



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 21-01131
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*
09/13/2022

Decision

MASON, Paul J., Administrative Judge:

Applicant’s unsupported evidence in mitigation is insufficient to meet his ultimate burden of persuasion under the guidelines for drug involvement and personal conduct. Eligibility for classified information is denied.

Statement of Case

On February 22, 2021, Applicant certified and signed his most recent Electronic Questionnaires for Investigations Processing (e-QIP) to obtain a security clearance required for employment with a defense contractor. After examining the background investigation, the Defense Counterintelligence Security Agency (DCSA) could not make the affirmative findings necessary to issue a security clearance. On June 25, 2021, DSCA issued a Statement of Reasons (SOR) to Applicant detailing security concerns under drug involvement and substance misuse (Guideline H), and personal conduct (Guideline E). The action was taken under Executive Order (E.O.) 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, establishing in Appendix A the National Security Adjudicative Guidelines for Determining Eligibility for

Access to Classified Information or Eligibility to Hold a Sensitive Position (AGs), made effective in the DOD on June 8, 2017.

Applicant provided an answer to the SOR on July 8, 2021. This case was originally assigned to another administrative judge on January 20, 2022. A notice of hearing was issued to Applicant on March 7, 2022 by the Defense Office of Hearings and Appeals (DOHA) scheduling a hearing for April 22, 2022. The case was then reassigned to me for administrative reasons and the hearing was held on the scheduled date. The Government's four exhibits were admitted into evidence without objection. Applicant did not seek admission of any exhibits into evidence. He did testify. On May 5, 2022, DOHA received a copy of the transcript (Tr.); the record closed the same day. The discovery letter, dated August 5, 2021, is marked as hearing Exhibit (HE) 1.

Findings of Fact

Based on the testimony and record evidence presented at the hearing, I make the following findings of fact. The July 2021 SOR alleges under paragraph 1.a that Applicant used marijuana at varying frequency between June 2000 and June 2020. In his July 2021 answer, he admitted the allegation, but noted there were breaks in usage and the total number of marijuana uses was in the "low single digits." He indicated that other than his marijuana use, he never violated federal law in any way. The use of marijuana never felt comfortable, and he had no desire to use the drug in the future. (July 2021 answer to SOR)

The SOR alleges under paragraph 1.b that Applicant used marijuana after he was granted access to classified information on March 21, 2006, and on February 10, 2016. Applicant admitted paragraph 1.b, but presented no additional comment to explain his admission.

Paragraph 2.a of the SOR alleges that Applicant provided false information on his September 2015 e-QIP by answering "No" to the Section 23 question of illegal drug use in the last 7 years, and by answering "No" to illegal drug use while possessing a security clearance. Applicant admitted providing false information, but claimed it resulted from misunderstanding the seven-year question. He remembered telling the Office of Personnel Management (OPM) investigator that he had used marijuana previously, but not in the last seven years. The investigator told him not to worry about his use. Applicant still believed the seven-year period applied to the second question (illegal use of drugs with a security clearance), even though "it (the security question) clearly included the word "EVER," referring to any past use. Applicant acknowledged illegal drug use, but contended that it took place outside the previous seven years. (July 2021 answer to SOR)

Paragraph 2.b of the SOR alleges that in his August 2005 security clearance application (SCA), Applicant answered "No" to question 27 asking whether he used illegal drugs since the age of 16 or in the last 7 years. In admitting the allegation,

Applicant characterized his negative answer as a miscalculation. In August 2005, he recalled using marijuana once in his life, but he was unsure when. Because he only remembered a single use many years ago, he determined it was outside the previous seven years. Upon current reconsideration of when he last used marijuana, his best estimate was that the use occurred in the middle of 2000. Applicant emphasized that he never intentionally furnished false information on a security clearance application. (July 2021 answer to SOR)

Applicant is 46 years old. From 1994 to 1997, he earned three years of college credits but no degree. From 1997 to 1999, he received additional college credits at two other colleges but no degree. (GE 2 at 9, Tr. 13, 16) He has been married since September 2010 and has two minor children, an 11-year-old daughter and a seven-year-old son. Since 1997, he has been employed by a defense contractor as an estimator. Applicant was granted a security clearance in March 2006, June 2010, and February 2016. He has owned his home since April 2011. (GE 1 at 9-18, 33)

The allegation of marijuana use set forth in SOR 1.a is based on Applicant's February 2021 e-QIP where he admitted that he used marijuana from June 2000 to June 2020. He described the frequency of use as approximately every couple of years. He indicated that he used marijuana while he held a security clearance. He did not intend to use marijuana in the future. Applicant commented that "[marijuana] doesn't do much for me. Every couple of years or so I think it might be better and I try it again. But it's always the same, just don't see the point." (GE 1 at 31)

