



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



In the matter of:)
)
) ISCR Case No. 15-05270
)
Applicant for Security Clearance)

Appearances

For Government: Mary Margaret Foreman, Esq., Department Counsel
For Applicant: Thomas W. Dean, Esq.

06/28/2017

Decision

MURPHY, Braden M., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H, drug involvement, due to his marijuana use while holding a security clearance, and his admitted intention to continue marijuana use. Under Guideline E, personal conduct, his failure to disclose his marijuana use on his security clearance application was not deliberately false. Applicant's eligibility for access to classified information is denied.

Statement of the Case

On March 30, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement, and Guideline E, personal conduct. The action was taken under Executive Order (Exec. Or.) 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 adjudicative guidelines effective within the DOD on September 1, 2006.

On December 10, 2016, the Director of National Intelligence (DNI) issued Security Executive Agent Directive (SEAD) 4, National Security Adjudicative Guidelines (AG). The Directive became effective on June 8, 2017 for all adjudicative decisions on or after that date, including this one.¹ Any changes resulting from the implementation of the new AGs did not affect my decision in this case.

Through counsel, Applicant answered the SOR on May 2, 2016. On June 17, 2016, Applicant, acting *pro se*, requested a decision based on the written record in lieu of a hearing. On July 28, 2016, Department Counsel submitted the Government's File of Relevant Material (FORM), including documents identified as Items 1-12. Items 1 and 2 are the pleadings in the case. Items 3, 4 and 12 were offered as substantive evidence. Items 5 through 11 were offered for the purposes of administrative notice. Applicant received the FORM on August 4, 2016. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant's counsel responded on September 8, 2016, by letter marked as Applicant's Exhibit (AE) A. He did not object to the Government's evidence.² After attempting to reach Applicant's counsel without success, Department Counsel e-mailed Applicant directly on December 14, 2016, to afford him an additional chance to respond to the FORM. That e-mail is marked as Item 13.³ Applicant did not respond or note an objection. AE A and FORM Items 3, 4, 12 and 13 are admitted into evidence. The case was assigned to me on June 2, 2017.

Request for Administrative Notice

In the Government's FORM, Department Counsel requested that I take administrative notice of certain official U.S. Government policies with regard to state legalization of marijuana, set forth in Items 5 through 11. I have taken administrative notice of certain facts that are supported by official U.S. Government publications. These facts are summarized below.

Findings of Fact

Through counsel, Applicant admitted SOR ¶¶ 1.a, 1.b and 1.c, denied SOR ¶¶ 2.a and 2.b, and provided a narrative statement. His admissions and other comments are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

¹ The new Adjudicative Guidelines are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

² In AE A, Applicant's counsel indicated that having received and reviewed the Government's FORM, his client "will not be pursuing an administrative appeal of this preliminary determination and will accept the denial of his security clearance." Applicant remains sponsored for a clearance as of this writing, so DOHA has jurisdiction over this case under ¶ 2.3 of DoD Directive 5220.6.

³ In Item 13, Department Counsel indicated she attempted on multiple occasions without success to reach Applicant's counsel by phone, as he did not provide an e-mail address. She therefore sought to provide Applicant the appropriate opportunity to "respond or provide clarifying information before his file is assigned to an administrative judge for a decision." Item 13. Applicant did not respond.

Applicant is 61 years old. He earned a master's degree in 2010. He has been employed as an engineer for various federal contractors since 2000. He has worked for his current employer since 2008.⁴ He was granted a security clearance in April 2005.⁵ He submitted his most recent security clearance application (SCA) in October 2014.⁶

The government alleged under Guideline H that Applicant used marijuana between about June 2013 to at least April 2015; that he used marijuana after having been granted a DoD industrial security clearance on April 13, 2005; and that he intended to continue to use marijuana in the future. Under Guideline E, the government cross-alleged the drug involvement security concerns and alleged that he falsified material facts on his October 2014 SCA by deliberately failing to disclose that he used marijuana while possessing a security clearance.

