



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 21-01493
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: *Pro se*

March 25, 2022

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted his most recent Electronic Questionnaires for Investigations Processing (e-QIP) on October 20, 2020. (Government Exhibit 2.) On August 5, 2021, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines H (Drug Involvement and Substance Misuse) and E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines effective within the Department of Defense after June 8, 2017.

Applicant answered the SOR in writing (Answer) on August 17, 2021, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on September 15, 2021. The case was assigned to me on September 21, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on September 23, 2021. I convened the hearing as scheduled on October 27, 2021. The Government offered Government Exhibits 1 through 3, which were admitted without objection. Applicant testified on his own behalf. He requested the record remain open for receipt of additional information. Applicant submitted Applicant Exhibits A through C in a timely manner. Applicant's exhibits were also admitted without objection. DOHA received the transcript of the hearing (Tr.) on November 4, 2021.

Findings of Fact

Applicant is a 30-year-old budget analyst with a defense contractor. He is single. Applicant has received a bachelor of arts degree. He is seeking to retain a security clearance in connection with his work with the DoD.

Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has used illegal drugs. Applicant admitted all three allegations under this paragraph with explanations.

Applicant has used marijuana during two separate periods. The first period extended from approximately 2009 to 2014. During this period, he was attending high school and then college. Applicant stated he used marijuana "sparingly" during that time, "approximately 10 or so times-ish." Applicant set forth his minor marijuana use in great detail during an interview with a Government investigator in January 2021. (Government Exhibit 3 at 7-8; Tr. 18, 23.)

Applicant began work for his current employer in 2017. He filled out his first e-QIP in November 2017. Shortly after that he obtained a security clearance. (Government Exhibit 1; Tr. 29.)

Applicant did not use marijuana for several years. He resumed using marijuana on a very infrequent basis during 2019 and 2020. Applicant used marijuana an additional three times during this period. Applicant testified that he realized the continuing Federal prohibition against marijuana use when filling out his second e-QIP in October 2020. Applicant has not used marijuana since June 2020 and evinced a credible intent not to use marijuana in the future. (Government Exhibit 2; Government Exhibit 3 at 7-8; Tr. 22-29, 38-39.)

With regard to his second period of marijuana use Applicant stated in his Answer:

[Applicant's state of residence] had lessened the laws on Marijuana but I did not take into account the Federal regulations which I fully admit is my mistake. I do not plan to use Marijuana in the future in order to keep my security clearance access, especially since the nature of my most recent use was infrequent.

Paragraph 2 (Guideline E – Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct that shows poor judgment, untrustworthiness or unreliability. Applicant admitted both the allegations under this paragraph.

2.a. The Government alleges in this subparagraph that the Applicant's drug use history, as set forth under Paragraph 1, above, is also cognizable under Guideline E.

2.b As stated, Applicant filled out an e-QIP in November 2017. (Government Exhibit 1.) Section 23 of the questionnaire asked Applicant about his drug use history. That section asked whether Applicant had used controlled substances during the previous seven years. Applicant stated, "Yes." Applicant further explained he had used marijuana in 2009 and 2010, "When I was in junior college I had tried it a couple times with friends and never after that." This statement was false in that Applicant had actually used marijuana about ten times during his college years, ending in 2014.

Applicant filled out a second questionnaire in October 2020. (Government Exhibit 2.) In answering the same question in Section 23 about his drug use over the past seven years Applicant again stated, "Yes." He further indicated that the usage extended from 2009 to 2020. Applicant went on to explain, "When I was in college I had tried it multiple times with friends and have smoked it occasionally in recent years." This was a more accurate statement of his use. The questionnaire also asked why he did not intend to use illegal drugs in the future. He stated, "I would not want the previous usage to effect [sic] my career advancement by not receiving a TS clearance."

Applicant admitted that he made a conscious mistake on his initial e-QIP when he set forth the time of his usage incorrectly. He freely admitted this error in judgment at the hearing. (Tr. 29-36.)

Mitigation

Applicant submitted a letter from his supervisor. The supervisor stated, "I have never experienced any issues in judgment or any questionable practices in day-to-day operations and fully trust his [Applicant's] input and decision making abilities." (Applicant Exhibit B.)

Applicant also submitted his annual review for the year 2020. He is described as a “Successful Performer.” (Applicant Exhibit C.)

Policies

When evaluating an applicant’s national security eligibility for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant’s national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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, “Any 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

See also Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)

The security concern relating to Drug Involvement and Substance Misuse 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. (Emphasis in original.)

I have examined the disqualifying conditions under AG ¶ 25 and especially considered the following:

- (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
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant used marijuana on an infrequent basis from 2009 to 2014. He used it three times in 2019 and 2020, while he was employed in the defense industry and held a security clearance. All of the stated disqualifying conditions apply.

The following mitigating conditions under AG ¶ 26 have also been considered:

- (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;

(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 used marijuana on an infrequent basis during two distinct periods of time. He used it about ten times between 2009 and 2014. Applicant used marijuana three additional times between 2019 and 2020. This latter use was due, in part, to Applicant's confusion over the impact of the legalization of marijuana use in his state of residence. When Applicant filled out a government questionnaire in October 2020 he realized the continuing Federal proscription against such use. Applicant stated in his Answer that he intended to abstain from future drug use. He confirmed this statement during his testimony. He shows a credible intent to avoid such conduct in the future. Viewing his minor marijuana use in the context of the whole person Applicant has mitigated the security significance of his past drug use. Paragraph 1 is found for Applicant.

Paragraph 2 (Guideline E – Personal Conduct)

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. Three are potentially applicable in this case:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

(e) personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant knowingly falsified material facts about his drug use history on a Government personnel security questionnaire in 2017. As stated, he used marijuana on an infrequent basis from 2009 to 2014, and three times from 2019 to 2020. The cited disqualifying conditions apply.

The following mitigating conditions under AG ¶ 17 are possibly applicable to Applicant's conduct:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

As stated under Paragraph 1, above, Applicant's drug use was very infrequent, in the past, and he evinces a credible intent not to use marijuana in the future. He has mitigated subparagraph 2.a.

Applicant freely admitted that he made a major mistake in misstating his drug use on the 2017 questionnaire. When filling out the 2020 questionnaire Applicant was fully forthcoming about his drug use. He also was truthful during an interview with a Government investigator in 2021. His voluntary admission on the second e-QIP and during the interview were the only evidence the Government had to establish the extent of his former drug use, and alleviated any security significance of his prior falsification.

This conduct was an aberration in judgment that will not be repeated. Applicant has mitigated the security significance of his falsifications on a Government questionnaire in 2017. Paragraph 2 is found for Applicant.

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 the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors 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 national security eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant has mitigated his minor drug use and the falsification of his first security clearance application. His recent forthright disclosures minimized or eliminated the potential for pressure, coercion, or duress. Continuation or recurrence of similar conduct is unlikely. Overall, the record evidence does not create substantial doubt as to Applicant's present suitability for national security eligibility and a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraphs 2.a through 2.c:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a through 2.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge