



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 21-02297
)
Applicant for Security Clearance)

Appearances

For Government: John C. Lynch, Esq., Department Counsel
For Applicant: *Pro se*

11/22/2023

Decision

MASON, Paul J., Administrative Judge:

Applicant has not mitigated the security concerns arising from the guidelines for drug involvement and personal conduct. Eligibility for a security clearance is denied.

Statement of Case

On September 10, 2019, Applicant certified and signed Electronic Questionnaire for Investigations Processing (e-QIP) to obtain or retain a security clearance required for employment with a defense contractor. On March 10, 2021, he provided a personal summary interview (PSI) to an investigator from the Office Personnel Management (OPM). After examining the background investigation, the Department of Defense Consolidated Adjudications Facility (the DoD CAF, predecessor to the Defense Counterintelligence Security Agency (DCSA), Consolidated Adjudications Services (CAS)) could not make the affirmative findings necessary to issue a security clearance. On April 11, 2022, the DCSA CAS issued a Statement of Reasons (SOR) to Applicant detailing security concerns under the guidelines for drug involvement and substance misuse (Guideline H), and personal conduct (Guideline E). The action was taken pursuant to 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 April 26, 2022, Applicant furnished an answer to the SOR. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 22, 2023, for a hearing on June 23, 2023. The hearing was held by Teams video teleconference as scheduled. I entered the Government's eight exhibits (GE) 1-8 exhibits into evidence without objection. Applicant submitted a one-page post-hearing exhibit dated June 27, 2023. Department Counsel had no objection to the exhibit, and it was received in evidence as Applicant's Exhibit (AE A). Applicant refers to the prescription as a "receipt," and interprets the date in the center of the exhibit as 12/22, which does not account for the first two digits to the left of 12/22 posted in the exhibit. I believe the complete date for all six numbers is December 22, 2020. DOHA received the transcript (Tr.) on July 3, 2023. The record closed the same day. The page numbers of GE 2 are located in the lower right-hand corner of each of the 14-page exhibit.

Rulings on Procedure

At the conclusion of the hearing, Department Counsel moved to strike SOR ¶ 2.e because Applicant did not have a security clearance on September 10, 2019, when he certified the e-QIP. (GE 8 at 1; Tr. 64-65) The allegation is withdrawn from the SOR.

Department Counsel moved to amend SOR ¶ 1.b by changing the date and year in the allegation from 2016 to September 26, 2019. Applicant had no objection to the amendment. (GE 8 at 1; Tr. 65-66) This amendment is authorized under E3.1.17. of DoD Directive 5220.6, so that the SOR conforms with the evidence of record.

Findings of Fact

The SOR alleges under paragraph 1.a that Applicant used marijuana at different frequencies from 2002 to the present; that he used marijuana with a security clearance since September 2019; that he tested positive for marijuana metabolites in 2005 and 2008; and, that he was arrested in 2010 having marijuana in his possession, and in 2012 by violating the terms of his 2010 probation because he had marijuana in his possession.

The second paragraph of the SOR alleges personal conduct by incorporating the information alleged under SOR ¶ 1. The SOR alleges that Applicant committed sexual acts on a minor in 2005, and made a false statement, in violation of four Articles of the Uniform Code of Military Justice (UCMJ). He also falsified information in three locations on his September 2019 e-QIP. The Applicant admitted all allegations listed in the SOR, without explanations.