Applicant admitted using marijuana as alleged, including while holding a security clearance. He admitted an intent to continue using marijuana in the future.⁷ He nonetheless denied the Guideline H allegations on the grounds that his possession and use of marijuana was legal under state law, and therefore was not disqualifying. Similarly, he argued that his future intent to use marijuana was also not disqualifying, since it, too, would be consistent with applicable state law governing the use of medical marijuana.⁸

On his SCA, Applicant answered "No" to the question, "Have you ever illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed."⁹ He therefore did not disclose his marijuana use while holding a security clearance between 2013 and 2015. In his answer and his FORM response, Applicant denied attempting to deceive the government when he failed to disclose his marijuana use on his SCA, since to him, his medical marijuana use was legal under state law, and also necessary to treat his medical condition.¹⁰

Applicant volunteered his marijuana use, and the fact that he had a medical marijuana card, in his background interview. He told the investigator that he first used marijuana in June 2013. He said he had last used marijuana on April 20, 2015, the day before his interview. Applicant was injured in a motorcycle accident, and has pinched nerves. He used marijuana as a sleep aid. He chose to use medical marijuana rather

⁴ Item 3.

⁵ Items 3, 12. Applicant also indicated on his security clearance application that he also held a clearance in the mid-1990s. Item 3 at 30.

⁶ Item 3.

⁷ Answer at 2.

⁸ Answer at 1 (citing the [State] Medical Marijuana Act, and its provision allowing medical marijuana use for those with a "recognized debilitating medical condition.").

⁹ Item 3 at 29.

¹⁰ Answer at 3; AE A.

than oxycontin. He purchased the marijuana in bottle form from a dispensary about every three weeks. He acknowledged that he used marijuana while possessing a security clearance. He indicated that he intended to continue using marijuana in that fashion in the future. He indicated that he had not used “illegal drugs,” since his marijuana use was legal under state law where he lives.¹¹

Applicant has had a medical marijuana card, issued by his state department of health services, since 2013. He has renewed his medical marijuana card annually since then. He renewed his most recent card, attached to his answer, in July 2015, after completing both his SCA and his background interview, and it was to have expired a year later, in July 2016.¹²

The U.S. Department of Justice has issued guidance making it clear that no state can authorize violations of federal law, including violations of the Controlled Substances Act, 21 U.S.C 801,¹³ which identifies marijuana as a Schedule 1 controlled substance. Further, on May 25, 2015, the U.S. Office of Personnel Management issued similar guidance noting that federal law on marijuana law remains unchanged. Knowing or intentional marijuana possession is illegal under federal law, even if an individual has no intent to manufacture, distribute, or dispense marijuana.¹⁴ On October 25, 2014, the Director of National Intelligence (DNI) reaffirmed that the disregard of federal law concerning the use, sale or manufacture of marijuana is relevant in national security determinations, regardless of changes in state laws concerning marijuana use.¹⁵

Policies

It is well established that no one has a right to a security clearance.¹⁶ As noted by the Supreme Court 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.”¹⁷

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief

¹¹ Item 4.

¹² Items 3, 4; Answer.

¹³ Items 6-9.

¹⁴ Item 11.

¹⁵ Item 10. The DNI’s October 2014 memorandum (Adherence to Federal Laws Prohibiting Marijuana Use) refers to the Adjudicative Guidelines for Determining Access to Classified Information which were then in effect. See Item 10 at Ref. H. As addressed above, those AGs have been superseded by the new AGs, effective June 8, 2017. Nonetheless, the DNI’s policy guidance is applicable.

¹⁶ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”).

¹⁷ 484 U.S. at 531.

