



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



In the matter of:)
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Applicant for Public Trust Position)

ADP Case No. 21-00433

Appearances

For Government: Brian Farrell, Esq., Department Counsel
For Applicant: *Pro se*

10/05/2022

Decision

DAM, Shari, Administrative Judge:

Applicant failed to mitigate the trustworthiness concerns raised under the drug involvement and substance misuse, personal conduct, and financial considerations guidelines. Eligibility for a public trust position is denied.

Statement of the Case

On March 26, 2020, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP). On December 17, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H (Drug Involvement and Substance Misuse), Guideline E (Personal Conduct, and Guideline F (Financial Considerations). On January 7, 2022, Applicant answered the SOR and requested a hearing (Answer).

On June 21, 2022, the case was assigned to me. On June 24, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing, setting the case for July 14, 2022. The hearing was held as scheduled. During the hearing, Department Counsel offered Government Exhibits (GE) 1 through GE 6 into evidence. Applicant testified and offered Applicant Exhibits (AE) A through AE K into evidence. All exhibits were admitted. I received the transcript of the hearing (Tr.) on August 2, 2022. The record

remained open until August 5, 2022, to give Applicant an opportunity to submit additional documents. He did not provide any additional exhibits.

Motion to Amend the SOR

At the conclusion of the hearing, Department Counsel moved to amend Paragraph 1.a of the SOR to conform with the evidence and based on Applicant's testimony. The amended paragraph reads as follows:

1.a. You used marijuana with varying frequency from about January 2019 to July 2022, while granted access to classified information, and you intend to continue use.

Applicant understood the motion and did not object. The motion was granted. (Tr. 55-56)

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations contained in SOR ¶¶ 1.a 1. b, 2.a, and 2.c. He denied the allegations in SOR ¶¶ 2.b, and 3.a through 3.f. His admissions are accepted as findings of fact.

Applicant is 27 years old. He graduated from high school in 2013. He served on active duty in the Army from June 2013 to March 2018, at which time he received an honorable discharge. He held a security clearance while serving. He has been married since 2017. He and his wife have one child. (GE 1) Between 2019 and 2020, he took online courses in information technology (IT). He is currently enrolled in college and pursuing a bachelor's degree in IT. He anticipates graduating in 2023. (Tr. 22-24)

After his discharge from the Army in March 2018, Applicant worked for a federal contractor for two months and then for a trucking company for six months. In December 2018, he started a position with the Army as an operating room nursing assistant. He worked there until October 25, 2019, when he was fired during his probationary period for testing positive for marijuana. He held a security clearance at the time he was fired. He then became self-employed as a driver for restaurants until he secured a position with another federal contractor. (Tr. 16; GE 1 at 33-34)

In March 2020, Applicant submitted an e-QIP, requesting eligibility to hold a sensitive position. In April 2020, Applicant started employment with another federal contractor for which he needs eligibility to occupy a position of public trust.

Drug Involvement and Substance Abuse

In his March 26, 2020 e-QIP, Applicant disclosed the following information:

(1) Under Section 13A - Employment Activities, he disclosed that in October 2019 he was fired from the Army for "Probationary Termination." (GE 1 at 15)

(2) Under Section 23 – Illegal Use of Drugs or Drug Activity, he disclosed that within the past seven years he illegally used drugs. He reported that he used “Recreational and Medication CBD W/THC below the Threshold” from “January 2019 to June 2019 (Estimated).” (GE 1 at 31) He stated that he used it while visiting another state. He noted that he used it to alleviate pain. He disclosed that he used it while possessing a security clearance and that he did not intend to use it in the future. (GE 1 at 31, 32)

(3) Section 23 – Illegal Use of Drugs or Drug Activity, While Possessing a Security Clearance, inquired: “Have you ever illegally used or otherwise been illegally involved with a drug or controlled substance while possessing a security clearance other than previously listed,” Applicant answered “no.” (GE 1 at 32)

