



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 24-00662
)
Applicant for Security Clearance)

Appearances

For Government: Cynthia Ruckno, Esq., Department Counsel
For Applicant: *Pro se*

12/05/2024

Decision

MASON, Paul J., Administrative Judge:

Applicant’s evidence in mitigation is insufficient to overcome the security concerns arising from Guideline H (Drug Involvement and Substance Misuse) Eligibility for a security clearance is denied.

Statement of Case

On September 19, 2023, 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 October 6, 2023, and December 4, 2023, Applicant provided personal subject interviews (PSIs) to an investigator from the Office Personnel Management (OPM). The second interview was by telephone. After examining the background investigation, the Defense Counterintelligence Security Agency (DCSA) could not make the affirmative findings necessary to issue a security clearance. On May 23, 2024, 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 June 4, 2024, Applicant furnished a response to the SOR. He decided to have his case decided administratively on the written record in lieu of a hearing. On July 22, 2024, the Government sent Applicant 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 July 29, 2024, which included Applicant's adopted PSIs. He was given 30 days to file objections to the FORM or furnish additional information for clarification purposes. His response was due by August 28, 2024. No response was received by DOHA. The Government's four items of evidence are admitted into the record. I was assigned the case on September 13, 2024.

Findings of Fact

Applicant admitted that he used marijuana from October 2007 to June 2023. (SOR ¶ 1.a) His attached explanation for his denial of SOR ¶ 1.b is unclear. He seems to be stating that he did not purchase the drug between 2007 and 2014 in State C. His purchase of marijuana in State A and State B was legal at the state level.

Applicant is 57 years old. He is single with no children. He has rented his parents' State A residence since January 2021. He lived in State B from July 2014 to January 2021. (Item 3 at 8-10) He lived in State C for seven years between 2007 and 2014. (Item 3 at 9-11) He received a high school diploma in 1986. He earned college credits from 1986 to 1987, and from 1988 to February 1989, but received no degree. He also took a typing and a journalism course from June to October 2005. (Item 3 at 11-13) He has worked as a junior quality assurance engineer since August 2023. He has been employed in previous jobs as a delivery driver, a marketing consultant, and a pay advisor. He was unemployed from March to June 2020, and for two months in late 2019 to early 2020. (AE 3 at 13-23) Applicant has never been investigated for a security clearance or had a clearance. (Item 3 at 38)

In response to Section 23 (Illegal Use of Drugs or Drug Activity) of his September 2023 e-QIP, Applicant indicated that he used marijuana from 2007 to June 2023. He used the drug in State B because marijuana is legal in the state, and he enjoyed the drug. He used the drug hundreds of times through a vaporizer or in edibles. He did not intend to use marijuana in the future. Applicant noted that "if the DEA moves pot from being a schedule 1 drug, like your heroin and fentanyl, (like they should) to a schedule 2, I will definitely partake – if work allows it." (Item 3 at 37)

In his October 2023 PSI, Applicant noted that he may have initially used marijuana in 1987. He explained to the investigator from OPM that in June 1990, he was cited by a police officer for having marijuana inside a water bottle in his car. He was charged with a misdemeanor. Apparently, he pleaded guilty was fined and ordered to complete community service. He completed all the conditions of his sentence. After summarizing the details of the offense, Applicant opined that the infraction had no effect on his professional or personal life. (Item 4 at 3, 9)

From October 2007 to June 2023, Applicant smoked low doses of marijuana every one or two months to relax, the major reason why he used the drug. He legally purchased the drug at dispensaries. He did not develop dependency on the drug. He does not intend to use the drug in the future unless it becomes legal at the federal level and his employer authorizes use. He has never tested positive for the drug, and he has never had drug counseling. In his December 2023 PSI, he admitted purchasing marijuana in the last seven years. He did not explain the frequency nor amount of his purchases during the period. (Item 4 at 4, 5)

In May 2024, the Government presented Applicant with interrogatories about the information he provided in his October and December 2023 PSIs concerning his marijuana use. He stated that he did not use marijuana about one or two times a month while living in State C (2007 to 2014) because of low funds. This statement is interpreted to mean that he used marijuana more often during other periods of a month while living in State C when he had the funds to purchase the drug. In the next sentence, he appears to be contradicting himself by claiming he smoked marijuana only seven times while living in State C from 2007 to 2014. (Item 4 at 6)

