



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND
APPEALS



In the matter of:)
)
) ISCR Case No. 19-004058
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Kent, 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 mitigated the security concern raised by his use of illegal drugs. Eligibility is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 13, 2019. The Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) on May 26, 2020, 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 undated answer to the SOR and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On August 30, 2021, Department Counsel submitted the Government’s file of relevant material (FORM), including documents identified as Items1 through 5 (Items). Applicant was sent the FORM on August 31, 2021, and he received it on October 4, 2021. He was afforded 30 days after receiving the FORM to file objections and submit material

in refutation, extenuation, or mitigation. Applicant responded to the FORM on October 27, 2021 (Response). The SOR and the answer (Items 1 and 2, respectively) are the pleadings in this case. Items 3 through 5 and Applicant's response to the FORM (Response) are admitted without objection. The case was assigned to me on December 2, 2021.

Findings of Fact

Applicant is 60 years old. He has never married and has no children. Applicant has a bachelor's degree. Since April 2019 he has been employed by a defense contractor. Before then, from 2011 to 2012, and from 2000 to 2008, Applicant worked for defense contractors. (Item 3.)

The SOR alleged that Applicant: (1) used marijuana with varying frequency from about June 2013 to about September 2018; (2) used marijuana with varying frequency from about 2003 to about June 2008, while having access to classified information; and (3) intends to continue using marijuana in the future, stating that "it is likely that [he] will use drugs in the future... [and] it is possible [he] will smoke marijuana again if the opportunity arises." (Item 1.)

Applicant qualifiedly admitted the first SOR allegation. The first SOR allegation is wrong on two counts. First, Applicant denies that his use was "with varying frequency." His use was once in June 2003 and once in September 2018. Second, the alleged date of June 2013 is wrong. (Item 2.)

Applicant qualifiedly admitted the second SOR allegation. Applicant had **no** security clearance in 2003 until 2004, when he received a clearance. He used marijuana once in June 2008, while holding a security clearance. (Item 2.)

Applicant qualifiedly admitted the third SOR allegation. In his answer, Applicant referred to his responses to interrogatories. In response to interrogatory no. 12, Applicant answered "I have no future intentions of drug use, purchase or distribution." Applicant has not used illegal drugs since September 2018, when he last used marijuana. (Items 2, 4, and Response.) Applicant was asked what he would do if he was in an environment and believed illegal drugs were or had been used. He responded "leave the area." Applicant also stated that he does not socialize with individuals who use illegal drugs. (Item 4, Personal Subject Interview.) Applicant disclosed his marijuana use in his May 2019 SCA.

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(f) any illegal drug use while granted access to classified information;

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;

AG ¶ 26(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 admitted using marijuana on three occasions, in June 2003 and June 2008, the latter while holding a security clearance, and with his last and most recent usage being in September 2018. Applicant also admitted that it is likely or possible he would use marijuana in the future if the occasion arises. 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.

Disqualifying conditions AG ¶¶ 25(a), (c), and (f), apply here. Because of Applicant’s past use of marijuana and his equivocation on future use, AG ¶ 25(g) may also apply. The next inquiry is whether any mitigating factors apply.

I have considered mitigating factor AG ¶ 26(a). Applicant used illegal drugs on three occasions, in June 2003, June 2008 (with a clearance), and in September 2018. His behavior was infrequent; his first use was in 2003, his next use in 2008, and his last use in 2018, almost four years ago. I find that AG ¶ 26(a) applies, thereby mitigating AG ¶¶ 25(a), (c), and (f).

AG ¶¶ 25(a), (c), and (f) are principally retrospective-looking, that is, they look to past conduct to inform a predictive assessment of potential future conduct. Provision AG ¶ 25(g), however, looks at contemporaneous expressions of future intent to use illegal drugs. Here, in his PSI Applicant stated that “it is likely... [and] possible [he] will smoke marijuana again if the opportunity arises.” That statement requires a consideration under

AG ¶ 25(g) whether Applicant has “clearly and convincingly [committed] to discontinue such misuse.” AG ¶ 26(b) has mitigating elements that complement the “clearly and convincingly” element of AG ¶ 25(g). Those complements are: (1) acknowledgement of drug involvement; (2) a pattern of abstinence; (3) disassociation from drug-using associates; (3) avoiding a drug-using environment; and (4) a signed statement to abstain from all future misuse of drugs, which misuse will be grounds for revocation of security eligibility.

In his SCA, his Answer to the SOR, his PSI, and his responses to interrogatories, Applicant has acknowledged his drug involvement. Applicant abstained from drug usage from 2003 until 2008 (five years) and from 2008 until 2018 (ten years). In his PSI, Applicant stated that he does not socialize with individuals who use illegal drugs. He also stated that if he found himself in a drug-using environment, he would “leave the area.” Finally, Applicant submitted two statements disavowing any intent to use illegal drugs in the future. It is fair to infer from his many years working for defense contractors that he was, and is, aware that future illegal drug usage would jeopardize his security clearance eligibility. I find that AG ¶ 26(b) mitigates disqualifying condition AG ¶ 25(g).

The record does not raise 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 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:	For Applicant
Subparagraphs 1.a-1.c:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant access to classified information.

Philip J. Katauskas
Administrative Judge