In May 2020, a government investigator interviewed Applicant about his illegal drug use and other background issues. Applicant discussed using marijuana while employed at the Army hospital. He told the investigator that in September 2019, he tested positive for marijuana while employed with the Army, which resulted in his termination. Applicant stated that after his supervisor notified him of his positive drug test, he was placed on administrative leave and terminated on October 25, 2019. He showed the investigator the termination notice. (GE 2 at 3)

Applicant told the investigator that he used marijuana about eight times and cannabidiol, a chemical found in marijuana (CBD), twice. He used CBD oil for insomnia and migraines. He did not have a medical marijuana card. He purchased marijuana from a stranger. He acknowledged that his use of marijuana and CBD was the reason for his termination. He said he did not intend to use it in the future. (GE 2 at 5)

Subsequent to his interview, the Government sent Applicant Interrogatories, which incorporated the report of his May 2020 interview and asked him to verify the accuracy of the information in that report. Applicant confirmed that the information was accurate. In addition, the Government asked him to complete Interrogatories which asked the following question: “In your interview, you disclosed that you used marijuana between January 2019 and August 2019. Have you used marijuana since then?” Applicant answered “no.” (GE 2 at 10) In response to two other questions, he reported that he did not intend to use marijuana in the future and that he no longer associates with the people with whom he used it. (*Id.*)

Applicant testified that he knew as a surgical assistant and as a federal employee holding a security clearance, he was prohibited from using marijuana or any illegal substance. He understood the adverse consequences of buying and using marijuana while employed in his position. He started using it because he witnessed gruesome trauma surgeries, which caused him serious emotional distress that he chose to manage with marijuana. (Tr. 25-33; GE 2 at 5) He said that he used marijuana for recreational purposes and CBD oil for medical purposes. (Tr. 33)

Applicant was diagnosed with post-traumatic stress syndrome (PTSD) in March 2018, prior to his discharge from the Army. He continues to suffer from it. After being diagnosed with PTSD, he began participating in therapy once a week for about two

months with a psychologist at the Veterans Affairs (VA) hospital. He has continued to participate in some form of treatment over the past four years. His therapist recommended that he not use marijuana. He has never been referred to a psychiatrist for medication, although he said he has requested it. He has continued to use marijuana monthly since 2019. He used it a week before this hearing and intends to continue using it. (Tr. 35-41, 54; GE 2)

Personal Conduct

Applicant admitted that he was fired from his employment at the Department of the Army in about October 2019 for testing positive for marijuana, and was not eligible for rehire, as alleged in SOR ¶ 2.a. (Answer)

Applicant denied the allegation in SOR ¶ 2.b, which alleged he deliberately failed to disclose in Section 23 – Illegal Use of Drug Activity of his March 2020 e-QIP the information set forth in SOR ¶ 1.a: He used marijuana with varying frequency, from about January 2019 to about August 2019, while granted access to classified information. He stated that he disclosed his illegal drug use under Section 23 in his e-QIP. In addition, Applicant asserted that he gave all of the information surrounding his drug use and termination to the investigator during his May 2020 interview. (Answer)

Applicant admitted the allegation in SOR ¶ 2.c that alleged he intentionally failed to disclose under Section 23 – Illegal Use of Drug Activity, While Possessing a Security Clearance, that he illegally used a drug while possessing a security clearance. Applicant admitted that he did not disclose the information under this heading because he disclosed it in the previous paragraph in Section 23. (Answer)

Financial Considerations

Based on credit bureau reports from October 2018, May 2020, April 2021, and February 2022, the SOR alleged six delinquent debts, which became delinquent between 2017 and 2021. (GE 3, 4, 5, and 6) They total \$12,154. In his Answer to the SOR, he denied owing all six debts because his mortgage company required him to resolve all of his delinquent debts before applying for a mortgage to purchase a home. (Answer) The status of each debt is as follows:

(3.a) Applicant said that this charged-off credit card debt for \$12,044 was settled for less and paid after the creditor obtained a judgment and then a lien. He said the account became delinquent before he started working for the Army because he could not afford to pay it. He said he settled it prior to May 24, 2021, the day he closed on a home. (Tr. 41-45; AE G) He agreed to submit proof of the settlement and payment, but did not do so. It is not resolved.