Applicant indicated that he stopped using marijuana because his current employer does not condone it. He declared that he was happy drinking alcohol at social gatherings, and if he discovered there were “hard drugs,” he would leave immediately. He did not explain what his response would be if only marijuana was being used at the social events. Applicant indicated that he “must have purchased THC a few times over the years, Frequently at college.” (Item 4 at 10) He never sold the drug. He believed his last purchase of marijuana was in April 2023 in State A. (Item 4 at 10)

In Applicant’s May 2024 interrogatories, which he signed on May 8, 2024, he claimed he stopped drinking when he moved in with his parents. According to his September 2023 e-QIP, he has been living there since January 2021. He did not want to be under the influence of alcohol in their presence. Apparently, his continuing use of marijuana until June 2023 posed no problems for him or displeasure for his parents. Currently, his overall focus in his life is his health and his regular yoga exercises. He belongs to a bicycle club while maintaining a vegetarian diet. (Item 4 at 12-13)

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 kinds of character 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 articulated 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; an (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); and

(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia.

Applicant's first encounter with marijuana may have been 1987, and he was cited in June 1990 for having marijuana in a water bottle. In his September 2023 e-QIP, he admitted using the drug between 2007 and June 2023 because he enjoyed the relaxing effect of the drug. He ingested the drug hundreds of times using a vaporizer or in edibles. He opined that if the drug became legal at the federal level and his employer approved of its use, he would resume use. Applicant's illegal marijuana use comes within the scope of AG ¶ 25(a). SOR ¶ 1.a is established.

While Applicant denied SOR ¶ 1.b in his response, he never provided a straightforward answer to purchasing marijuana. In his December 2023 PSI, he provided a vague response admitting that he purchased the drug in the last seven years. In his May 2024 interrogatory response, he admitted that he must have purchased the drug a few times in his life. Applicant's inability to provide sufficient information about his purchase of marijuana undermines his credibility, thus raising doubts of whether he has provided a complete account of his drug involvement. Applicant's illegal marijuana purchases fall within the scope of AG ¶ 25(b). SOR ¶ 1.b is established. The evidentiary burden shifts to Applicant to establish one or more the following mitigating conditions.

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 admitted marijuana use began in at least in 2007 and probably earlier. His use of the drug lasted until June 2023. I draw the same conclusion about his purchase of the drug as he admitted in his May 2024 interrogatory responses that he frequently purchased marijuana in college, which was 1986 to 1989, and 2005. Based on his vague and evasive responses throughout the security investigation about his marijuana purchasing frequency, I conclude that he purchased the drug more than a few times in his life. Applicant's marijuana purchase and use occurred between 2007 and April to June 2023, about a year before he submitted his response to the SOR. His use was occasional to regular. Applicant has not presented sufficient independent evidence that convinces me the drug use is unlikely to recur. AG ¶ 26(a) does not apply.

Though Applicant voluntarily admitted his marijuana involvement during the security investigation, he has furnished no independent evidence to support his claims of abstinence since June 2023. With no supporting evidence from Applicant showing that he has severed his contacts with drug users, AG ¶ 26(b)(1) does not fully apply. Terminating interaction with drug-using associates usually means avoiding the environment where drugs are used. Applicant has provided no corroborating evidence which reinforces his claims of focusing on his health. He presented no character evidence from his coworkers, supervisors, friends, and exercise associates who could potentially expand upon the purported changes he has made in his current environment. AG ¶ 26(b)(2) does not fully 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 57 years old and has been employed as a junior quality assurance engineer by a defense contractor since August 2023. I have fully considered that he volunteered information about his marijuana history on his September 2023 e-QIP. However, the equivocal nature of his responses in purchasing the drug over the years raises persistent doubts concerning his security clearance eligibility. The drug involvement guideline has not been mitigated.

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.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. Eligibility for access to classified information is denied.

Paul J. Mason
Administrative Judge