



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



In the matter of:)
)
) ADP Case No. 21-00935
)
Applicant for Public Trust Position)

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: Douglas Hiatt, Esq.

03/03/2023

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant did not mitigate the Guideline H (drug involvement and substance misuse) and Guideline E (personal conduct) while granted access to classified information security concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On August 16, 2021, the Defense Counterintelligence and Security Agency (DCSA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H and E. This action was taken under Executive Order (EO) 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 implemented by the DOD on June 8, 2017.

On October 10, 2021, Applicant responded to the SOR (Answer) and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals

(DOHA). He admitted all of the allegations, and he did not attach any documentary evidence to his Answer.

On November 18, 2021, the Government indicated that it was prepared to proceed with Applicant's hearing. I was assigned this case on December 2, 2021. I initiated contact with Applicant on January 6, 2022, and he indicated he was represented by counsel; however, due to COVID-related issues, Applicant's counsel was unable to enter his appearance until January 25, 2022. DOHA issued a notice on March 25, 2022, for a hearing set for April 12, 2022. Prior to the scheduled hearing date, Applicant's counsel requested and received a continuance for health reasons. An amended notice of hearing was sent on April 1, 2022, scheduling the hearing for April 26, 2022. The hearing proceeded as rescheduled via online video-teleconferencing.

I marked Department Counsel's November 19, 2021 amendment to the SOR as Hearing Exhibit (HE) I; the March 16, 2022 case management order as HE II; Department Counsel's exhibit list as HE III; Department Counsel's November 23, 2021 discovery letter as HE IV; and Applicant's exhibit list as HE V. Government Exhibits (GE) 1 through 4 were admitted without objection. Applicant Exhibits (AE) A through D were admitted without objection, Applicant and one expert witness testified. The record was held open until May 4, 2022, to allow Department Counsel an opportunity to respond to the brief submitted by Applicant (AE D). Applicant was afforded until May 9, 2022, to respond to Department Counsel's post-hearing submission, and Department Counsel was given until May 12, 2022, to issue a final response. I received the complete transcript (Tr.) on May 5, 2022. Department Counsel timely submitted a brief in response to Applicant's brief (AE D), that I marked as GE 5 and admitted without objection. Applicant timely submitted documents which I marked as AE F to H and admitted without objection. Department Counsel did not submit a response to Applicant's post-hearing documentation, and the record closed on May 27, 2022.

Amendment to the SOR

Prior to the hearing, Department Counsel moved to amend the SOR, pursuant to ¶ E.3.1.13 of DoD Directive 5220.6, in the following manner:

1. Amend the caption to strike "Applicant for Security Clearance" and replace with "Applicant for Public Trust Position;"
2. Amend the caption to strike "ISCR Case No. 21-00932" and replace with "ADP Case No. 21-00935;"
3. Strike and replace the opening with:

"A review of your eligibility to occupy an automated data processing (ADP) position designated ADP-I/II/III to support a Department of Defense (DoD) contract has been made pursuant to DoD Directive 5220.6, dated, January 2, 1992, (as amended). Because this office is unable to conclude that you are eligible to occupy such a position, your case will be submitted to an

Administrative Judge for a determination as to whether or not to grant, deny, or revoke your eligibility. This determination is based on the following reasons.”

At the hearing, Department Counsel moved to amend the SOR, to amend SOR ¶ 1.b to state:

“b. You used marijuana after being granted access to classified information or holding a sensitive position.”

Applicant did not object to the amendments of the SOR allegations, and I granted the motions. (HE I; Tr. 12-13, 138-139)

Findings of Fact

Applicant is 42 years old. He was previously married from July 2012 until January 2017 and has no children. He has attended some college courses but has not earned a degree. Since approximately November 2016, he has been employed full time as a migration engineer for a DOD contractor. (Tr. 23-25, 105-106; GE 1)

