



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 23-00580
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: *Pro se*

02/02/2024

Decision

MASON, Paul J., Administrative Judge:

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

Statement of Case

On September 22, 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 November 3, 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 June 30, 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 July 9, 2023, Applicant admitted the three allegations of the SOR, with explanations. He decided to have his case evaluated administratively on the written record in lieu of a hearing. On August 2, 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 8, 2023. He was provided 30 days after receipt of the FORM to submit a response. In his August 31, 2023 FORM-response to the Defense Office of Hearings and Appeals (DOHA), he provided statements stressing that he has been using marijuana sanctioned by the state since 2017. The marijuana is used to treat his chronic pain related to migraine headaches. He uses the drug under the guidance of a state-approved physician, and purchases the drug at state-approved medical dispensaries. (July 9, 2023 answer to SOR)

Applicant's response to the FORM is dated August 31, 2023, and received by DOHA on September 5, 2023. Department Counsel had no objection to Applicant's response. The statement is entered into evidence. I was assigned the case on January 12, 2024.

Findings of Fact

The SOR lists three allegations under the drug involvement and substance misuse guideline (Guideline H). Applicant's basic justification for using marijuana is chronic pain stemming from headaches and lower back is statutorily sanctioned by the state medical use registry. He has renewed his application for use of medical marijuana six times since 2017. He uses the drug under the guidance of a physician approved by the state, and purchases marijuana products at state-sanctioned dispensaries. (July 2023 response to FORM)

According to Applicant's e-QIP dated September 22, 2022, he is 47 years old. He has lived at his current residence, property owned by his relatives, since May 2009. He received associate's degree in July 2000. After enrolling in a dual degree program in July 2000, he was awarded a bachelor's degree and a master's degree in May 2003. (Item 4 at 2) He has been employed as a master architect since February 2022. Previous jobs in his professional career have been as a sales person, a lead designer, and a graduate architect. Applicant has never had a security clearance before. He has no military service. (Item 3 at 17, 34)

Also, in his September 2022 e-QIP, Applicant provided information about his marijuana use. He used the drug for chronic pain from June 2017 to September 2022,

the date of his application. The drug was prescribed by a doctor. He intended to use marijuana in the future. (Item 3 at 32-33)

In his November 2022 personal subject interview (PSI), Applicant traced his history of using marijuana. He first used the drug in June 2017 for chronic pain. He indicated that he used the drug to the present (November 03, 2022). He ingested the drug in the form of edibles, taking a piece of the drug before going to sleep. The drug had no affect on him other than blunting the pain emanating from his head and his back. He intentionally used the drug but was never involved in production or selling the drug. He has never had a problem caused by his use of marijuana. He has never been arrested because of his marijuana use and he has never been diagnosed for drug abuse. He does not associate with anyone who uses illegal drugs. He intends to use marijuana in the future to manage his chronic pain. "However, if the usage will prevent him from getting a security clearance, he will stop its usage and seek out other methods to deal with his chronic pain." (Item 4 at 3) Applicant did not believed that any information in his background or personal conduct could make him susceptible to coercion. (Item 4 at 4)

The DCSA CAS issued interrogatories to Applicant on February 2, 2023. (Item 5 at 1-10) These interrogatories relate to Applicant's drug use. He admitted using marijuana and not taking medication to help him abstain from illegal drug use. He did not intend to illegally use drugs in the future. (Item 5 at 4)

On the next page of the interrogatories, Applicant provided information in a chart about his illegal drug use. The chart has five columns. Starting at the left side, in response to the first column labeled "Type of drugs or controlled substances illegally used," Applicant inserted "Medical Marijuana." In response to the next column labeled "Frequency of use," he supplied the following "At least once a day." In response to the third column labeled "Date of most recent illegal use of drugs or controlled substances," Applicant furnished the date "2/13/2023." In response to the fourth column labeled "Amount used per occasion," Applicant stated, "10 mg. (milligrams)." The fifth column is labeled, "Intend to continue future rate of illegal use," Applicant indicated "Yes." The next question underneath the chart (#3) is the question "Have you ever used marijuana based upon a state law "legalizing" or "decriminalizing" marijuana use for medicinal or recreational purposes?" Applicant answered "Yes." (Item 5 at 5)

