



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



In the matter of:)
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 [NAME REDACTED]) ISCR Case No. 14-05263
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 Applicant for Security Clearance)

Appearances

For Government: Adrienne Strzelczyk, Esq., Department Counsel
For Applicant: *Pro se*

05/31/2016

Decision

MALONE, Matthew E., Administrative Judge:

Applicant uses marijuana for medicinal purposes that was properly prescribed for him in a state where personal use and possession of marijuana is generally legal. He also has used marijuana for recreational purposes where it is legal to do so. Changes in state laws pertaining to marijuana do not alter the existing illegality of marijuana possession under federal law and the general proscription against illegal use of controlled substances by person's holding a security clearance. Most of Applicant's marijuana use has occurred while holding a security clearance. Applicant intends to continue using marijuana. He has not mitigated the security concerns about his drug use. His request for continued eligibility for a security clearance is denied.

Statement of the Case

On April 25, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to renew eligibility for access to classified information as required for his job with a defense contractor. After reviewing the completed

background investigation, which included his responses to interrogatories¹ from Department of Defense (DOD) adjudicators, it could not be determined that it is clearly consistent with the national interest to continue Applicant's eligibility for access to classified information.²

On March 23, 2015, DOD issued a Statement of Reasons (SOR) alleging facts that raise security concerns addressed under Guideline H (Drug Involvement).³ Applicant timely responded to the SOR and requested a decision without a hearing.

On August 20, 2015, Department Counsel for the Defense Office of Hearings and Appeals (DOHA) issued a File of Relevant Material (FORM)⁴ in support of the SOR. Applicant received the FORM on December 29, 2015, and was advised he had 30 days from the date of receipt to submit additional information in response to the FORM. Applicant did not submit any additional information in response to the FORM. The record closed on January 29, 2016, and the case was assigned to me on April 1, 2016.

Findings of Fact

Under Guideline H, the Government alleged that Applicant used marijuana from March 2011 until at least April 2013, despite having been granted a security clearance in 2008 (SOR 1.a). In response to the SOR, Applicant admitted the allegation. (FORM, Item 1) In addition to the facts established by Applicant's admission, I make the following findings of fact.

Applicant is a 45-year-old employee of a defense contractor, where he has worked as an information systems analyst since November 2005. He has generally worked in the information technology field since at least 2002. In November 2007, Applicant applied for and subsequently received a DOD security clearance. (FORM, Item 2)

In his current application for clearance, Applicant disclosed he has been using marijuana for pain management related to gastrointestinal problems since March 2011. At the time, his most recent documented use of marijuana was in April 2013, the same month in which he submitted his EQIP. Applicant stated therein that he had been lawfully prescribed marijuana for medicinal purposes in a state where personal use of the drug is now legal. In his EQIP, Applicant also stated his intent to use marijuana in the future. (FORM, Item 2)

¹ Authorized by Section E3.1.2.2, DOD Directive 5220.6 (Directive)

² Required by Executive Order 10865, as amended, and by the Directive.

³ See Directive, Enclosure 2. See also 32 C.F.R. § 154, Appendix H (2006).

⁴ See Directive, Enclosure 3, Section E3.1.7. The FORM included five exhibits (Items 1 - 5) proffered in support of the Government's case.

In response to interrogatories from DOD adjudicators, Applicant stated that he had been prescribed marijuana for medical purposes at least four times between 2010 and 2012. He also disclosed that he had last used the drug, at that point, on June 28, 2015. He also provided information regarding his medical marijuana license and medical marijuana prescriptions. Additionally, Applicant acknowledged using marijuana for recreational purposes. (FORM, Item 3)

I take administrative notice *sua sponte* 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 memoranda issued by the Office of the Assistant Secretary of Defense (OASD), in February 2013; by the Director of National Intelligence (DNI) in October 2014; and by the Office of Personnel Management (OPM) in May 2015 all make 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 supercedes state laws on this issue.

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁵ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the adjudicative guidelines. 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 interest⁶ for an applicant to either receive or continue to have access to classified information. Department Counsel must produce sufficient reliable information on which DOD based its preliminary decision to deny or revoke a security clearance for an applicant. Additionally, Department Counsel must prove

⁵ Directive. 6.3.

⁶ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

controverted facts alleged in the SOR.⁷ If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the case for disqualification.⁸

Because no one is entitled to a security clearance, applicants bear a heavy burden of persuasion to establish that it is clearly consistent with the national interest for them to have access to protected information.⁹ A person who has access to such information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, there is a compelling need to ensure each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the nation's 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 to classified information in favor of the Government.¹⁰

Analysis

Drug Involvement

Applicant has used marijuana with varying frequency since March 2011. His last known use occurred three months after the SOR was issued, and he has held a security clearance at all times while using marijuana. Applicant intends to use marijuana in the future. This information reasonably raises a security concern that is stated at AG ¶ 24 as follows:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances;

More specifically, available information requires application of the following AG ¶ 25 disqualifying conditions:

(a) any drug abuse (see above definition);

⁷ Directive, E3.1.14.

⁸ Directive, E3.1.15.

⁹ See *Egan*, 484 U.S. at 528, 531.

¹⁰ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

(g) any illegal drug use after being granted a security clearance; and

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

In response to the SOR and the FORM, Applicant did not present information that would support any of the mitigating conditions listed at AG ¶ 26. Although legal under state law where he lives, Applicant's use of marijuana is still impermissible under federal controlled substances laws and DOD industrial security policy guidance consistent with those laws. Even if there were policy exceptions regarding medical use of marijuana, Applicant also disclosed that he has used marijuana for recreational purposes. On balance, Applicant did not mitigate the security concerns established by the Government's information.

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(a). Applicant's use of marijuana, despite clear and consistent policies against such conduct, raises doubts about his judgment, reliability, and willingness to follow rules and regulations in the protection of sensitive information. Because the protection of the national interest is the principal goal of these adjudications, those doubts must be resolved against 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: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Conclusion

In light of all available information, it is not clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is denied.

MATTHEW E. MALONE
Administrative Judge