Applicant is 39 years old and has been divorced since February 2015. He has a son from his former wife. His current girlfriend gave birth to a two-year-old daughter in 2021. He received a security clearance in 2019 when he began working for his then employer. From June 2002 to November 2002, he served in the United States (U.S.) Army on active duty. From November 2002 to September 2004, he served in the Army Reserve, and received an honorable discharge. He returned to active duty in the U.S. Army from September 2004 to December 2009, when he received a general discharge under honorable conditions for drug-related conduct and positive drug tests. He has been living in Country B since 2014. Applicant seeks security clearance eligibility. In August 2018, he began working as a senior logistic specialist, and was recently promoted to a senior analyst of stock control. (GE 1 at 9-28; GE 2 at 7; Tr. 7-8, 35, 38-39, 40)

SOR ¶ 1.a – Applicant testified that he has been using marijuana from 2002 to the present. Since 2012 or 2013, he has been using marijuana to relax his urethra when he urinates. In 2022, he began obtaining the marijuana by prescription because Country B legalized marijuana use. Before the drug was legalized, he obtained the drug illegally from family and friends. In his March 2021 PSI, he indicated he was paying between \$250 and \$300 a month or every other month for the drug. He noted that the purchase and use of marijuana was legal in Country B. Applicant's last drug treatment or counseling was in 2022, when a doctor, featuring alternative treatment methods, provided him with a prescription for marijuana. (GE 2 at 7; Tr. 20, 23, 43, 45, 47)

Applicant's girlfriend uses marijuana occasionally. His longest period of abstinence was in 2007 for four and one-half months while in the U.S. Army. He has never violated the laws of Country B. (Tr. 56-58)

SOR ¶ 1.b – Applicant used marijuana after he was granted an interim security clearance on September 26, 2019, which was removed when he received the SOR in April 2022. From 2015 through 2018, Applicant believed he had a public trust position. (GE 8 at 1; 34-37)

In his March 2021 PSI, Applicant stated that he intended to stop using marijuana before his daughter was born in June 2021. He did not want his marijuana use to impair his chances of promotion. (GE 2 at 8) He changed his mind because of his ongoing urethra problem causing difficulty urinating. He uses marijuana weekly or whenever he needs the drug. He does not drive a car within three hours of marijuana use. He testified that he has not driven to work for two or three years since he has been in treatment for post traumatic stress disorder (PTSD) from nerve damage in his scrotum since surgery in 2006. (Tr. 43-47)

SOR ¶¶ 1.c – Applicant tested positive for marijuana metabolites on a U.S. Army urinalysis, conducted on March 16, 2005. Following a field grade Article 15, he was found guilty by his command of wrongful possession and use of a controlled

substance in violation of the UCMJ, reduced in rank, assigned to 45 extra days of duty, and 45 days restriction.

Applicant believed that the 2005 positive drug test, and subsequent Article 15, were caused by fellow service member rolling hash-laced cigars that Applicant smoked daily for three or four months. He was not used to the hash smell, but he determined that the smoke produced was not ordinary cigar smoke. He recalled relaxing after he smoked the hash. (GE 2 at 6-7; Tr.22)

On April 6, 2005, Applicant tested positive for marijuana metabolites. (GE 4 at 2; Tr. 48) This urinalysis is not alleged in the SOR, and cannot be used for disqualification purposes, but will be evaluated in the whole-person review of this case. (Tr. 22)

SOR ¶ 1.d – On August 27, 2008, Applicant tested positive for marijuana metabolites. After field grade Article 15, he was found guilty. The conditions of his Article 15 punishment were the same as those identified in SOR ¶ 1.c. He believed the positive drug test was caused by the hemp tea he was using to relax his urethra, but he provided no evidence to support his claim. He received a general discharge from the U.S. Army in December 2009 for his drug use. He subsequently received an upgraded honorable discharge. (GE 2 at 7; Tr. 52-54)

SOR 1.e – Applicant was arrested with possession of marijuana in September 2010. The police came to his residence and smelled marijuana. He was found guilty, fined, and placed on a period of at least two years of probation. (GE 2 at 7; Tr. 54)

SOR ¶ 1.f – In March 2012, Applicant was driving with his brother to another location to celebrate the return of a friend from overseas when he was stopped by the police for a traffic infraction. The police found marijuana in the car. Applicant's claim that he was not driving is refuted by documentation that indicates he was driving on a suspended or revoked license. (GE 3 at 8) He was charged with violating his probation imposed in the SOR ¶ 1.e sentence. For the probation violation, he was sentenced to two weeks in jail, a fine of \$1,776, and an unidentified number of hours of community service. (GE 2 at 7)