Applicant's admissions about illegal marijuana use and use while holding a security clearance in his February 2021 e-QIP contradict his negative responses in his September 2015 e-QIP to using illegal drugs in the last seven (7) years, and never using drugs while possessing a security clearance. (SOR 2.a) (GE 2 at 30) Applicant's February 2021 drug admissions are also inconsistent with his negative response to Question 27 of his August 2005 e-QIP requiring disclosure of information of illegal drug use since the age of 16 or in the last 7 years. (SOR 2.b) (GE 3 at 4)

At the April 2022 hearing, Applicant was questioned further about his history of marijuana use. He claimed that he used the drug no more than four times in his lifetime, which is less than half as many times as he disclosed in his February 2021 e-QIP. (Tr. 11-12)

Applicant testified that his first use of marijuana occurred after returning from college in 1997. Then he testified the first use may have occurred between 1997 and 1999. Then he testified he could not remember when the first use took place. Notwithstanding his inability to recall when he began using marijuana, he indicated that he used the drug with a group of friends at someone's house after a holiday party. (Tr. 17)

Applicant's second marijuana use occurred the following year in probably 1998 or 1999, in a similar situation. He accepted someone's offer of the drug. He claimed the effect of his second use was just as unimpressive as his first use. (Tr. 18)

In 2007 or 2008, Applicant's third use of marijuana occurred at his parents' summer house in a state where marijuana had been recently legalized. His parents had obtained a chocolate edible mixed with marijuana from a dispensary. Having been granted his security clearance in March 2006, Applicant knew that his marijuana use was inconsistent with his federal security clearance responsibilities. Applicant compared the edible to "chewing a stick" and has not used marijuana in edible form since. He decided to use the drug because, as noted earlier, the state had recently legalized the drug, and he was not really thinking about his security clearance responsibilities at the time he used the drug. (Tr. 18-19, 23-24)

After a social event with neighbors in June 2020, Applicant and his wife returned home. She pulled out a vape pen that she said she had received from a friend in high school. She had occasionally used marijuana in Applicant's presence in the past, but this was the first time he used the drug with her. He was at home engaging in an experimental method of using the drug, and was not thinking about his security clearance at the time. Because he could not taste the flavor the pen produced, he decided that he did not like it. Applicant testified that his security clearance is not at the "forefront of most things I do on a daily basis." He periodically thinks about his security clearance at work, but otherwise he does not think about the clearance regularly. (Tr. 19-20, 26-28)

Applicant was asked about the scope and frequency of his marijuana use between June 2000 and June 2020. He read the relevant portion of his February 2021 e-QIP describing his use of marijuana about every two years over the twenty-year period. Applicant disagreed with his statements by indicating he should have taken more time and explained that his use was about four times over a period of 20 years. Subsequently, he stated that he described his marijuana use inadequately in that he believed his reply appearing in the e-QIP was focused on the overall number of years. Therefore, in Applicant's opinion, he only used marijuana twice between June 2000 and June 2020. He was not really considering his lifetime total marijuana usage. The June 2000 date was an estimate as to when he began marijuana use. He believed the beginning use was closer to 1997. Although he testified earlier in the hearing that he used marijuana twice between 1997 and 1999, once in 2007 or 2008, and once in June 2020, he did not disclose that use in his February 2021 e-QIP because of "poor wording," "averaging it out," over the period rather than stating the number of times he used the drug. No additional clarifying information was provided. (GE 1 at 31; Tr. 28-30, 34-35)

Applicant testified that he did not intend to use marijuana in the future. However, he was unable to state that he would not use the drug after he retires to a state with warmer weather. Given that he has not been awed by his use of the drug four

times in the past, he did not see a need to use the drug in the future. Even though his security clearance is a growing factor in not using marijuana, the primary factor still is that he does not like marijuana. (Tr. 30-31)

Although Applicant unequivocally stated in his February 2021 e-QIP that he used marijuana approximately every two years between June 2000 and June 2020, he testified that he only used the drug twice during the period. Though he admitted falsifying the two questions on his 2015 e-QIP concerning drug use, and using drugs while possessing a security clearance, he claimed the negative answers resulted from misunderstanding the questions asked, rather than deliberately falsifying his answers. Though he admitted falsifying the drug use question in his 2005 e-QIP, his negative answer was the result of a miscalculation, and not deliberately falsifying his answer. He was unsure when his last use of the drug occurred. In light of Applicant's five years of a college education, his employment with a defense contractor for about 24 years, his possession of a security clearance for at least 14 years, his knowledge that marijuana use is illegal at the federal level and inconsistent with holding a security clearance, I do not consider his discrepant and ambiguous accounts of his drug history and the explanations for his falsifications to be credible.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines, which should be applied with common sense and the general factors of the whole-person concept. All available, reliable information about the person, past and present, favorable and unfavorable, should be carefully reviewed before rendering a decision. The protection of the national security is the paramount consideration. AG ¶ 2(d) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." 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 in seeking a favorable security decision.

Analysis

Drug Involvement and Substance Misuse

The security concern under the Drug Involvement/Substance Abuse Guideline is set forth in AG ¶ 24:

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 my analysis of this case, I have taken administrative notice of Executive Order (E.O.) 12564 signed by the then-President of the United States on September 15, 1986. The primary issues addressed in the E.O. are: (1) federal employees cannot use illegal drugs; (2) illegal drug use by federal employees, on or off duty, is contrary to the efficiency of the service; and (3) persons who use illegal drugs may not be suitable for federal employment. I have also taken administrative notice of a memorandum issued by the Director of National Intelligence (DNI) In October 2014, advising that no state can authorize violations of federal law regarding the use of marijuana, a Schedule 1 controlled drug under the Controlled Substances Act. Changes in state law concerning the use of marijuana do not alter national security guidelines. Lastly, the 2014 memorandum indicates that "an individual's disregard of federal law pertaining to use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations."

AG ¶ 25. Conditions that could raise a security concern and may be disqualifying include:

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

Applicant's use from June 2000 to June 2020, at a frequency of about every two years, falls within the scope of AG ¶ 25(a). His use of the drug involved illegal possession of a controlled substance as defined by AG ¶ 25(c). His possession and use of the drug after being granted access to classified information in March 2006, comes within the purview of AG ¶ 25(f).

AG ¶ 26. Conditions that could mitigate security concerns include:

- (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.

During the course of the security clearance investigation and at the hearing, Applicant provided discrepant and unclear statements concerning his history of illegal marijuana use. These inconsistencies, coupled with his continued marijuana use after he had been granted a security clearance in February 2016, have a negative impact on the credibility of his claim that he has not used marijuana since June 2020. Applicant's conduct raises ongoing security concerns concerning his judgment and reliability. AG ¶ 20(a) does not apply.

Though Applicant denied that he will use marijuana in the future, he did not provide a signed statement of intent acknowledging that any future drug involvement is grounds for revocation of his security clearance eligibility. There is no evidence that he has severed his relationships with drug-using individuals or has made positive changes in his environment and lifestyle that facilitates abstinence from future drug use. AG ¶ 20(b) does not apply.

Personal Conduct

AG ¶ 15 expresses the security concerns related to 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. The following will normally result in an unfavorable national security eligibility determination, security

clearance action, or cancellation of further processing for national security eligibility:

AG ¶ 16. Conditions that could raise security concerns and may be disqualifying include:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant denies that his falsification of his 2015 e-QIP was intentional, but resulted from not understanding the questions asked. Applicant denies that his falsification of his 2005 e-QIP was intentional, but resulted from a miscalculation of when he last used marijuana. To determine whether the falsification was intentional or unintentional, the applicant's statement of mind is an important consideration along with his age, education, and professional background. See, ISCR Case No. 03-09483 at 4 (App. Bd. Nov.17,2004); ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010) In view of Applicant's age, education, and the long period in which he has held a security clearance, I do not find his misunderstanding and miscalculation explanations to be credible. The evidence satisfactorily supports AG ¶ 16(a).

AG ¶ 17. Conditions that could mitigate security concerns include:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(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; and

(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.

Applicant did not make prompt good-faith efforts to correct his 2015 and 2005 e-QIP falsifications. His misunderstanding and miscalculation explanations are not credible. AG ¶ 17(a) does not apply. Deliberately providing false information to the Government cannot be considered minor and reflect negatively on his trustworthiness and judgment. While he has demonstrated some compunction for not being forthright in

the e-QIPs, insufficient time has passed to justify with complete confidence that this conduct will not recur. AG ¶¶ 17(c) and 17(d) do not apply.

Whole-Person Concept

I have examined the evidence under the guideline for drug involvement/substance misuse in the context of the nine general factors of the whole-person concept 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 access to classified information must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole-person concept.

I have considered the disqualifying and mitigating conditions in light of the evidence as a whole. I have considered that Applicant is a 46-year-old employee of a defense contractor that he has worked for since 1997. He married in 2010 and has two children.

On the other hand, given Applicant's periodic use of marijuana between 2000 and 2020, his use of the drug knowing that it was illegal at the federal level, his marijuana usage while possessing a security clearance since after March 2006, and the inconsistencies and ambiguities he supplied when explaining his history of marijuana use, Applicant has not overcome the security concerns that remain under the drug involvement and personal conduct guidelines.

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.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT

Subparagraphs 2.a, 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 security interests of the United States to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is denied.

Paul J. Mason
Administrative Judge