DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 20-01873
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric C. Price, Esq., Department Counsel
For Applicant: *Pro se*

04/14/2021

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Decision

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MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used marijuana and tetrahydrocannabinol (THC) oil from June 2018 to December 2018, each drug about ten times a month, in contravention of Federal drug laws and his security clearance eligibility. He is currently on two years of deferred adjudication with community supervision for a December 2018 drug possession charge and the disposition of a December 2018 drunk-driving charge is unclear. Reform was not sufficiently established of either the drug involvement and substance misuse or the alcohol consumption security concerns. Clearance eligibility is denied.

Statement of the Case

On November 2, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H, drug involvement and substance misuse, and Guideline G, alcohol consumption. The DCSA CAF explained in the SOR why it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DCSA CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel*

Security Clearance Review Program (January 2, 1992), as amended (Directive); and the National Security Adjudicative Guidelines (AG) effective June 8, 2017, applicable to all adjudications for national security eligibility or eligibility to hold a sensitive position.

Applicant submitted an undated response to the SOR in which he admitted the allegations without comment. He requested a decision on the written record in lieu of a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. On December 31, 2020, the Government submitted a File of Relevant Material (FORM) consisting of seven exhibits (Ex.), which included the SOR as Ex. 1 and his SOR response as Ex. 2. DOHA forwarded a copy of the FORM to Applicant on January 6, 2021, and instructed him that any response was due within 30 days of receipt. Applicant received the FORM on January 28, 2021. No response was received by the February 27, 2021 deadline.

On March 25, 2021, the case was assigned to me to determine whether it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant. I received the case file on April 2, 2021.

Findings of Fact

The SOR alleges under Guideline H that Applicant used THC extract oil (SOR ¶ 1.a) and cannabis (SOR ¶ 1.b) approximately ten times a month each from June 2018 to about December 2018 while granted access to classified information, and that he was arrested in December 2018 and charged with felony possession of a controlled substance (SOR ¶ 1.c). Under Guideline G, Applicant is alleged to have been arrested in December 2018 and charged with driving while intoxicated (DWI) (SOR ¶ 2.a). When he responded to the SOR, he admitted all of the allegations without comment. Applicant's admissions are accepted and incorporated as factual findings. After considering Exhibits 1 through 7 in the FORM, I make the following additional findings of fact.

Applicant is 57 years old, married, and has a 20-year-old son and three daughters, ages 23, 21, and 17. He earned a bachelor's degree in mechanical engineering and has worked for his current employer, a defense contractor, since September 1999. Applicant reports that he was granted a DOD secret clearance in February 2005. (Ex. 3.) Government records show he was granted a DOD secret clearance most recently in October 2009. (Ex. 6.)

Applicant consumed five to six glasses of wine at a concert on December 20, 2018. In route home, he was stopped for weaving. He failed a field sobriety test and also a breathalyzer test, which showed a blood-alcohol level of .12%. Applicant was arrested and charged with DWI and with possession of a controlled substance after an electronic cigarette containing THC extract was found in his vehicle. (Ex. 4.)

On July 15, 2019, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86). He disclosed in response to police record inquires his arrest in December 2018 on pending charges of misdemeanor DWI and

felony possession of a controlled substance (cannabis or THC extract). In response to an inquiry into whether he had illegally used any drug in the last seven years, Applicant reported that he used "cannabis or THC extract" by smoking vapor 20 times per month between June 2018 and December 2018. He responded affirmatively to whether his use occurred while possessing a security clearance but also indicated that he did not intend to use cannabis or THC extract in the future "for family, health and legal reasons." Applicant disclosed in a separate entry that he used "THC oil" ten times from June 2017 to December 2018, while possessing a security clearance. (Ex. 3.) On August 8, 2019, a grand jury indicted Applicant for felony possession of THC in amount of less than one gram for the THC found in his vehicle on December 20, 2018. (Ex. 4)

On October 22, 2019, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). He indicated that he had not yet appeared in court for his December 2018 DWI. He described his then current consumption of alcohol as two or three glasses of wine two or three times a week to relax or for social reasons. He admitted that he had consumed more alcohol than he should have at the concert, but at the time, he did not believe that his alcohol consumption was a problem. Applicant stated that a friend, who lives in a state where recreational marijuana use is legal, had given him the electronic cigarette containing THC extract which was found during the search of his vehicle incident to his December 2018 DWI arrest. Applicant related that he used THC to relax in his home, five to ten times a month from June 2018 to December 2018, while he held a security clearance. He denied any use of THC since then and any intent to use the drug in the future. (Ex. 4.)

