



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 20-03228
)
Applicant for Security Clearance)

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: *Pro se*
03/23/2022
Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for access to classified information. Applicant has not mitigated the security concern raised by his use of illegal drugs. Eligibility is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 18, 2020. The Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) on March 19, 2021, detailing security concerns under Guideline H, Drug Involvement and Substance Misuse. The DOD CAF acted 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

Applicant submitted an Answer to the SOR on April 28, 2021, and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On July 12, 2021, Department Counsel submitted the Government’s file of relevant material (FORM), including documents identified as Item 1 through 4. (Items.) Applicant was sent the FORM on July 16, 2021, and received it on August 2, 2021. He was afforded 30 days after receiving the FORM to file objections and

submit material in refutation, extenuation, or mitigation. Applicant did not respond to the FORM. The SOR and the answer (Items 1 and 2, respectively) are the pleadings in this case. Items 3 through 4 are admitted without objection. The case was assigned to me on October 6, 2021.

Findings of Fact

Applicant is 35 years old. He is married and has one child (four years old). Applicant has a bachelor's degree. Since September 2017, he has been employed by a defense contractor. (Item 3.)

The SOR alleged that Applicant: (1) purchased and used marijuana with varying frequency from about January 2017 until February 2020; and (2) intends to continue using marijuana in the future. (Item 1.) Applicant admitted the SOR allegations. (Item 2.) He later qualified those admissions. In his Personal Subject Interview (PSI), Applicant said that marijuana purchase and use is legal in his state's law. He purchases the drug legally at a "recreational dispensary." Applicant said, "he will stop using and purchasing marijuana if he is granted a Federal security clearance." Applicant was aware that purchase and use of marijuana is illegal under Federal law. (Item 4.)

Discussion

Guideline H – Drug Involvement and Substance Abuse

Under AG H for drug use, suitability of an applicant may be questioned or put into doubt because drug use can both impair judgment and raise questions about a person's ability or willingness to comply with laws, rules, and regulations. AG ¶¶ 24, 25 and 26 (setting forth the concern and the disqualifying and mitigating conditions).

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 analyzing the facts of this case, I considered the following disqualifying and mitigating conditions or factors:

AG ¶ 25(a) any substance misuse (see above definition);

AG ¶ 25(c) illegal possession of a controlled substance;

AG ¶ 25(g) expressed intent to continue drug involvement . . . or failure to clearly and convincingly commit to discontinue such misuse;

AG ¶ 26(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;

Applicant admitted to legally purchasing and using marijuana from January 2017 to February 2020. Applicant also admitted that he will continue to use marijuana, unless he is granted a security clearance. Facts admitted by an applicant in an answer to an SOR or in an interview require no further proof from the Government. ISCR Case No. 94-1159 at 4 (App. Bd. Dec. 4, 1995) ("any admissions [applicant] made to the SOR allegations . . . relieve Department Counsel of its burden of proof"); ISCR Case No. 94-0569 at 4 and n.1 (App. Bd. Mar. 30, 1995) ("[a]n applicant's admissions, whether testimonial or written, can provide a legal basis for an Administrative Judge's findings").

Marijuana is a Schedule I controlled substances, and possession of it is regulated by the federal government under the Controlled Substances Act. 21 U.S.C. § 811 *et seq.* The knowing or intentional possession and use of any such substance is unlawful and punishable by imprisonment, a fine or both. 21 U.S.C. § 844. In an October 25, 2014 memorandum, the Director of National Intelligence affirmed that the use of marijuana is a security concern. James R. Clapper, Director of National Intelligence, Memorandum: *Adherence to Federal Laws Prohibiting Marijuana Use* (October 25, 2014). See also <http://www.dea.gov/druginfo/ds.shtml>.

More recently, on December 21, 2021, the Director of National Intelligence signed the memorandum, *Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*. It emphasizes that federal law remains unchanged with respect to the illegal use, possession, production, and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the "whole-person concept" stated under SEAD 4, to determine whether the applicant's behavior raises a security concern that has not been mitigated.

Applicant's past use of marijuana and his conditional intent to use it in the future if a clearance is not granted make disqualifying conditions AG ¶¶ 25(a), (c), and (g), apply here. The next inquiry is whether any mitigating factors apply.

I have considered disqualifying factor AG ¶ 25(g) in light of Applicant's admission that he would cease using marijuana if he were granted a security clearance. Adjudicative Guideline H does not recognize, expressly or impliedly, a mitigating factor under these circumstances. Nor does the "whole person concept" offer any guidance that would

mitigate Applicant's past and potentially future use of marijuana if a clearance is not granted. The Government's grant or denial of a clearance is not a bargaining chip that can be negotiated away by an applicant's promise to cease illegal drug usage in the future

I have considered mitigating factor AG ¶ 26(a). Applicant used illegal drugs on varying occasions from January 2017 to February 2020. His behavior was not infrequent, nor was it long ago. I find that AG ¶ 26(a) does not apply.

The record raises doubts about Applicant's reliability, trustworthiness, judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept. AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6). Accordingly, I conclude that Applicant has not met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the SOR allegations:

Paragraph 1, Guideline H:	Against Applicant
Subparagraphs 1.a-1.c:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant access to classified information. Clearance is denied.

Philip J. Katauskas
Administrative Judge