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

AG ¶ 24 expresses the security concern for 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);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Marijuana is a Schedule 1 drug under the Controlled Substances Act. Its use and possession remain illegal under federal law. Applicant used marijuana between about June 2013 and at least April 2015. His use occurred while he held a security clearance, and he intends on continued marijuana use. The above disqualifying conditions apply.¹⁸

I have considered the mitigating conditions under AG ¶ 26. The following are potentially applicable:

- (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;
- (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)

¹⁸ Both Guideline H and Appendix B of the June 8, 2017 Adjudicative Guidelines reference Public Law 110-118 (the Bond Amendment), and note that it is applicable to Guideline H. See SEAD-4 at Guideline H, Fn. 1. Under Appendix B (Bond Amendment Guidance), "heads of agencies are prohibited from granting or renewing national security eligibility for any covered individual who is a controlled user of a controlled substance . . ." See SEAD-4, App. B, ¶ 1 (PROHIBITION). The Bond Amendment was made effective on January 1, 2008. See SEAD-4, App. B. I therefore considered potential application of the Bond Amendment to this case. However, I note that the Government did not allege the Bond Amendment in the SOR. I therefore decline to apply it to the Applicant so as to statutorily prohibit him from access to classified information.

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; and

None of the mitigating conditions apply. Applicant used marijuana, with a security clearance, between June 2013 and April 2015 as a sleep aid and to relieve his pain after a motorcycle accident. He indicated that he intends to continue using marijuana. He has not established that his marijuana use is dated or infrequent, or that it occurred under such circumstances that it is unlikely to recur. Indeed, to the contrary. AG ¶ 26(a) does not apply.

Similarly, while Applicant acknowledged his marijuana use, he has not acknowledged that his use was illegal. He has not provided any evidence of any actions taken to overcome his marijuana use. He has not established a pattern of abstinence. AG ¶ 26(b) does not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

Conduct 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . .

SOR ¶ 2.a is merely a cross-allegation of the drug involvement allegations in SOR ¶¶ 1.a – 1.c. The judgment concerns associated with that conduct are sufficiently addressed under Guideline H and are not addressed separately. While these concerns are alleged under separate guidelines, they are also redundant and unnecessary. I therefore find for Applicant as to SOR ¶ 2.a.

This leaves the falsification allegation under SOR ¶ 2.b. On his SCA, Applicant answered “No” to the question, “Have you ever illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed.”¹⁹ He therefore did not disclose his marijuana use between 2013 and 2015, which occurred while holding a security clearance. In this regard, Applicant was wrong. His marijuana use was illegal under federal law, and he therefore had a duty to disclose it on his SCA in answering that question.

In answering SOR ¶ 2.b, Applicant denied that he deliberately attempted to deceive the government in this regard. This puts the burden on the Government to

¹⁹ Item 3 at 29.

prove the allegation. Applicant consistently explained in his interview, his answer and his FORM Response, that he believed that he did not “illegally use” marijuana, since it was legal under state law, and was also necessary to treat his medical condition.²⁰ Thus, he believed he did not have to disclose it. This belief was wrong, but it does not rise to the level of deliberate falsification, as required. Further, Applicant discussed his marijuana use freely with the interviewing agent, and explained his rationale for why he did not disclose it on his SCA.²¹

Under the circumstances, I conclude that the Government has not met its burden of establishing Applicant’s deliberate falsification, as required under AG ¶ 16(a).²² Since the Government has not established disqualifying conditions, I need not address applicability of the Guideline E mitigating conditions.²³

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 Guidelines H and E in my whole-person analysis. I conclude Applicant did not falsify his SCA, but did not mitigate the drug involvement security concerns over his use of marijuana with a security clearance. Overall, the record evidence leaves me with questions and doubts as to Applicant’s eligibility and suitability for a security clearance.

²⁰ Answer at 3; AE A; Item 4.

²¹ Item 4.

²² I also note that the Government’s FORM did not present an argument under Guideline E, though the argument presented under Guideline H was thorough and extensive.

²³ AG ¶¶ 17(a) – 17(d).

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, Guideline H: AGAINST APPLICANT

 Subparagraphs 1.a-1.c: Against Applicant

Paragraph 2, Guideline E: FOR APPLICANT

 Subparagraphs 2.a-2.b: For 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.

Braden M. Murphy
Administrative Judge