Applicant was re-interviewed by the OPM investigator on January 8, 2020, to provide an update about the status of his pending misdemeanor DWI and felony drug possession offenses. He stated that he had rejected the first plea bargain of the prosecution on the drug charge but did not elaborate as to its terms. He had yet to appear in court on the DWI charge because the county wanted to close the felony drug case first. Regarding his drinking, Applicant volunteered for the first time that his alcohol consumption had a negative impact on him from January 2014 to December 2018. He did not give a reason for his increased alcohol consumption during that time but admitted that it caused him marital difficulties. He denied any consumption of alcohol since December 2018. (Ex. 4.)

On March 3, 2020, Applicant pled guilty to a negotiated charge of misdemeanor possession of a controlled substance — THC less than one gram. He was placed on deferred adjudication for 24 months with community supervision for two years, fined $1,500 plus costs for a total of $3,295, and ordered to submit to random hair follicle drug testing, complete 40 hours of community service, and attend a drug offender education program. (Ex. 4; Ex. 5.) As of May 20, 2020, Applicant had yet to pay $3,173 of the financial assessment for the drug offense. (Ex. 5.) The state where Applicant was arrested allows for community supervision by a court under a continuum of programs and sanctions with conditions imposed for a specific period during which criminal proceedings are deferred without an adjudication of guilt, or where a sentence of imprisonment or confinement,

imprisonment and fine, or confinement and fine, is probated and the imposition of sentence is suspended in whole or in part. *See* Chapter 42A Tex. Code Crim. Proc.

In response to DOHA interrogatories, Applicant stated on August 19, 2020, that he was currently on "probation with [a] community supervision officer" for the deferred Class A misdemeanor drug possession charge, and was scheduled to plead in court for the DUI on September 10, 2020. Relevant court records confirm that court date. In response to a DOHA interrogatory into whether he had ever used any narcotic, depressant, stimulant, hallucinogen, or cannabis or misused any prescription medication, Applicant reported that use used marijuana and THC oil, each ten times per month, between June 2018 and December 2018. He denied any intent to use either drug in the future, stating "No intention to use illegal drugs. Avoid people or places where that takes place." He responded negatively to a question concerning any participation in an alcohol or drug rehabilitation support group but affirmatively to a question concerning current participation in a drug testing program. Applicant explained that, as required by his community supervision officer, he was subjected to quarterly hair follicle testing at the probation office. He responded negatively to an inquiry concerning any current consumption of alcohol, stating that he last used alcohol on the day of his December 2018 arrest for DWI, and he denied any intent to consume alcohol in the future. As to the next step in the judicial process for his DWI, Applicant responded, "Plead Guilty in Court on Sept. 10, 2020." He denied any other alcohol-related incidents (Ex.4), and there is no evidence to the contrary shown on available criminal records, including from the Federal Bureau of Investigation (FBI). (Ex. 7.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. 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 to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Section 7 of EO 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H: Drug Involvement and Substance Misuse

The security concerns about drug involvement and substance misuse are 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.

Despite some states' legalization or decriminalization of small amounts of marijuana for recreational use, marijuana remains a Schedule I controlled substance, and its use is illegal under Federal law and contrary to the obligations of security clearance eligibility. Applicant indicated on his SF 86 that he used marijuana or THC extract by smoking vapor (vaping) "monthly, 20 times" between June 2018 and December 2018. He separately listed use of THC oil ten times between June 2017 and December 2018. While it is unclear whether the June 2017 date for first use of THC oil is a typographical error, the DCSA CAF alleged use of THC extract oil ten times per month from June 2018 to December 2018 (SOR ¶ 1.a). During his October 2019 OPM interview, Applicant minimized his THC use in that he stated that he used THC five to ten times a month over the six months. In his August 2020 response to DOHA interrogatories, he reported that he used marijuana and

THC oil at a frequency of 10 times per month for each substance. The record evidence establishes that he illegally used THC in some form 20 times a month from June 2018 to December 2018 while he held a secret clearance. When he was arrested for DWI on December 20, 2018, he had an electronic cigarette containing THC in his possession. He told the OPM investigator that a friend gave him the "E cigarette with THC extract." The record does not otherwise reflect how he obtained the THC, including marijuana, which he used on a frequent basis over the course of six months in 2018. Nonetheless, his illegal drug involvement establishes disqualifying conditions AG ¶¶ 25(a), "any substance misuse;" 25(c), "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;" and 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position."

Applicant knew or can reasonably be held to have known that his marijuana use was against Federal law, if not also his state's drug laws, and contrary to the requirements of his security clearance eligibility. While his friend may have acquired the vaping pen with THC legally in the friend's state, as evidenced by the illegal possession charge against Applicant, it was not legal of be in possession of THC in Applicant's state. Applicant had been working for his defense-contractor employer since 1999 and held a secret clearance since at least 2009 if not earlier. He did not present any evidence of his employer's policy regarding the use of marijuana. Applicant's decision to forego future marijuana use, which he expressed on his SF 86, during his October 2019 OPM interview, and in response to DOHA interrogatories, is viewed favorably, but it does not necessarily dispel the security concerns raised by his drug involvement in contravention of Federal and his state's laws and the requirements of his security clearance.