SOR ¶ 2.b – in December 2005, Applicant was driving three other service members to a pool party. The same four individuals left the party with a 16-year-victim that Applicant assumed was 18 or older. One of the occupants in the car agreed to take the victim home if she performed fellatio on all four occupants. (Tr. 27) After the sexual activity, they dropped her off at a gas station that had cameras in various locations. The U.S. Army Criminal Investigative Division (CID) reviewed the videos, and a month or two later, summoned Applicant to the CID station. Applicant was interrogated about the incident, and he initially lied to protect the other three service members from military punishment under Article 15. During a second interrogation, Applicant divulged the complete account of sexual activity.

Applicant was charged with Forced Sodomy, Indecent Acts Upon a Child, a False Statement, and Conspiracy, in violation of Articles 125, 134, 107, and 81 of the UCMJ. Following a summary court-martial, he was found guilty of the offenses, ordered to forfeit \$1,128, and assigned to 45 days extra duty.

SOR ¶¶ 2.c and 2.d refer to Applicant's falsifications of material facts on his September 2019 e-QIP. First, in response to Section 22 (SOR ¶ 2.c), he answered that he had never been involved in an offense involving alcohol or drugs, deliberately failing to disclose the information set forth in SOR ¶1.e. Second, in response to Section 23 (¶ 2.d), Applicant answered that he had not illegally used drugs in the past seven years, deliberately failing to disclose the information set forth in SOR ¶ 1.a. He told the OPM investigator in March 2021, that he had no explanation for not disclosing the information. (GE 2 at 7)

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 positions 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.

I have also taken administrative notice of the Director of National Intelligence Memorandum Adherence of Federal Laws Prohibiting Marijuana Use, (October 25, 2014), *Adherence to Federal Laws Prohibiting Marijuana Use*, which clearly states that state laws do not authorize persons to violate federal law, including the Controlled Substances Act (21 U.S.C. §§ 801-971 (1970)), which identifies marijuana as a Schedule 1 controlled drug.

Changes in state laws or the District of Columbia, pertaining to marijuana use do not change the existing National Security Adjudicative Guidelines (Security Executive Agent Directive 4, effective June 8, 2017). An individual's disregard of the federal law pertaining to marijuana involvement remains adjudicatively relevant in national security determinations.

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 illegal use, possession, production, and distribution of marijuana. Disregard of federal law relevant to marijuana (including prior recreational marijuana use) remains relevant, but not determinative to adjudications of security clearance eligibility. Agencies are required to employ the "whole-person concept" stated under SEAD 4, to determine if an applicant's behavior raises a security concern that has not been mitigated.

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

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug;

(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's illegal use of marijuana from 2002 to April 2022, when the SOR was issued, meets the definition of AG ¶ 25(a). He continued to use the drug to two days before the hearing in June 2023. In order to use the drug, Applicant had to possess it as defined by AG ¶ 25(c). He tested positive while in the U.S. Army for marijuana metabolites in 2005. Following positive test results for marijuana in 2008, he received a general discharge from the U.S. Army in December 2009. SOR ¶ 25(b) applies. AG ¶ 25(f) does not apply to the public trust position Applicant had on September 10, 2019 when he signed and certified the e-QIP. However, his illegal use of marijuana after receiving his interim security clearance on September 26, 2019, brings his behavior within the scope 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.

Applicant has a history of illegally using marijuana that began in 2002 until shortly before the June 2023 hearing. He used marijuana while in the U.S. Army as confirmed by his positive test results in 2005 and 2008. His arrest in 2010 for possession of marijuana resulted in a finding of guilty and probation. He violated his probation in 2012 for having marijuana in his car, and driving on a suspended license.

He used marijuana after he was granted a security clearance. AG ¶ 26(a) does not apply.

