



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 24-01090
)
Applicant for Security Clearance)

Appearances

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

12/17/2024

Decision

MASON, Paul J., Administrative Judge:

Applicant’s evidence in mitigation is insufficient to overcome the security concerns arising from drug involvement and substance misuse (Guideline H). Conversely, he has mitigated criminal conduct (Guideline J). Eligibility for a security clearance is denied.

Statement of Case

On November 9, 2023, Applicant certified and signed an Electronic Questionnaires for Investigations Processing (e-QIP, Item 2) to obtain a security clearance required for employment with a defense contractor. On December 19, 2023, Applicant provided a personal subject 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 August 1, 2024, DCSA CAS issued a Statement of Reasons (SOR) to Applicant detailing security concerns under drug involvement and substance misuse

(Guideline H) and criminal conduct (Guideline J). 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 August 7, 2024 (the date Applicant signed the type-of-hearing selection form), he furnished a response to the SOR. He decided to have his case decided administratively on the written record in lieu of a hearing. On September 3, 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. He received the FORM on or about September 6, 2024. He was given 30 days to file objections to the FORM or furnish additional information for clarification purposes. His response, dated September 9, 2024, was received by DOHA on September 17, 2024. The Government's three items of evidence, Applicant's June 4, 2024, answer to the SOR, and Applicant's September 12, 2024, FORM response are admitted into the record without objection. The pages of Item 3 (Interrogatory responses) contain 11 pages that are marked at the bottom-center of each page. I was assigned the case on December 6, 2024.

Findings of Fact

Applicant admitted that he used marijuana from July 2012 to December 2023, with varying frequency. (SOR ¶ 1.a) He admitted the misdemeanor charge of possession of marijuana in April 2018 alleged in SOR ¶ 1.b but denied that his conviction for possession of marijuana in represented criminal conduct alleged in SOR ¶ 2(a). A recurring position in his answer and FORM response is the application of a legislative bill "S.4711 - Dismantling Outdated Obstacles and Barriers to Individual Employment Act" (DOOBIE Act). Applicant contends that the act (which advanced out of a Senate committee in December 2024, but has not been voted on by Congress) would somehow limit federal agencies from using past use of marijuana as a factor in employment and security clearance decisions.

Applicant is 27 years old and single with no children. He has been living with his girlfriend since May 2020. (Item 2 at 25) Though he indicated that he moved from State A to State B in August 2021 (FORM response), he still listed his permanent address in State A from May 2021 to August 2022. (Item 2 at 7)

From January 2023 to Applicant's hire with a defense contractor in late 2023, he was working as a teller-lead for a bank. His previous job for two months was in data entry analysis. From June to November 2022, he was a technician. From January 2020 to June 2022, Applicant was a team lead for a service delivery manager. In the preceding six months, he was a server at a restaurant. From September 2018 to May

2019 (age 21), he was a delivery driver. Applicant worked as a laborer from April 2015 to October 2018 (age 20). (Item 2 at 12-21) Before Applicant began his employment with the defense contractor in late 2023, he was employed in all state jobs and probably did not have to disclose his drug use nor have to hold a security clearance.

In July 2012, Applicant began using marijuana. Initially, his frequency of use was about once a month with his older brother. During college, he used marijuana about one to two times a week with college friends. Since his graduation from college in December 2019, Applicant has used the drug one to two times a month with friends or his girlfriend before bedtime to facilitate his sleep. His use also improves his social interaction. (Item 3 at 10)

Applicant's friends know that he uses marijuana. He has not revealed his use to a bank, who was his employer in January 2023 because the bank did not require him to report his drug use. Though he tried to abstain from drug use, he smoked marijuana twice since September 2023. On his birthday in October 2023, his girlfriend purchased the drug, and they shared it. In November 2023, he purchased and smoked the drug with his girlfriend at the end of November 2023, or the beginning of December 2023, to celebrate her job promotion. Applicant's drug use has had no impact on his professional or personal life. (Item 3 at 10-11) Applicant claims that he merits a security clearance based on the truthfulness he has displayed during the security investigation and the drug screening he passed. (Applicant's September 2024 FORM response)

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 and substance misuse 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; 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); and

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

Applicant used marijuana from July 2012 to December 2023. In order to use the drug, Applicant had to possess it. While he admitted purchasing the drug once in November 2023, I conclude that he purchased the drug occasionally over the 11-year-period since 2012. His illegal marijuana use comes within the scope of AG ¶¶ 25(a) and 25(c). SOR ¶ 1.a is established.

Applicant's possession of marijuana charge in April 2018 and conviction in 2019 raises security concerns about his reliability and judgment, and his readiness to comply with rules and regulations. The conviction falls within the ambit of AG ¶¶ 25(a) and 25(c). 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.

AG ¶ 26(a) mitigates illegal drug involvement that occurred a long time ago. Applicant's 11-year-period of illegal marijuana purchase and use did not end until recently in December 2023, about eight months before he submitted his response to the SOR. Even though he volunteered his illegal marijuana use in his November 2023 e-QIP, and stated he would not use controlled substances in the future, his use of the drug again at the end of November 2023, or the beginning of December 2023,

continues to cast doubt on Applicant's trustworthiness and good judgment. AG ¶ 26(a) does not apply.

Though Applicant acknowledged his illegal marijuana use, he has not established a pattern of abstinence. He has not provided any supporting evidence to establish that he has severed ties with his drug using associates and contacts. He has not provided any corroborating evidence that he has changed his environment to one that is conducive for drug abstinence. He has not provided a signed sworn statement acknowledging that future drug involvement is grounds for revocation of his national security eligibility. AG ¶ 26(b)(1), (2), and (3) do not apply.

Criminal Conduct

The security concern for criminal conduct is set forth in AG ¶ 30: Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

The potential disqualifying condition under AG ¶ 31 is:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was charged, prosecuted or convicted.

AG ¶ 32 lists the pertinent mitigating condition that may be applicable in this case:

(a) so much time has passed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Applicant was charged with possession of marijuana in April 2018. He pleaded guilty in May 2019 (age 21), and successfully completed all conditions of his sentence. About five years have passed without additional violations of state law. Applicant did not begin working for the Federal Government until late 2023 and did not have a security clearance. I find for Applicant under the criminal conduct guideline.

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 and has been employed by a defense contractor since December 2023. He has an 11-year-history of marijuana use since July 2012. After his conviction in May 2019 for possession of marijuana, he continued to use the drug. Before he signed and certified that the informational entries in his November 2023 e-QIP were truthful and made in good faith, he indicated he did not intend to use any controlled substances in the future. However, he celebrated his girlfriend's promotion by using marijuana with her at the end of November or beginning of December 2023. His reliance on the DOOBIE ACT, which has not been enacted into law, has no relevance to this decision. Applicant's application is being denied because he did not stop using marijuana until December 2023, and he did not provide independent evidence to shore up his case in mitigation. Applicant's failure to establish the mitigating conditions under the drug involvement guideline require an ultimate finding against him under the drug involvement guideline. The criminal conduct guideline is found in his favor.

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 (Drug Involvement):	AGAINST APPLICANT
Subparagraphs 1.a, 1.b:	Against Applicant
Paragraph 2 (Criminal Conduct):	FOR AEPPLICANT
Subparagraph 2a:	For 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