



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 21-02113
)
Applicant for Security Clearance)
)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

08/26/2022

Decision

MASON, Paul J., Administrative Judge:

Eligibility for a security clearance is denied.

Statement of Case

On November 30, 2019, Applicant certified and signed an Electronic Questionnaires for Investigations Processing (e-QIP, Item 3) to obtain a security clearance required for employment with a defense contractor. On January 10 and January 14, 2021, Applicant provided personal summary interviews (PSIs) to an investigator from the Office Personnel Management (OPM). After examining the background investigation, the Defense Counterintelligence Security Agency (DCSA) could not make the affirmative findings necessary to issue a security clearance. On August 19, 2022, DOD issued a Statement of Reasons (SOR) to Applicant detailing security concerns under drug involvement and substance misuse (Guideline H). The action was taken pursuant to 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 August 23, 2022, Applicant furnished an answer to the SOR. He decided to have his case decided administratively on the written record in lieu of a hearing. On September 9, 2022, the Government sent a copy of its File of Relevant Material (FORM), the Government's evidence in support of the allegations in the SOR, to Applicant. He received the Form on September 21, 2022. He was advised that he could make objections, submit evidence in rebuttal, extenuation or mitigation, to clarify the contents of the PSI. He was provided 30 days after receipt of the FORM to submit a response. DOHA received no response by the deadline date of October 21, 2022. I was assigned the case on December 1, 2022.

Findings of Fact

Applicant admitted the three allegations listed in the SOR, with explanations. He admitted using marijuana at varying frequency from 2001 to about October 2021. (SOR 1.a) He expressed his intention to use the drug in the future if he was not granted access to classified information. (SOR 1.b) Lastly, he acknowledged the drug-related arrests and the citation in 2007 (SOR 1.c), 2011 (SOR 1.d), and 2014 (SOR 1.e), respectively.

Applicant is 35 years old. He is single with no children. (Item 3 at 17-18) He has owned his own residence since August 2016. (Item 3 at 9) He received a high school diploma in June 2005. (Item 3 at 11) He has worked as a shipping manager for the same employer since October 2015. He was a shipping manager for a previous employer for ten years until the employer transferred his business to another location in the United States. Applicant has never been investigated for a security clearance or had a clearance. (Item 3 at 11-14, 31)

In his November 2020 security clearance application, Applicant described his marijuana use as random to occasional to recreational from June 2001 to November 2020. He answered "yes" that he would use marijuana in the future because he believed that marijuana use would be legalized soon. However, he believed he could stop using the drug if necessary. He received drug and alcohol counseling in 2009 and 2011. He successfully completed both programs that included classroom instruction. (Item 3 at 29-31)

In his January 2021 PSI, Applicant explained that the only drug he uses is marijuana. He smokes at his home or his parents' home where he usually smokes with his father. He continues to smoke with his father to be social. Applicant's last use with his father was December 30, 2020. He has never been diagnosed a drug abuser or

drug dependent. The drug has never affected his behavior. Applicant agrees to stop smoking marijuana if he receives a security clearance. Otherwise, he will possibly continue to use the drug. (Item 4 at 9)

Applicant has not made any changes in his lifestyle to increase the chances of not using or being involved in drug use in the future. He has not tried to reduce or stop marijuana use. In a drug use chart included in Applicant's October 2021 answers to interrogatories, Applicant noted his first use of marijuana was in 2001 and his last use was on October 3, 2021. (SOR 1.a) SOR 1.b is established by Applicant's stated intention not to use marijuana or any other federally illegal drugs in the future, ("unless not granted a clearance, probably will try again at some point."). (Item 4 at 9-10, 12-13)

SOR 1.c – In January 2007, Applicant was arrested for driving while under the influence of marijuana. He was driving home after having used marijuana with a former friend, and was stopped for by police for failing to yield at a stop sign. In September 2007, Applicant pled guilty and was fined \$3,500. He was sentenced to three days in jail. He noted that if he was not granted a security clearance, he would possibly continue to use marijuana. Applicant claimed that, except for his father who also uses marijuana, he does not socialize or work with anyone involved in criminal activity. (Item 4 at 6-7)

