



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



In the matter of:

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ISCR Case No. 17-02493

Applicant for Security Clearance

Appearances

For Government: Ross Hyams, Esq., Department Counsel

For Applicant: *Pro se*

03/15/2018

Decision

CURRY, Marc E., Administrative Judge:

Applicant's last use of marijuana occurred less than two years ago, after he had been granted a security clearance. Consequently, although he deserves credit for reporting his most recent usage, it is too soon to conclude that he has mitigated the security concerns. Clearance is denied.

Statement of the Case

On August 7, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) 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 interests of national security to grant or continue security clearance eligibility. The DOD CAF 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on June 8, 2017.

On August 30, 2017, Applicant answered the SOR allegations, admitting all of the allegations except those alleged in Paragraph 2. He requested a decision on the written record instead of a hearing. On September 28, 2017, Department Counsel prepared a File of Relevant Material (FORM). Applicant received the FORM on November 11, 2017, and filed a response within the time allotted. The case was assigned to me on January 17, 2018.

Evidentiary Ruling

Item 6 in the FORM is a Report of Investigation (ROI) summarizing Applicant's Personal Subject Interview conducted on September 22, 2014. In the FORM, Department Counsel informed Applicant that such reports are typically inadmissible without authenticating witnesses, and that he could either object to its admissibility, or clarify any inaccuracies Directive ¶ E3.1.20. Applicant did not address this issue in his response to the FORM. Consequently, I have considered this document in my disposition of this case.

Findings of Fact

Applicant is a 30-year-old single man. He graduated from college in 2015, and works for a federal contractor as an engineer. He began working for his employer in 2014 as a college intern. (Item 4 at 13)

In 2005, when Applicant was in high school, he had to undergo multiple oral surgeries. Applicant's physician prescribed him an "overly generous portion of opioids, far in excess of what was needed to cope with the surgeries." (Response at 1) Applicant's parents did not dispose of the leftover opioids because they believed it was wasteful to throw away medicine. Subsequently, Applicant began to use the opioids recreationally, and to self-medicate, using them to cope with emotional problems related to his high school social life. Applicant gradually stopped abusing prescription medication after he began experiencing side effects such as bloating, constipation, and sluggishness. He stopped abusing the prescription pain medication completely in 2008 and has not used it in nearly ten years. (Item 6 at 4)

Applicant smoked marijuana from May 2005 to February 2013. His use was heaviest in high school and his first two years of college, when he smoked it two to three times per week. Gradually, his use diminished to a few times per month. Applicant received a security clearance at or about the time he began working for his current employer in 2014. His employer informed him that marijuana use was "absolutely incompatible with the job." (Item 3 at 3)

In July 2016, Applicant traveled to an other state for vacation. Marijuana was legal in this state, and a marijuana dispensary was across the street from his hotel. Curious, he went to the dispensary, purchased some marijuana-infused cookies, and ate a few of them. (Item 4 at 36; Item 7 at 2) Applicant thought that it was acceptable to use this marijuana product because it was legal in the state where he was vacationing. When Applicant returned home, he told a coworker about his experience. The coworker told him that

marijuana use while working for their employer was forbidden regardless of its legality from state to state. Applicant then reported his use to his employer. (Item 7 at 3)

Applicant has not used marijuana since the episode on vacation. Although he remains baffled about the divergence between federal law and some states' laws regarding the legality of marijuana use, he now understands "that there are special prohibitions specifically against people with a clearance using federal controlled substances regardless of the substances' legality where it is consumed, and that these prohibitions have reasoning [sic] beyond avoiding illegal activity." (Response at 1)

Applicant continues to associate with friends who use marijuana. He "has an understanding with [them] that [he does] not use marijuana and so they do not offer them any." (Item 3 at 8)

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. According to AG ¶ 2(a), the entire process is an evaluation 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 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

The security concern under this guideline is as follows:

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. (AG ¶ 24)

Applicant's abuse of prescription drugs and use of marijuana, including one episode of marijuana use after the grant of a security clearance, triggers the application of the following disqualifying conditions under AG ¶ 25:

- (a) any substance misuse; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The following mitigating conditions under AG ¶ 26 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; 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;
 - (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; and
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended.

Applicant's prescription drug abuse occurred after he was over-prescribed drugs to ameliorate the pain related to multiple oral surgeries that he underwent as an adolescent. After he recovered from the surgeries, he stockpiled the extra pills, and began using them for their euphoric side effects. Once he began experiencing negative side effects, he stopped using them. He has not abused any prescription drugs in nearly ten years and has no intent to do so in the future. The passage of time since the last abuse and the unique circumstances surrounding his introduction to prescription pain medication, render the likelihood of recurrence unlikely. I conclude that AG ¶ 25(c) applies. Applicant has mitigated subparagraph 1.d.

Applicant's heaviest marijuana use occurred ten years ago when he was in high school and during his first two years of college. It has become increasingly sporadic since then. After graduating from college, he became a full-time employee of his current employer where he had previously been interning. His most recent use of marijuana, however, occurred less than two years ago after the grant of a security clearance.

Applicant contends that he was unaware that marijuana use posed a security concern in a state where it is legal. This contention has minimal probative value given that his employer told him unequivocally that marijuana use was incompatible with the job. Under these circumstances, Applicant's last use of marijuana is too recent to conclude that he has mitigated the security concern.

Guideline E, Personal Conduct

Under this guideline, "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 ¶ 15) Paragraph 2 is merely a cross-allegation of the drug involvement allegations in Paragraph 1, and is sufficiently addressed in the drug involvement section of this decision, above. Therefore, I will not address it separately here.

Whole-Person Concept

In assessing the whole person, 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).¹ The majority of Applicant's marijuana use occurred several years ago. Any positive inference generated by this fact is undercut by his use of

¹ The factors under AG ¶ 2(d) 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.

marijuana, less than two years ago, after the grant of his security clearance. Under these circumstances, it is too soon to conclude Applicant has mitigated the security 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, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge