



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 20-03192
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Leon J. Schachter, Esq.

02/22/2022

Decision

MASON, Paul J., Administrative Judge:

Applicant used marijuana while possessing a security clearance. Based on his self-reporting of the drug use in his security clearance application, and his persuasive evidence in mitigation, he has overcome the security concerns raised by the drug involvement guideline. Eligibility for classified information is granted.

Statement of Case

On December 2, 2019, Applicant certified and signed an 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 January 4, 2020, DOD issued a Statement of Reasons (SOR) to Applicant detailing security concerns under drug involvement and substance misuse (Guideline H). 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.

On February 9, 2021, Applicant provided an answer to the SOR. I was assigned the case on July 30, 2021. On September 30, 2021, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing for October 21, 2021. Government exhibit (GE) 1 (Applicant's December 2019 e-QIP) was admitted in evidence without objection. Applicant objected to GE 2 (Applicant's February 2020 personal subject interview (PSI, GE 2) because there was no witness to authenticate the exhibit. See, E3.1.20 of DoD Directive 5220.6. The motion was granted. Applicant's exhibits (AE) A-H were admitted into evidence without objection. AE H, an updated exhibit list adding drug test results to the current number, is located at the front of Applicant's exhibits ahead of his original exhibit list. On September 28, 2021, DOHA received a copy of the transcript (Tr.). The record closed the same day.

Findings of Fact

The January 2020 SOR alleges under 1.a that Applicant used or purchased THC (marijuana) from March to September 2019. In his February 9, 2021 signed answer, Applicant admitted the allegation. He indicated that he "experimented with THC approximately 7-10 times total over a limited period of roughly six (6) months." He never purchased the drug and his use was recreational. He has had no further contact with the drug using individuals. He emphasized his intent to forego use of any illegal drugs in the future. He signed a statement of intent to abstain and agrees to a revocation of his security clearance for a violation. (AE 8)

Applicant is 31 years old and single. He has been engaged for the last five years. He received an associate's degree in business administration in May 2011, followed by a bachelor's degree in business management in May 2013. (GE 1 at 12) Since September 2018, he has been employed as a cybersecurity analyst for a defense contractor. For the previous two years, he was a systems engineer. From 2013 to August 2016, he was a records management assistant. (GE 1 at 13-17; Tr. 19-20; AE A) While studying for his associate's degree in 2011 and bachelor's degree in 2013, Applicant worked as a foreman in his brother's landscaping business and has continued in that position throughout his professional career. He has held a security clearance since July 2013. (GE 1 at 13, 38; Tr. 17, 21; AE A)

On December 12, 2019, Applicant signed and certified an e-QIP. In response to Section 23 (illegal use of drugs or controlled substances) of the application, he answered "yes" to illegal drug use in the last seven years. He identified marijuana and explained that he only experimented with the drug and "do not use on a regular basis." (GE 1 at 36-37) His first use of the drug was in March 2019. His most recent use was in

September 2019. He answered “yes” to using marijuana while possessing a security clearance. He answered “no” indicating his intention not to use this drug or controlled substance in the future, explaining that he was only experimenting and did not enjoy the feeling. He also answered “no” to using any other illegal drug or purchasing any drug. (GE 1 at 36-37)

At some point between his February 2021 answer to the SOR and the hearing in September 2021, Applicant modified his answer to the SOR regarding his use of marijuana in March and September 2019. Early in his testimony, he declared that he was not a drug user and did not know why he should be at the September 2021 security clearance hearing. He based the amount he used, which he posted in his e-QIP, on the number of times he ingested a puff of marijuana from a vape pen, a device that produces vapor from different types of substances, including marijuana. He perceived a difference between smoking the marijuana from a joint or a pipe, as opposed to ingesting the substance from a pen. (Tr. 23) Applicant noted that he did not inhale marijuana seven to ten times (over the period identified in the SOR). Rather, it was seven to ten puffs from a vape pen on two separate occasions, once at a motorcycle race in March 2019 and once at a motorcycle race in September 2019. On both occasions, a stranger asked Applicant whether he wanted to inhale a puff from the pen, and he acquiesced rather than considering the adverse impact on his security clearance. Furthermore, ingesting the drug had no effect on him. (Tr. 22-24, 28, 30)

During the two times Applicant ingested the substance from the pen, he really could not identify the substance (vapor), taking a position at odds with his February 2021 answer to the SOR. It could have been nicotine or another chemical found in marijuana. Applicant listed marijuana in his December 2019 e-QIP because he wanted to be honest and cover himself if he was given a polygraph examination or if the subject was discussed in other subsequent security investigation venues. When he inhaled the substance in the two circumstances, he was not thinking about his job. In both situations, he had a security clearance. (Tr. 24-26)