(3.b) Applicant said the charged-off \$3,137 motorcycle loan was a personal loan he obtained in 2016. He settled the debt and paid it. He thinks he received a Cancellation of Debt document from the creditor in the amount of the loan. (Tr. 46-49) He agreed to submit documents verifying that it was resolved, but did not do so. It is not resolved.

(3.c) Applicant negotiated a settlement of \$1,600 for the \$2,805 collection account owed to LVNV. He paid the debt in February 2021. (Tr. 49-50; AE F, AE J) It is resolved.

(3.d) The \$1,273 collections account owed to LVNV for a mattress was paid and settled for \$1,018 after the creditor sued Applicant. (Tr. 50-51; AE K) It is resolved.

(3.e) The \$1,009 collections account is owed to an apartment complex for unpaid rent. Applicant said he paid it and would submit a receipt. (Tr. 52) He did not provide a receipt. It is not resolved.

(3.f) The \$886 collections account is owed to a jewelry store. Applicant said he resolved it and would provide proof of payment. (Tr. 53) He did not submit any documentation. The debt is not resolved.

Applicant stated that some of the above accounts began accumulating prior to 2018, when he started working for the Army hospital. He said that he was spending more money than he was earning. (Tr. 42) He began addressing his delinquent debts in 2021 because he wanted to repair his credit so he could purchase a house, which he did in May 2021. (Tr. 52) His income is now stable. He started receiving disability payments from the VA in September 2019. His initial disability rating was 90 per cent. In December 2019, the rating was raised to 100 percent. He receives \$4,000 each month, which is tax free. (AE D) In April 2020, Applicant started a position with a federal contractor as an infrastructure monitoring analyst. (Tr. 15-18)

As of December 15, 2021, Applicant had earned about \$55,800. (AE A) In January 2021, he completed a homeownership education course with Fannie Mae. (AE E)

Mitigation

While serving in the Army, he received two Army Achievement Medals, a National Defense Service Medal, and the Army Service Ribbon. He served in management positions and conducted service trainings for patient healthcare. (Tr. 20-21)

Policies

This national security eligibility action was taken DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), which became effective on June 8, 2017.

When evaluating an applicant's eligibility for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AGs. 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 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.

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 the applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline H: Drug Involvement and Substance Misuse

AG ¶ 24 describes the concerns related to 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.

AG ¶ 25 sets out four conditions that could raise trustworthiness concerns and may be disqualifying in this case:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant has a history of illegally possessing and using marijuana. He admitted that from January 2019 to July 14, 2022 (the date of this hearing), he illegally purchased and used marijuana. In September 2019, he tested positive for marijuana while employed by the Army. He intends to continue using it in the future. The evidence establishes the above disqualifying conditions.

AG ¶ 26 lists conditions that could mitigate trustworthiness concerns raised under this guideline: The following are potentially 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;

(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; 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.

There is insufficient evidence to establish any of the above mitigating conditions. Applicant has been illegally using and possessing marijuana since January 2019, over three years. He intends to continue using it. He does not believe he has a drug problem and has not taken steps to address the issue. He has not participated in a substance abuse treatment program or been evaluated by a mental health professional for substance abuse. His ongoing use of marijuana casts doubt on his judgment.

Guideline E: Personal Conduct

AG ¶ 15 explains the trustworthiness concerns relating to personal conduct:

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 following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

AG ¶ 16 describes two conditions that could raise a trustworthiness concern and may be disqualifying 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; 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.

SOR ¶ 2.a alleges that in October 2019, Applicant was fired from his employment with the Army for testing positive for marijuana and not being eligible for rehire. The evidence establishes a disqualifying condition under AG ¶ 16 (e)(1) because he engaged in personal misconduct which could affect his professional standing, if known by other employers or professionals.

The Government alleged in SOR ¶¶ 2.b and 2.c that Applicant deliberately failed to disclose his purchase and use of marijuana, an illegal drug, from January 2019 to about August 2019, while having been granted access classified information. After reviewing his March 2020 e-QIP, his May 2020 interview, and 2020 Interrogatories, I do not find that he deliberately withheld requested information from the Government about his drug purchase and use, frequency of his use, and the fact that he had had been granted access to classified information during that time frame. To the contrary, he disclosed his termination from his Army position under Section 13A. Under Section 23 of his e-QIP, he disclosed his use of marijuana, and that he possessed a security clearance at the time he used it. He disclosed this information in the initial paragraph of Section 23, and not under the heading "While Possessing a Security Clearance," three paragraphs down. His disclosures in the e-QIP sufficiently notified the Government of his illegal drug use, such that I do not find that he deliberately attempted to withhold information from the Government. In his interview, he forthrightly discussed his positive drug test and

subsequent termination. He also admitted the misconduct in his 2020 Interrogatories. The allegations in SOR ¶¶ 2.b and 2.c are refuted.

AG ¶ 17 provides conditions that could mitigate the trustworthiness concern raised in SOR ¶ 2.a. Two are potentially applicable:

(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.

The evidence does not establish the above mitigating conditions. Applicant's termination in October 2019 for testing positive for marijuana while working for the Army and having been granted access to classified information was not a minor offense. Applicant candidly acknowledged his past use of marijuana. He clearly stated that he does not intend to stop using marijuana and has taken no actions to do so. Based on his stated intention, he may continue to associate with people who are involved in criminal activities, such as selling illegal drugs. He failed to mitigate the allegation in SOR ¶ 3.a.

Guideline F: Financial Considerations

The trustworthiness concerns relating to the guideline for financial considerations are set out in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

The guideline lists conditions that could raise trustworthiness concerns under AG ¶ 19. The following two are potentially applicable in this case:

- (a) inability to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant acknowledged that he was financially unable to satisfy debts that started to become delinquent in 2017. The evidence establishes both disqualifying conditions.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. Four are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control; and
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant stated that he was required to resolve all six delinquent debts before he could obtain a mortgage to purchase a home. He said he paid his debts prior to May 2021, so he could close on his house. However, he did not provide proof of resolution for four of the alleged debts, including the largest debt for \$12,000.

Applicant provided evidence that he paid and resolved the \$2,805 delinquent debt alleged in SOR ¶ 3.c, and the \$1,273 delinquent debt alleged in SOR ¶ 3.d. There is sufficient evidence to establish full mitigation under AG ¶ 20(a) and AG ¶ 20(d) as to these debts. There is insufficient evidence to establish mitigation under any of the mitigating conditions for the remaining four unresolved debts. Applicant admitted that his debts arose because he spent more money than he earned before he started working for the Army in late 2018, and that he did not start to resolve them until he decided to purchase a home in 2021. He did not submit evidence that his finances are under control, or that he has a payment plan for the debts alleged in SOR ¶¶ 3.a, 3.b, 3.e, and 3.f, and that he is making payments on those plans.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a public trust position 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 access to sensitive information must be an overall commonsense judgment based upon careful consideration of the guidelines.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is a 27-year-old veteran who honorably served in the Army. After leaving military service in March 2018, he was diagnosed with PTSD. He started working for an Army hospital in December 2018. He found his job as a surgical assistant to be difficult and stressful. Sometime in January 2019, he began purchasing and using marijuana while holding a security clearance. He continues to use marijuana and intends to use it in the future. He said that he uses it recreationally and for medical purposes. As a consequence of his history of using marijuana over the past three years, and his intention to continue using it, he has not mitigated the trustworthiness concerns under the guidelines for drug involvement and substance misuse, and personal conduct. In addition, he failed to mitigate the financial considerations because he did not provide evidence that he resolved four delinquent debts, which he asserted he paid.

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:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant

Subparagraph 2.c:	For Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraphs 3.a and 3.b:	Against Applicant
Subparagraphs 3.c and 3.d:	For Applicant
Subparagraphs 3.e and 3.f:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a position of trust.

Shari Dam
Administrative Judge