In response to interrogatory 4, Applicant provided a history of his marijuana use, why he used the drug, and the state controlled procedures under which he uses the drug. In response to interrogatories 5 and 6, Applicant indicated the drug had no affect on him and he had never been evaluated or treated for illegal drug use. (Item 5 at 6)

In response to interrogatories 7 and 8, Applicant had never used illegal drugs before or at work. He never failed a random drug test. He stated that he has never been terminated or asked to resign from a job for illegal drug use. His current employer has a

drug policy and requires random drug tests. Applicant has not possessed a security clearance or a position of trust while holding a security clearance. (Item 5 at 7-8)

Under interrogatory 13, Applicant answered “Yes” to understanding that marijuana use remains illegal under Federal law and that any future use may affect his security clearance eligibility. In response to question 14, Applicant answered “Yes” to the question of whether he intends to use illegal drugs or controlled substances in the future. His reason for continuing to use marijuana is the state medical use of marijuana law that authorizes the use depending on the severity of his chronic pain. (Item 5 at 9) In reply to interrogatory 10, the additional information that Applicant provided was that his job required a security clearance. (Item 5 at 10) On February 14, 2023, Applicant provided his signature to the last page swearing that his responses to the 16 interrogatories were true and correct. (Item 5 at 11) Because Applicant requested an administrative determination on the record without a hearing, I had no opportunity to assess his credibility or demeanor.

In the first paragraph of his August 31, 2023 response to the FORM, Applicant denied that he was placed on notice that legally prescribed marijuana was against Federal law. He denied stating he did not wish to stop using medical marijuana, but instead stated that he is prepared to stop when he receives his security clearance. Applicant’s legally prescribed use of marijuana does not show poor judgment and unreliability. On the contrary, the legally prescribed use, coupled with a personal and professional records, and the lack of any kind of negative record, shows dependability and responsibility. Further, his legally authorized marijuana use “likely” falls under Pub. L. 117-215, an act to expand research of marijuana, including section 202, and Food and Drug Administration (FDA) approved drugs, including Section 301 (Doctor-Patient Relationship)

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 June 2017 to the present. He used the drug regularly to treat his headaches and back pain. In his November 2022 PSI, after describing how he takes the marijuana, the frequency of his usage, and his intention to use the drug in the future, he stated that if continued use would prevent him from getting a security clearance, he would stop and seek out other methods to deal with his chronic pain.

In February 2023, Applicant replied affirmatively to interrogatory 13 understanding that marijuana use remains illegal under Federal law and that future use could affect his security clearance eligibility. However, he intended to illegally use marijuana in the future because it was authorized under the state medical use law. Applicant’s illegal ongoing purchase and use of marijuana, and his intention to purchase and use the drug in the future falls within the scope of AG ¶¶ 25(a), 25(c), and 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 use of marijuana for about six years and his conscious decision to continue using the drug in the future, demonstrates poor judgment and unreliability that removes AG ¶ 26(a) from consideration.

Though Applicant indicated in November 2022 that he would seek alternative mode of treatment if continued marijuana use hampered his chances of obtaining a security clearance, there is no indication in the record that he found another course of treatment. He has furnished no evidence of searching and finding an alternative treatment.

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. 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 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 47 years old. He has been purchasing and using marijuana since June 2017 because state law authorizes its use. State law controlling marijuana purchases and use within the state does not eclipse the authority of the Federal government to control the use of illegal drugs and controlled substances by those employed on Government projects. Hence, by working through a private defense contractor on a United States (U.S.) Department of Defense task for the Federal government, an applicant must abide by Federal law. Applicant's position that the procedure necessary to obtain a security clearance is to stop when he gets his security clearance is wrong. Instead, Applicant should show that he has made constructive changes in his lifestyle that cultivates a drug free environment. For example, Applicant could have provided evidence that he discovered alternative treatment regimens for his chronic pain. 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) Considering the entire record under the whole person, Applicant's evidence in mitigation does not overcome the drug involvement guideline.

Applicant's reliance on Public Law 117-215 is misplaced. The regulation addresses medical marijuana research and is not relevant to security clearance holders. A medical marijuana card does not excuse a security clearance applicant from the Department of Defense (DOD) around-the-clock prohibition against use of illegal drugs while working on Federal government projects.

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-c:	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