Regardless of the legality of marijuana use from one state to another, Applicant knows he should not have used the drug. He is sure that he received security briefings or training in the last eight years about marijuana use being against federal law. However, he suggested there should be more frequent training to remind individuals with security clearances not to engage in any illegal drug use under any circumstances, exposing their clearance to immediate jeopardy. (Tr. 26-2, 40)

Applicant’s resolve not to use marijuana in the future is reinforced by his signed statement of intent to abstain from all drug use in the future, recognizing any future drug involvement is grounds for revocation of national security clearance eligibility. (AE D) Applicant has undergone hair follicle drug testing in January, April, and September 2021, with consistently negative test results. (Tr. 28-29; AE E, G1, G2) An article published by a well-known drug laboratory explains the benefits of drug testing through

an examination of hair follicles. (AE F) This laboratory administered the tests described in AE E, G1, and G2, using this technique.

The loss of close friends due to drug use during Applicant's formative years has galvanized his determination to steer clear of illegal drugs always. He does not associate with drug users. (Tr. 46-47) He has not been to motorcycle races since September 2019, and he keeps his motorcycle in the garage. In addition to his work as a cybersecurity analyst, Applicant has worked in his brother's landscaping business since 2008. Finally, Applicant's ongoing compliance with security regulations is critical to his continuing obligations of support to his fiancé and her daughter. (Tr. 28-29, 41-42)

At the present time, Applicant is closely involved in the sporting events of his fiancé's daughter, his nieces, and his nephews. These events occur on the weekends, which means that Applicant is attending a softball game or a football game almost every weekend. (Tr. 45-46)

Character Evidence

A character reference recommends Applicant for a security clearance based on his 11-year relationship with Applicant, particularly in 2018 or 2019 when they were coworkers. (C-1)

A second character reference has known Applicant for 13 years because their families lived close to one another at an earlier period in their lives. The reference has never seen Applicant under the influence of drugs. He vouches for Applicant's security clearance eligibility. (C-2)

The third character reference (C-3) is a former Judge Advocate General (JAG) officer from the United States Air Force (USAF), with extensive experience prosecuting drug cases. Reference C-3 has a security clearance. He met Applicant three years ago when Applicant began dating his niece, who is Applicant's fiancé. He testified that he was shocked to learn that Applicant used marijuana while holding a security clearance. However, based on his interaction with Applicant and his niece over the last three years, C-3 does not believe that Applicant will not resume illegal drug use in the future. (Tr. 53-55)

The fourth character reference indicated that Applicant's aberrant display of poor judgment is not representative of his stable character. She joins C-3 in recommending Applicant for a security clearance. (C-4) Applicant's performance reviews for 2019 "exceeded expectations." (B-1, 2)

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.

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

- (a) any substance misuse (see above definition); and

- (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 use while granted access to classified information or holding a sensitive position.

Applicant used marijuana once during a motorcycle race in March and once during a race in September 2019. His use of the illegal drug equates to possession of the drug. The display of poor judgment is aggravated by the fact that he used the drug

after receiving his security clearance in 2013. The three disqualifying conditions above have been established. Applicant's burden is to submit sufficient evidence in mitigation or extenuation.

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.

Applicant's overall marijuana use was limited to once in March and once in September 2019, with his last use occurring more than two years ago. His use was not continuous throughout the six-month period as alleged in the SOR. He never purchased the drug. He voluntarily reported his September marijuana use on his December 2019 e-QIP, and he submitted evidence that he no longer associates with drug users. I am convinced that Applicant fully comprehends that marijuana use continues to be against federal law. The depth of his commitment to abstain in the future is reinforced by his signed statement of intent. All prongs of AG ¶¶ 26(a) and 26(b)

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. The safeguarding of classified information, together with complying with security regulations and the federal law, is an around-the-clock responsibility that does not end when an applicant leaves a secured facility at the end of a work day, or when an applicant is on vacation.

Applicant's illegal use of marijuana stopped in September 2019. Regardless of whether he used marijuana or some other illegal drug on both occasions, he does not associate with persons who do drugs. He no longer attends motorcycle races. He is focused on supporting his future family. He spectates in weekly softball games of his wife's daughter. He regularly watches the sporting events of his nieces and nephews. Given the favorable character references who endorse his security clearance application, and the positive changes in his lifestyle, Applicant's evidence in mitigation overcomes the security concerns arising from the drug involvement guideline.

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:

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|---------------------------|---------------|
| Paragraph 1, Guideline H: | FOR APPLICANT |
| Subparagraph 1.a: | For Applicant |

Conclusion

In light of all of the circumstances presented by the record in this case, it is 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 granted.

Paul J. Mason
Administrative Judge