



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



In the matter of:

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Applicant for Security Clearance

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) ISCR Case No. 17-00892
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Appearances

For Government: Pamela Benson, Esq., Department Counsel

For Applicant: *Pro se*

06/07/2018

Decision

HEINY, Claude R., 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's most recent use of marijuana was in April 2016. He used and purchased marijuana after completing a security clearance application in November 2014. He failed to mitigate the security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. Applicant's eligibility for access to classified information is denied.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,² on May 5, 2017, the DoD issued a Statement of Reasons (SOR) detailing security concerns under

¹ This is Applicant's name. The name on the Statement of Reasons is not reflected on his birth certificate or was ever used by Applicant. (Item 4)

² Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*

Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. On May 17, 2017, Applicant answered the SOR and elected to have the matter decided without a hearing. On July 25, 2017, Defense Office of Hearings and Appeals (DOHA) Department Counsel (DC) submitted the Government's case in a File of Relevant Material (FORM). The FORM contained four attachments (Items). On August 2, 2017, Applicant received a copy of the FORM, along with notice of his opportunity to object to the Government's evidence and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions. Applicant's response was due on September 6, 2017. No response was received. On December 19, 2017, I was assigned the case.

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's security clearance eligibility under the new AGs.³

Findings of Fact

In Applicant's answer to the SOR, he admitted using marijuana from 2002 to June 2006 and using and purchasing marijuana from July 2012 to April 2016. He admitted his use and purchase after being granted a DoD security clearance on October 25, 2006. After a thorough review of the pleadings and exhibits, I make the following findings of fact.

Applicant is a 34-year-old curriculum developer who has worked for a defense contractor since April 2014. He seeks to obtain a security clearance. (Item 3) From June 2006 through June 2012, he honorably served as a signals intelligence analyst in the U.S. Army. (Item 2) He is married and has no children. (Item 2)

On November 20, 2014, Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP). In his e-QIP he admitted using marijuana weekly from July 2012 through February 2014. He stated, "I was out of the military and decided to try it. I don't believe cannabis should be illegal. I believe it is safer than alcohol, and I'm not ashamed to say I used it." (Item 2) He admitted to purchasing marijuana when he used it. He also stated in his e-QIP about his intentions the following:

For as long as I intend to hold and maintain a security clearance I will not use it. However, once cannabis prohibition is repealed and I no longer require a security clearance I may decide to try it again.

(January 2, 1992), as amended (Directive); and the adjudicative guidelines (Sept. 1, 2006 AG) effective within the DoD on September 1, 2006.

³ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

When Applicant answered the SOR, he expressed his disagreement with the federal prohibition on marijuana:

To whom it may concern, I admit to being a frequent cannabis user, I recognize that although many states permit cannabis for medical or recreational use, Virginia is not one of those states, and that the federal government chooses to maintain cannabis prohibition, despite no evidence that cannabis is any more harmful than alcohol or tobacco. I question the judgment of a government for disqualifying someone for what they do on their free time, while allowing thieves and charlatans to take over government who do not have our nation's best interests at heart. It is, of course, your prerogative (sic) to decide who you allow to access classified information, but you lose out on having the skills of a good veteran intelligence analyst/instructional designer in doing so . . . With honesty and no regrets.

On May 16, 2016, Applicant completed a personal subject interview. (Item 4) During that interview he stated he first used marijuana in 2002. He used it a few times between 2002 and 2006.⁴ (Item 4) He stated from July 2012 until April 2016, the month prior to his interview, he used marijuana monthly. (Item 4) However, in his November 2014 e-QIP he estimated from July 2012 until February 2014 he use marijuana weekly. He purchased marijuana monthly from July 2012 through April 2016. He continued to use marijuana after completing his e-QIP.

Applicant asserted during his interview he never used marijuana while holding a security clearance. In his SOR response he admitted using marijuana after being granted a DoD security clearance in October 2006. (Item 1) He said he used marijuana after leaving the Army in June 2012. He also said during his interview that said he planned to continue using marijuana if his job does not test for it and as long as he does not need a security clearance. (Item 4) He also stated he would give up marijuana use if he needed a security clearance. He has smoked marijuana with his wife and purchased the marijuana from an associate of his wife. (Item 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 must 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

⁴ Applicant denies, and there is no evidence to the contrary, that he used marijuana while he was in the Army from June 2006 to June 2012.

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 adjudication process is an examination of a sufficient period and a careful weight of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the whole-person concept.

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.

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 Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination of 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

Guideline H, Drug Involvement and Substance Abuse

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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. 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.

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

(a) any substance misuse; and

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

In his November 2014 e-QIP, Applicant estimated from July 2012 until February 2014 he used marijuana weekly. In his May 2016 personal subject interview, he stated from July 2012 until April 2016, the month prior the interview, he used marijuana monthly. He purchased marijuana monthly from July 2012 through April 2016, for his personal consumption. I find AG ¶ 25(a) applies.

