



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 23-00744
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

01/30/2024

Decision

MASON, Paul J., Administrative Judge:

Applicant has not mitigated the security concerns raised by the guidelines for substance abuse and drug involvement. Eligibility for a security clearance is denied.

Statement of Case

On May 4, 2022, Applicant certified and signed an Electronic Questionnaires for Investigations Processing (e-QIP, Item 4) to obtain or retain a security clearance required for employment with a defense contractor. On May 23, 2022, he provided a personal summary interview (PSI) to an investigator from the Office Personnel Management (OPM). After examining the background investigation, the Defense Counterintelligence Security Agency (DCSA) Consolidated Adjudications Services (CAS) could not make the affirmative findings necessary to issue a security clearance. On May 12, 2023, the DCSA CAS issued a Statement of Reasons (SOR) to Applicant detailing security concerns under the guideline for drug involvement and substance misuse (Guideline H). The action was taken by the 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 Department of Defense (DOD) on June 8, 2017.

On May 22, 2023, Applicant furnished an answer to the SOR. He decided to have his case evaluated administratively on the written record in lieu of a hearing. On August 4, 2023, 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 August 9, 2023. He was provided 30 days after receipt of the FORM to submit a response. In his August 22, 2023 FORM-response to the Defense Office of Hearings and Appeals (DOHA), he provided a statement in which he wanted to "retract" his earlier statement indicating the circumstances for him to stop using marijuana. On the same day of the submission, Department Counsel indicated that she had no objection to Applicant's statement. The statement is entered into evidence. I was assigned the case on January 12, 2024.

Findings of Fact

The SOR lists two allegations under the drug involvement and substance misuse guideline (Guideline H). Applicant admitted both allegations listed in the SOR, without explanations. His August 22, 2023 response to the FORM is now a part of the record. Based on Applicant's response to the FORM indicating that he stopped marijuana use in early June 2023, I *sua sponte* amended the SOR by replacing "April 2023" with "early June 2023," to conform the SOR with the evidence presented. This amendment was made pursuant to E3.1.17. of DOD Directive 5220.6

Applicant is 27 years old and single. He has rented his apartment since November 2021. From December 2017 to November 2021, he rented a dwelling from his grandmother. In December 2019, he received an associate's degree. (Item 4 at 7-8)

On November 7, 2013, Applicant received a security clearance. (Item 7) Applicant had a security clearance when he entered the United States (U.S.) Army in July 2014. After completing his basic training in October 2014, he was stationed overseas from January to September 2015. From February to October 2016, he was deployed to another location overseas. (Item 5 at 3-4) He ended his military service in December 2017, with an honorable discharge. (Item 4 at 15) He was unemployed for three years before beginning employment as a technical analyst in March 2021. He began working for his current employer in November 2021, as a cybersecurity analyst. (Item 4 at 10-14)

On May 4, 2022, Applicant signed and certified his security clearance application. In response to the illegal drug use and drug activity questions, he indicated that he had not purchased or used illegal drugs in the last seven years. He indicated

that he had never been involved with a drug or controlled substance while possessing a security clearance other than previously listed. (Item 4 at 28-29)

According to his May 2022 PSI, Applicant began smoking marijuana two or three times a week in March 2022 to help him sleep. He purchased the drug online and received directions to an address to obtain the marijuana. He smoked the drug by himself through a glass bowl. He applied for and received a medical marijuana card from an online doctor in February 2022. (Item 4 at 4)

Applicant provided additional information in his May 2022 PSI about his decision to use marijuana. He did not view his marijuana use as showing poor judgement or failing to follow the rules. He did not inform his facility security office (FSO) about his drug use. He continues to use marijuana as a sleep aid. He “would stop marijuana if instructed by employer to do so.” (Item 4 at 5) Applicant has never been treated for drug use and he believed that his employer did not administer drug tests. He is not sure why he did not disclose the marijuana [in his May 4, 2023 security clearance application]. (Item 4 at 5)

Before signing his answers to interrogatories on April 23, 2023, Applicant agreed that the May 23, 2022 PSI was accurate, and that he had no additional comments regarding the matters discussed. Above his signature on page 7 is his confirmation that the May 23, 2022 PSI was accurate, and that making a false statement was punishable under § 1001 of Title 18, United States Code Annotated. (Item 5 at 6-7)