Applicant bears the burden of establishing that matters in mitigation apply. AG ¶ 26 provides for mitigation as follows:

> (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 an individual's current reliability, trustworthiness, or good judgment;
>
> (b) the individual acknowledges his or 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 illegal drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

AG ¶ 26(a) cannot reasonably apply in mitigation. Applicant's THC involvement from June 2018 to December 2018 is considered recent as of his July 2019 SF 86. At 20 times a month, it was frequent during the time frame that he used it. Neither AG ¶ 26(c) nor AG ¶ 26(d) was shown to apply. AG ¶ 26(b) (3) is not fully established, despite his repeated denials of any intent to use THC in the future. It is not enough in reform that he is currently avoiding persons who may use illegal drugs. He admitted during his October 2019 OPM interview that he used THC to relax while he was at home. He was in his mid-50s when he used THC, and he held a DOD clearance. The circumstances of his illegal drug involvement raise serious doubts about his judgment, reliability, and trustworthiness. Moreover, it would be premature to find that he is fully reformed of his illegal drug involvement at this juncture. He is still on community supervision for his illegal drug possession offense committed in December 2018 and subject to drug testing. He presently has every motivation to avoid use of any THC because he would jeopardize his deferred adjudication status if found to have used or possessed an illegal drug. Moreover, he has yet to pay all the fines and costs assessed for his illegal drug possession. The drug involvement and substance misuse security concerns are not mitigated.

Guideline G: Alcohol Consumption

The security concern for alcohol consumption is articulated in AG ¶ 21:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

Applicant's December 2018 DWI offense with a blood-alcohol level of .12% is evidence of abusive drinking under AG ¶ 22(a), which provides:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder.

On that occasion, Applicant consumed five to six glasses of wine at a concert. Applicant told the OPM investigator in October 2019 that he did not think his drinking was a problem at that time, but given the quantity consumed and his blood-alcohol level, it could be considered an episode of binge drinking under AG ¶ 22(c), which states:

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

The term "binge" drinking is not defined in the Directive. The generally accepted definition of binge drinking for males is the consumption of five or more drinks in about two hours. This definition of binge drinking was approved by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) National Advisory Council in February 2004. *See* U.S. Department of Health and Human Services, NIAAA Newsletter 3 (Winter 2004 No. 3), http://www.pubs.niaaa.nih.gov/publications/Newsletter/winter2004/NewsletterNumber3.pdf. Even so, the evidence of excessive consumption that would trigger AG ¶ 22(c) is otherwise limited. During his October 2019 OPM interview, Applicant gave the impression that his excessive drinking at the concert was situational and not reflective of his drinking pattern at the time. He said that he drank two or three glasses of wine two to three times a week. When re-interviewed in January 2020, Applicant indicated that alcohol had a negative impact on him from January 2014 to December 2018. He did not give a reason for his increased alcohol consumption during that time but admitted that it caused him marital difficulties. However, without more detail about his drinking habits during that time, I cannot find that he engaged in habitual or binge drinking beyond the DWI incident.

Two mitigating conditions under AG ¶ 23 have some applicability. They are:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment; and

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Applicant's DWI was an isolated incident and therefore "so infrequent" under AG ¶ 23(a). That being said, it was recent enough to cause some concerns about his current reliability, trustworthiness, and especially his judgment. As of Applicant's August 2020 response to DOHA interrogatories, he had yet to appear in court. He apparently planned to plead guilty on September 10, 2020, but he presented no evidence of such a plea or of a final disposition for the charge even though he had an opportunity to update the record information in rebuttal to the FORM.

AG ¶ 23(b) is partially established in that Applicant has been abstinent from alcohol since his arrest for DWI on December 20, 2018. He has not had any counseling, although it is not required for mitigation under AG ¶ 23(b) provided he takes other actions, such as moderating or eliminated consumption of alcohol, to avoid a recurrence of abusive drinking. However, it is difficult to conclude that Applicant is fully rehabilitated without knowing the

terms of his sentence, if any, for the DWI and whether he is in compliance with any sentence imposed. Based on the record before me, the alcohol consumption security concerns are only partially mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(d). They are as follows:

> (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.

Applicant's illegal drug use raises serious concerns about his ability and willingness to abide by his security clearance obligations. It occurred when he was in his mid-50s, so immaturity is no excuse. He clearly enjoyed the relaxing effects of THC, and it is not clear that he would have ceased his drug involvement in December 2018 had he not been caught with a THC-infused E-cigarette and charged with felony possession. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). The Government must be able to rely on those persons granted security clearance eligibility to fulfill their responsibilities consistent with laws, regulations, and policies. For the reasons previously discussed, doubts persist as to whether it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance.

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
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Eligibility for access to classified information is denied.

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Elizabeth M. Matchinski
Administrative Judge