SOR 1.d – In February 2011, Applicant and his girlfriend at the time were parked in a bar parking lot when police drove in behind them. Upon sensing the police presence, Applicant's girlfriend became rattled and announced there was marijuana in their car and she did not want to go to jail. The police charged Applicant with driving while under the influence of marijuana and issued him a ticket to appear in court. He was not arrested. He pled guilty to driving while under the influence of marijuana. He was sentenced to 12 months of probation and ordered to pay a fine, but he could not recall the amount. He also attended one drug counseling session which he completed. The only change Applicant made in his life after the February 2011 incident was terminating the relationship with his girlfriend who was with him in the bar parking lot. (Item 7-8)

SOR 1.e – In 2014, while Applicant was living with his parents, the police searched his room and found marijuana. He was cited for possession of marijuana. In court he pled guilty to the charge. He paid a fine, but could not recall the amount. There is no indication in the record that he was sentenced or placed on probation. (Item 4 at 8-9)

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 and 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 are not suitable for federal employment.

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

(g) expressed intent to continue drug involvement and substance abuse, or failure to clearly and convincingly commit to discontinue such use.

Applicant began using marijuana in 2001. In his November 2020 e-QIP, he described his marijuana use as random to social, probably a few times monthly between 2001 and November 2020. In his January 2021 PSI, his last use of marijuana was in December 2020. In the drug chart included with his October 2021 answers to interrogatories, Applicant disclosed that his last use of marijuana was in October 2021. His use falls within the scope of AG ¶ 25(a). Even though he may not have purchased the drug, AG ¶ 25(c) applies because he still had to possess or have control over the drug to use it.

Throughout the security investigation, Applicant indicated that it was likely that he would use marijuana in the future. In his November 2020 e-QIP, he stated he would use marijuana in the future as he believed that marijuana use would soon be legalized. In his January 2021 PSI, Applicant stated he would possibly use marijuana in the future if his security clearance was not granted. In his October 2021 answers to interrogatories, he indicated he would not use marijuana in the future unless his security clearance was not granted, in which case he would probably use the drug at some point. Applicant's unconditional affirmative response to SOR 1.b to continue using the drug if not granted a security clearance, brings his behavior within the scope of AG ¶ 25(g).

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 marijuana abuse began in 2001 and is still ongoing. There is a strong likelihood he will continue to use marijuana in the future. Given his long history of marijuana use, his conduct raises significant residual concerns about his trustworthiness and good judgment. AG ¶ 26(a) does not apply.

Though Applicant admits his marijuana involvement, he has furnished no evidence of action taken to overcome his illegal drug use, with an objective directed at abstinence from the drug. With no evidence from Applicant showing that he has severed his contacts with his drug-using associates, primarily his father, AG ¶ 26(b)(1) does not apply. Terminating interaction with drug-using associates usually means avoiding the environment where drugs are used. Applicant has made no effort to reduce or stop his marijuana use at his house or his parents' house. AG ¶ 26(b)(2) does not apply. Lastly, the record contains no signed statement of intent by Applicant that any future drug involvement will constitute grounds for revocation of national security eligibility. AG ¶ 26(b)(3) is inapplicable.

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.

Applicant has illegally used marijuana for the past 20 years. Even though he has been placed on notice in 2020 and 2021 that illegal drug use is inconsistent with holding a security clearance, his statements show that he intends to continue illegal drug use in the future. Based on Applicant's lengthy history of illegal marijuana use with no attempt to reduce or stop use, the three drug-related incidents, the lack of evidence indicating separation from drug users and corresponding environments, Applicant has not mitigated the security concerns arising from the guideline for drug involvement and substance misuse.

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.e:	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 interest 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