On April 27, 2023, Applicant completed a chart providing information about his illegal drug use. The chart has four columns. Starting at the left side, in response to the first column labeled “Federally Illegal Drug Used,” Applicant inserted the illegal drug Marijuana. In response to the next column labeled “Date of First Use,” Applicant supplied the date March 2022. In response to the third column labeled “Date of Last Use,” Applicant furnished the date April 23, 2023. In response to the fourth column labeled “Frequency of Use,” Applicant stated that he used the drug 2-3 times a week. The next question underneath the chart is the question “Do you intend to use federally illegal drugs in the future? Applicant provided an “X” on the line to the left of the word “YES” Above his signature on page 7 is his confirmation that the May 23, 2022 PSI was accurate, and that making a false statement was punishable under § 1001 of Title 18, United States Code Annotated. (Item 5 at 8) After comparing and contrasting the May 4, 2022 security clearance application with the May 23, 2022 PSI, Applicant was using marijuana and had a security clearance when he provided false information on the May 4, 2022 security clearance application.

On August 22, 2023, Applicant provided his response to the FORM addressing the statements he made and the information provided in his May 2022 PSI, and his interrogatory answers on April 23 and April 27, 2023. He indicated that he wanted to withdraw the May 2022 PSI statement expressing his intention to use marijuana in the

future as a sleep aid unless instructed by his employer to stop. He claimed that he stopped using marijuana in early June 2023 and has no plan to resume use in the future. Applicant does not believe marijuana use is worth putting his job at risk. In the balance of his statement, Applicant described the positive impact that his security consciousness and job performance has had over the last two years with his current employer. (Response to FORM) Because Applicant requested an administrative determination on the record without a hearing, I had no opportunity to assess his credibility or demeanor.

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), 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 (SEAD 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. 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);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to commit clearly and convincingly to discontinue such misuse.

Applicant began using marijuana in March 2022 after he obtained a medical marijuana card in February 2022. He purchased the drug online and drove to a location in a neighboring jurisdiction to collect the drug. The frequency of his use was two or

three times a week. He used the illegal drug while granted access to classified information or holding a sensitive position in 2013. On three or four times between his May 2022 PSI and his August 2023 responses to the FORM, even though he was apparently aware of the consequences, Applicant confirmed the contents of his May 2023 PSI, specifically his intentions to use marijuana in the future. AG ¶¶ 25(a), 25(c), 25(f), and 25(g) apply.

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 used marijuana regularly between March 2022 and at least early June 2023. He purchased and used the drug while holding a security clearance or holding a sensitive position. He knew that illegal drug use was against federal law. He stated his intention to continue using the drug until his employer told him to stop. He acquired some level of reassurance for continued use because he did not think his employer conducted drug tests. His marijuana use and intention to use the drug in the future raises continuing doubt regarding his judgment and reliability. AG ¶ 26(a) 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 an objective directed at abstinence from illegal marijuana use. Applicant has claimed that he stopped use in early June 2023. While he may only ingest the drug by himself, he is still violating federal law. AG ¶ 26(b)(1) does not apply. With no evidence of the surrounding facts and circumstances, I am unable to conclude one way or the other whether Applicant has successfully changed his lifestyle and environment. 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 is 27 years old. He has been working for his employer as a cybersecurity analyst since November 2021. He considers that he has contributed a meaningful performance to his employer and the national security.

After evaluating the entire record, the foregoing favorable evidence supporting security eligibility is insufficient to overcome the evidence supporting a denial of Applicant's security clearance application. Applicant illegally used marijuana between March 2022 and at least June 2023. Applicant began using marijuana in March 2022, Yet when he certified his security clearance application in early May 2022, he falsely claimed that he had not used illegal drugs in the last 7 years, and that he had never used illegal drugs while holding a security clearance. 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 any given time. A medical marijuana card confers no unique significance under the adjudicative guidelines or supplemental regulatory policies. See ISCR Case No. 20-02974 at 5 (App. Bd. Feb. 1, 2022) Even though some states have decriminalized marijuana use, it is still illegal at the federal level. Insufficient time has passed to confidently conclude that Applicant's drug involvement is behind him. After weighing the entire record under the whole person, Applicant's evidence in mitigation does not overcome 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:

Paragraph 1, Guideline H: AGAINST APPLICANT

Subparagraphs 1.a-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 interest of the United States to grant Applicant eligibility for access to classified information or hold a sensitive position. Eligibility for access to classified information is denied.

Paul J. Mason
Administrative Judge