There is insufficient evidence demonstrating that Applicant has severed his ties with drug associates and the drug environment. AG ¶ 26(b)(1) and 26(b)(2) do not apply. Applicant has not submitted a signed statement of intent to forgo future use of all drug involvement, acknowledging that any future use is grounds for revocation of national security eligibility. AG ¶23(b)(3) does not apply.

Though Applicant admits his involvement with marijuana, he has furnished no independent evidence of action taken to overcome his illegal drug use, with the objective of abstaining from all future drug use.

Personal Conduct

The security concern for personal conduct is set forth in AG ¶ 15:

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 information. Of special interest is any failure to provide truthful and candid answers during the national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation or further processing for national security eligibility.

The potential disqualifying conditions under AG ¶ 16 are:

(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;

(c) credible adverse information in several adjudicative areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that he may not properly safeguard classified or sensitive information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse

determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information ...
- (2) any disruptive, violent, or other inappropriate behavior;
- (3) a pattern of dishonesty or rule violations; and
- (4) evidence of significant misuse of Government or other employer's time or resources.

Applicant's drug involvement has independent significance under AG ¶¶ 16(c) and 16(d)(3) because it demonstrates questionable judgment and an unwillingness to comply with rules and regulations.

The adverse information identified under SOR ¶ 1, containing Applicant's long history of illegal marijuana use, combined with three positive drug test results over a three-year period, two drug-related arrests in 2010 and 2012, and using marijuana after being granted a security clearance in September 2019, represents disqualifying misconduct within AG ¶ 16(c) and 16(d)(3).

Applicant's behavior during his participation in the sexual acts in December 2005 is aggravated by the fact that the victim was a minor. While Applicant claims he initially falsified the facts concerning misconduct to protect the three other participants, it is incipiently apparent that he was trying to avoid potential punishment himself. AG ¶ 16(c) and 16 (d) apply to SOR ¶ 2(b).

Applicant's admitted falsification of material facts from his September 2019 e-QIP was deliberate. AG ¶ 16(a) applies to SOR ¶¶ 2.c and 2.d.

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.

AG ¶ 17(a) does not apply. The condition requires a prompt, good-faith effort to correct the omission before being confronted. Applicant revealed his drug involvement in March 2021 after he was confronted with the earlier omissions in his September 2019 e-QIP. Considering the evidence in its totality, Applicant's disclosure of his overall drug use was neither prompt nor made in good faith.

Applicant's falsification in September 2019 of his arrest in 2010 for an offense involving alcohol or drugs was not minor. Applicant's lack of candor about his criminal history is always important to a security investigation as is Applicant's illegal use of drugs in the last 7 years. Considering the evidence as a whole, 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.

Applicant is 39 years old. He has an eight-year-old son and a two-year-old daughter. He has been working for his employer since 2020. He began as a data analyst and was recently promoted to senior analyst of stock control.

The favorable evidence supporting security eligibility is insufficient to overcome the countervailing evidence. Applicant has illegally used marijuana since 2002. Holding a security clearance is a 24-hour-responsibility which requires complying with all federal laws at work and after work, even when the clearance is inactive, and regardless of the amount of classified information the holder may handle at a given time. Even though some states and Country B have decriminalized marijuana use, it is still illegal at the federal level for federal contract employees, even though they may be working in a country outside of the United States and their marijuana use may be legal and prescribed in that country. Applicant's decision to keep using marijuana was stronger than his desire to stop using the drug when his daughter was born in June 2021. Medical marijuana assigns no special status under the adjudicative guidelines. See, ISCR Case No. 20-02794 at 5 (App. Bd. Feb.1, 2022) After weighing the entire record under the whole person, including his deliberate falsifications of his September 2019 e-QIP, Applicant's evidence in mitigation does not overcome the security concerns raised by 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-f:	Against Applicant
Paragraph 2, Personal Conduct:	AGAINST APPLICANT
Subparagraphs 2.a-d:	Against Applicant
Subparagraph 2.e:	Withdrawn

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