clearance application, as alleged in Paragraph 2. He requested a decision based on the evidence on file instead of a hearing. On August 16, 2023, Department Counsel prepared a file of relevant material (FORM), a brief with four attachments supporting the Government's contention that Applicant should be precluded from having access to classified information. Applicant received the FORM on August 16, 2023, and notified that he had 30 days to file a reply. Applicant did not file a response.

Findings of Fact

Applicant is a 40-year-old, single man. For the past six years, he has been working for a defense contractor as an engineer. Previously, he worked as a sales representative for a tech company. (Item 2 at 13)

Applicant has been using marijuana weekly from about 2013 to 2022. (Item 1 at 3) He buys marijuana from state dispensaries and uses it in both cigarette and edible form. (Item 4 at 4) He enjoys using it because it makes him feel calm. (Item 4 at 4) He has used it at different points in his career while he possessed either a security clearance or a position of trust. (Item 4 at 6) On September 14, 2023, Applicant completed a set of interrogatories that the Government propounded. Questions 13 and 14 asked the following:

13. Do you understand that marijuana use remains illegal under Federal law and that any future use of marijuana may affect your security clearance eligibility?

14. Do you intend to illegally use drugs or controlled substances in the future?

Applicant answered "Yes" to both questions. (Item 4 at 7)

In 2020, Applicant completed a security clearance application. He did not disclose his marijuana involvement and his use of marijuana while possessing a security clearance. (Item 2 at 24) In his Answer, he explained that he did not disclose his use because it was obtained legally and used in a state where it was legal. (Item 1 at 4) Section 23 of the security clearance application, which contained all the questions related to drug involvement, informs applicants to answer the questions "in accordance with Federal Laws, even though permissible under state laws." (Item 4 at 24) Two months later, Applicant disclosed his marijuana use during an investigative interview. (Item 4 at 10,11)

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. 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.

Analysis

Guideline H, Drug Involvement and Substance Abuse

The security concerns about drug involvement and substance abuse are set forth in 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's history of illegal drug use triggers the application of AG ¶¶ 25(a), "any substance abuse." His intent to continue using marijuana in the future despite its illegality under federal law triggers the application of AG ¶ 25(g), "expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse." Because Applicant has no intention of stopping his marijuana use, none of the mitigating conditions apply. Applicant has failed to mitigate the drug involvement security concern.

Guideline E, Personal Conduct

Under this guideline, "[c]onduct 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) Applicant's omission of his marijuana use in response to questions about drug involvement on his 2020 security clearance application raises the question of whether 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," applies. Despite the instruction to disclose marijuana use even if legal under state law, Applicant thought that he did not have to disclose his marijuana use because it was legal in the state where he used it. Nevertheless, Applicant disclosed his marijuana use during an investigative interview conducted two months after completing the security clearance application, during the course of his interview, and later, in his response to interrogatories, and his SOR answer. In addition, throughout the investigative process, Applicant readily discusses his marijuana use, including his intention to keep using it. Given how forthcoming he has been throughout the investigative process, I conclude that Applicant's omission of marijuana use on his security clearance application was unintentional, and not duplicitous. AG ¶ 16(a) does not apply. I resolve the Guideline E allegations in Applicant's favor.

Whole-Person Concept

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). They are as follows:

- (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.

By using marijuana and expressing an intent to continue using marijuana, Applicant is violating federal law with impunity. Such nonchalant violation of the law raises unanswered questions about whether he would comply with rules and procedures governing the handling of classified information.

Formal Findings

Formal findings for 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
Subparagraph 1.a – 1.d:	Against Applicant

Paragraph 2, Guideline E:

FOR APPLICANT

Subparagraphs 2.a-2.b:

For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the security interests of the United States to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge