



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



In the matter of:)
)
) ADP Case No. 20-03014
)
)
Applicant for Public Trust Position)

Appearances

For Government: Raashid S. Williams, Department Counsel
For Applicant: Pro se

April 29, 2022

Decision

Lokey Anderson, Darlene D., Administrative Judge:

On December 12, 2019, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On July 13, 2021, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline H, Drug Involvement and Substance Misuse, and Guideline E, Personal Conduct. The action was taken under Executive Order 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 the adjudicative guidelines (AG) effective within the DoD for SORs issued after September 1, 2006.

Applicant answered the SOR on August 16, 2021. He requested that his case be decided by an administrative judge on the written record without a hearing. (Item 2.) On October 30, 2021, Department Counsel submitted the Government's written case. A complete copy of the File of Relevant Material (FORM), containing four exhibits, was sent to the Applicant and received on December 1, 2021. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant did not

respond to the FORM. DOHA assigned the case to me on April 6, 2022. Items 1 through 4 were admitted into evidence, and are hereinafter referred to as Government Exhibits 1 through 4.

Findings of Fact

Applicant is 39 years old. He is separated from his spouse and has two minor children. He is employed by a defense contractor as a Senior Vulnerability and Threat Analyst. He is seeking to obtain eligibility for a public trust position in connection with his employment.

Guideline H - Drug Involvement and Substance Misuse

Guideline E – Personal Conduct

The Government alleges that the Applicant has used controlled substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose, and has engaged in conduct involving questionable judgment, which can raise questions about an individual's reliability and trustworthiness.

Applicant served on active duty in the U.S. Army from August 2001 to June 2004, and then in the Active Reserves from 2004 to 2009. Applicant first obtained a security clearance during his time in the military.

Applicant began working for his current employer in May 2018. From about May 2009 to about April 2019, Applicant has used marijuana with varying frequency. He states that he has used marijuana six times over the past eleven years. Applicant states that he has held a security clearance for almost twenty years now, and that he used marijuana while possessing a security clearance. In April 2019, he used marijuana in the form of edible gummies. He used marijuana to help him relax and sleep. Applicant indicated that his separation and pending divorce caused him to have problems sleeping. Applicant seemingly used the marijuana as a coping mechanism. In his security clearance application dated December 12, 2019, Applicant stated that, "I smoked pot while I was in between jobs. Although still a maintainer of a security clearance, I have never smoked pot while conducting official business." (Government Exhibit 3.)

Applicant states that his marijuana use ended because he has received family counseling. He is now able to sleep because of the family counseling. (Government Exhibit 4.) Applicant has never sold, manufactured, supplied, or grown any illegal drug including marijuana.

Applicant is proud to have held a security clearance for over twenty years, and is now hoping to be found eligible for a public trust position.

Policies

Positions designated as ADP I, II, and III are classified as “sensitive positions.” The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to the DoD and DOHA by the Defense Security Service and Office of Personnel Management. DoD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access to determination may be made.

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines 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. 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.

Directive ¶ E3.1.14, requires the Government to present evidence that establishes 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 applies for access to sensitive information seeks to enter 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 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 information.

Section 7 of EO 10865 provides that adverse 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 concern relating to the guideline for Drug Involvement and Substance Misuse is set forth at 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.

The guideline at AG ¶ 25 contains three conditions that could raise a security concern and may be disqualifying:

- (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.

The guideline at AG ¶ 26 contains conditions that could mitigate security concerns. None of the conditions are applicable:

- (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.

None of the mitigating factors are applicable. Applicant used marijuana for at least a ten-year period, from 2009 to about April 2019, at times, while possessing a security clearance. His actions are not mitigated. Applicant states that he is no longer using marijuana.

Guideline E- Personal Conduct

The security concern 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. One is potentially applicable in this case:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a while-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. This includes, but is not limited to, consideration of;

- (2) any disruptive, violent or other inappropriate behavior; and
- (3) a pattern of dishonesty or rule violations.

The guideline at AG ¶ 17 contains conditions that could mitigate security concerns. One of the conditions is potentially applicable:

(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.

Applicant used marijuana for many years, and while possessing a security clearance. The use of marijuana is in violation of Federal law. It is also against DoD policies. Applicant is prohibited from using marijuana while holding a public trust position. His conduct shows poor judgment, unreliability and untrustworthiness.

Considered in totality, Applicant's conduct precludes a finding of good judgment, reliability, and/or the ability to abide by rules and regulations. To be entrusted with the privilege of holding a public trust position, applicants are expected to abide by all laws, regulations and policies that apply to them. Applicant has chosen to live his life to his convenience, and has disregarded the law. Knowing that the use of marijuana is illegal, Applicant has disregarded the law and used it anyway. Applicant has engaged in conduct involving questionable judgment. Under the particular facts of this case, Applicant does not show the requisite character or judgment of someone who has the maturity, integrity, and reliability necessary to access classified information. At this time, Applicant does not meet the qualifications for a position of trust.

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 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 facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis. An individual who holds a public trust position is expected to comply with the law at all times. Applicant has not demonstrated the level of maturity needed for access to sensitive information. Applicant served in the military and held a security clearance during that time. He understands the requirements associated with holding a position of trust and knows that illegal drug use

is not tolerated. Applicant is not an individual in whom the Government can be confident to know that he will always follow rules and regulations and do the right thing, even when no one is looking. In this case, Applicant is not subject to random drug tests and so no one knows when he has marijuana in his system. This is dangerous and unacceptable. Applicant does not meet the qualifications for a public trust position.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant failed to mitigate the Drug Involvement and Substance Misuse, and Personal Conduct security concerns.

Formal Findings

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

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a	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 interest to grant Applicant national security eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Darlene Lokey Anderson
Administrative Judge