



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 23-02220
)
Applicant for Security Clearance)

Appearances

For Government: Sakeena Farhath, Esq., Department Counsel
For Applicant: *Pro se*

09/24/2024

Decision

MASON, Paul J., Administrative Judge:

After an evaluation of the record in this case, including the pleadings and items of evidence, Applicant has not mitigated the security concerns raised by the guideline for drug involvement and substance misuse. Eligibility for a security clearance is denied.

Statement of Case

On April 28, 2023, Applicant certified and signed an Electronic Questionnaires for Investigations Processing (e-QIP, Item 3) to obtain or retain a security clearance required for employment with a defense contractor. On June 21, 2023, she provided a personal summary interview (PSI, Item 4) 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 November 29, 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.

In her March 5, 2024, answer to the SOR, Applicant admitted the three allegations of SOR, without explanations. She decided to have her case evaluated administratively on the written record in lieu of a hearing. On April 1, 2024, 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. She received the FORM on May 13, 2024. She was provided 30 days after receipt of the FORM to submit a response. Her response was due by June 12, 2024. No response was received. The Government's four items of evidence (identified on page 1 of the FORM) are admitted into the record. References to evidence within the FORM will cite the item number followed by the page number of the exhibit.

Findings of Fact

The SOR lists three allegations under the drug involvement and substance misuse guideline (Guideline H): that Applicant used marijuana (tetrahydrocannabinol-T) between September 2019 and November 2023 (SOR ¶ 1.a); that she purchased marijuana on various occasions (SOR ¶ 1.b); and that she intends to use marijuana in the future (SOR ¶ 1.c).

Applicant is 53 years old and has been in a domestic partnership since 2014. She has been employed as a contractor since 2010. Her previous job was as a census employee in 2010. She has owned her own home since 2005. She received a bachelor's degree in 1994 and a vocational degree in March 2023. (Item 3 at 7-15)

In Applicant's view, marijuana is the only treatment that relieves the symptoms of her serious medical condition. She has never been treated nor ever sought voluntarily sought treatment for illegal drug use. (Item 3 at 25-28)

In her June 2023 PSI (Item 4), Applicant agreed that she used marijuana from 2019 to June 2023 (Item 4 at 3), then to October 2016 (Item 4 at 14), based on her answers to interrogatories. Though the supporting evidence in the FORM does not establish that she used marijuana to November 2023 as alleged in SOR ¶ 1.a, her admission to the allegation and her future intention to use the drug in the future, validates the three allegations.

Applicant reiterated her use of marijuana to reduce inflammation. (Item 4 at 3) She described her marijuana use as once a week under a medical prescription in a state where marijuana use is legal. She uses the marijuana flower bud of the plant in the privacy of her home. She purchased the drug four to five times a year from a dispensary. She never tested positive for drugs. She knows that the drug is illegal under

Federal law. Applicant is not dependent on the drug and the drug has had no effect on her judgment, personality, or capability to safeguard a confidence. (Item 4 at 3-4)

The DCSA CAS issued interrogatories to Applicant. (Item 4 at 5-14) These interrogatories relate to Applicant's drug use. She agreed with and had no corrections or modifications to make concerning the June 2023 PSI. (Item 4 at 1-4, 6)

On the next page of her interrogatory answers, Applicant provided information in a chart about her illegal drug use. (Item 4 at 8) The chart has five columns. Starting at the left side of the chart, in the first column labeled "Name of drug," Applicant inserted "Cannabis." In response to the next column labeled "Date of First Use," she supplied the following date of "09/19." In response to the third column labeled "Date of Last Use," Applicant furnished the date "PRESENT." In response to the fourth column labeled "Frequency of Use," Applicant stated, "Weekly as needed." The fifth column is labeled, "Intentions of Future Use," Applicant indicated "yes." The next question underneath the chart (#2) is the question "Have you ever failed a drug or urinalysis test," and Applicant answered "No." (Item 4 at 8)

In the next five pages (Item 4 at 9 through 14) of the interrogatories, Applicant responded that she had never been convicted of a drug-related offense. Though she claimed that she never purchased any illegal drug, she admitted in her earlier June 2023 PSI that she was purchasing marijuana four to five times a year at a dispensary. She noted that she had never been in a drug treatment program or a support group. She never sought help to modify her lifestyle. (Item 4 at 9-11)

Applicant did not believe that her employer had a drug policy. Yet, she reported her drug use to her employer. She never used drugs while holding a security clearance. Even though she is aware that the purchase and use of marijuana is inconsistent with being granted access to classified information, she intends to use marijuana or THC in the future. She has a prescription for marijuana and a medical marijuana card issued by her state of residency. She does not associate with drug users and does not visit locations where drugs are being used. On October 16, 2023, Applicant signed sworn and affirmed that her answers to the interrogatories were true and made in good faith. (Item 4 at 7, 14)

Because Applicant requested an administrative determination on the record without a hearing, I had no opportunity to assess her 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 alter 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; 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 September 2019 and continues to the present. She used the drug regularly once a week under medical supervision to decrease her inflammation related to a serious medical condition. Because she intends to use the drug in the future, it is logical to conclude that she will continue to purchase the drug at least four to five times a year. AG ¶¶ 25(a), 25(c), 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's use of marijuana for almost five years and her conscious decision to continue using the drug in the future demonstrates poor judgment and unreliability that removes AG ¶ 26(a) from consideration.

There are three components to AG ¶ 26 (b). To Applicant's credit, she does not associate with drug users and does not frequent environments where drugs are used. However, she cannot satisfy the third component of the mitigating condition as she intends to use marijuana in future, even though she knows that marijuana use violates Federal law.

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.

Using marijuana under authorized medical supervision with 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) Hence, a medical marijuana card does not excuse a security clearance holder from the DOD around-the-clock prohibition against use of illegal drugs while working on Federal government projects. This means that Applicant cannot use illegal drugs at work, away from work at home, or on vacation. Considering the entire record under the whole person concept, 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-1.c:	Against Applicant

Conclusion

In view of all 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