Applicant admitted using marijuana after being granted a security clearance in the Army and continued to use marijuana after completing his e-QIP. However, he denies using marijuana while holding a clearance. He stated he did not use marijuana while in the Army, but decided to try it after he was out of the Army in 2012. After leaving the Army, he would no longer have a security clearance. Therefore, he could have used it after 2006 and still not had a clearance when he used it. The record is unclear if he possessed a security clearance when he used marijuana. I find AG ¶ 25(f) does not apply. However, the record is clear that he continued to use marijuana after completing his November 2014 e-QIP and used it until April 2016, which raises serious concerns about his judgment and reliability.

AG ¶ 26 provides conditions that could mitigate security concerns. Two potentially apply in this case:

(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; and

(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) 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 or misuse is grounds for revocation of national security eligibility.

Applicant's use of marijuana was frequent during the time frame he used it. He claims abstinence since his last use in April 2016, approximately two years ago. An applicant's use of illegal drugs after having completed a security clearance application raises questions about his or her judgment, reliability, and willingness to comply with laws, rules, and regulations. See, e.g., ISCR Case No. 14-03450 at 3 (App. Bd. Sep. 11, 2015).

Given the circumstances of Applicant's use (i.e. using marijuana weekly or monthly, at times, from July 2012 through April 2016 and knowing such use was against federal law), insufficient time has passed to determine that recurrence is unlikely. Applicant's future intent regarding marijuana is to use it if his job does not test for it and he does not need a security clearance.

There is no showing Applicant has disassociated himself from drug-using associates or contacts, which would include his wife. There is no showing he has changed or avoids the environment where drugs are used. His claimed abstention is insufficient to convince me that recurrence is unlikely. The recency of his past use after completing a security clearance application and disregard for federal law casts doubt upon his current reliability, trustworthiness, and good judgment. AG ¶¶ 26(a) and 26(b) do not apply.

It is well-settled that administrative agencies, such as DOHA, have limited authority. See, e.g., *Thunder Basin Coal Company v. Reich*, 510 U.S. 200, 215 (1994). DOHA Judges have no authority to entertain challenges to statutes, regulations, or, as in this case, the Federal law prohibiting the use of marijuana. See, e.g., ISCR Case No. 04-01961 at 3 (App. Bd. Jul. 12, 2007). It is also well-settled that DOHA proceedings are intended to adjudicate security eligibility of individual applicants and not as a forum to pass judgment on Federal laws or processes. See, e.g. ISCR Case No. 03-06174 at 8 (App. Bd. Feb. 28, 2005) and ISCR Case No. 14-03734 at 3 and fn. 2 (App. Bd. Feb. 18, 2016).

Access to national secrets entails a fiduciary duty to the United States. A person who enters into such a fiduciary relationship is charged with abiding by legal and regulatory guidance regardless of whether he or she believes that guidance to be wise.

See, e.g. ISCR Case No. 16-3460 at 4 (App. Bd. May 24, 2018) Drug involvement and substance misuse security concerns persist.

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. . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

SOR ¶ 2.a is a cross-alleges the drug involvement allegations in SOR ¶ 1. The security concerns associated with that conduct are largely addressed under Guideline H above. The record established the above disqualifying condition, requiring additional inquiry about the possible applicability of the applicable mitigating conditions. AG ¶ 17 provides conditions that could mitigate the personal conduct security concerns. I considered the following mitigating conditions under AG ¶ 17 including:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the above conditions have been shown to apply. The use and purchase of marijuana is not minor and only a little over two years has passed since Applicant's last purchase and use. The use and purchase did not occur under unique circumstances. To Applicant's credit he was forthcoming when he completed his e-QIP and during his personal interview. However, there is no showing of counseling to change the behavior or that the behavior is unlikely to recur. Applicant has not presented evidence to support any of the above mitigating conditions.

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 the 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 considered Applicant's honorable military service and that he voluntarily disclosed his marijuana use on his e-QIP and to an investigator. However, I also considered that he made a conscious and calculated choice to violate federal law by engaging in marijuana use. Marijuana use is prohibited before, during, and after completing a security clearance application. Indeed, it is prohibited without reference to clearance adjudications, and there is no reason to believe that Applicant was unaware of this, any more than he would have been unaware that other criminal acts are forbidden at all times.

In requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances,

articulate his position, and mitigate the drug involvement and personal conduct security concerns. Considerable concern is raised about his willingness to comply with federal law by failing to provide such information, and by relying on only a single paragraph of explanation in his SOR response. Security concerns remain.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct.

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 and 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Personal Conduct:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant

Conclusion

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

CLAUDE R. HEINY II
Administrative Judge