At the hearing, Applicant admitted he ingests marijuana using a vape device on an almost daily basis, and he used it the night before the hearing. He uses marijuana because it helps him tolerate food, and he uses it as a sleep aid. He intends to continue to use marijuana in this manner and with this frequency, notwithstanding its impact on his clearance eligibility. He has not disclosed his marijuana use to anyone other than his physicians and his father. Additionally, no one at his company is aware of his past or ongoing use of marijuana. He first used marijuana recreationally in 2005. He did not use it between 2005 and 2012. In approximately 2012, he obtained a medical marijuana card/marijuana prescription after his hip surgeries and his gastroparesis diagnosis. His medical marijuana card expired in 2013, and he never renewed it. (Tr. 78, 81-84, 94-104, 108-111, 118, 121, 124-125; GE 1)

In January 2017, Applicant certified and submitted his first Electronic Questionnaire for Investigations Processing (e-QIP). Under Section 23, he responded “NO” to the following query, “In the last seven (7) years, have you illegally used any drugs or controlled substances?” (Tr. 106-107; GE 2)

In July 2018, Applicant certified and submitted a Standard Form (SF) 85P for Public Trust Positions. Under question 10, he responded “NO” to the following query, “In the last seven (7) years, have you illegally used any drugs or controlled substances?” The SOR did not allege that Applicant falsified this document, and his response will not be considered disqualifying conduct. (Tr. 107-108; GE 3)

In June 2020, Applicant completed a second e-QIP, and under Section 23, he disclosed that between June 2005 and June 2020, he had used “THC, (Such as marijuana, weed, pot, hashish, etc.” His use was related to treating conditions and symptoms for a medical condition. Additionally, he stated, “There are virtually no medications that help with the symptoms I experience. I have an extensive medical record

trying existing medications, I have made many changes [to] my diet and continue to work with my medical doctor to improve my condition so that I many discontinue use.” (GE 1)

Applicant was interviewed by a government investigator in August 2020. He confirmed that the information he disclosed in his 2020 e-QIP regarding his drug was accurate. Additionally, he stated that he intended to continue to use marijuana to alleviate the symptoms of his medical condition. He claimed he obtained marijuana through a prescription from his physician. (GE 4)

In Applicant’s Answer, he admitted to deliberately omitting or falsifying information about his illegal drug use on his January 2017 e-QIP but provided no explanation. However, at the hearing, he testified that he did not disclose his marijuana use in his 2017 e-QIP and 2018 SF 85P, because he considered his use of marijuana to be legal under applicable state laws, and he was not intentionally trying to hide it. He disclosed marijuana use in his 2020 e-QIP, because he was under the impression, at that time, that because he was required to sign a medical release form through his employer, his company was going to be able to review his medical records and would learn that he was using medical marijuana. (Tr. 76-81, 108-110; GE 1-3)

After the SOR was issued, Applicant did not approach his physicians for legal medical alternatives for his illegal marijuana use. When questioned at the hearing regarding his company’s policy regarding drug use, he responded, “I can’t think of what it is, recite it off the top of my head, but I’m pretty sure that they don’t want you [to] do any illegal drugs.” When asked to clarify if his company considers marijuana to be an illegal drug, he responded, “I’m not sure if they do or not.” He did not ask for clarification, because it is his medical information. He is not subject to drug testing at work. (Tr. 111-112, 120)

Applicant testified that he is aware that marijuana use is illegal under federal law, and the following dialogue at the hearing indicates he is fully aware that his use of marijuana is prohibited by DOD regulations for individuals holding public trust positions.

Applicant’s Attorney: Have you ever used marijuana with anybody at work?

Applicant: No.

Applicant’s Attorney: Has it ever come up as a topic any time, anywhere for any reason?

Applicant: Absolutely not, Jesus Christ.

Applicant’s Attorney: Okay

Applicant: I like having my job.

Applicant’s Counsel: [Y]ou felt it was appropriate and go ahead and disclose your medical use?

Applicant: I didn't think I had much of a choice. (Tr. 78-79)

At the hearing, an expert witness (EW) testified regarding the use of cannabis medicine or medical marijuana. He is a physician, specializing in palliative care and rehabilitative medicine, and he has a Doctor of Philosophy (PhD) in medical geography. According to EW, marijuana use should be decriminalized, and it should no longer be a Schedule I drug, despite its federal classification, as it has medicinal benefits. Medical marijuana was legalized in Applicant's state of residence in 1999, and its recreational use was legalized in 2012. (Tr. 29-70; AE A; AE B)

EW does not treat Applicant, nor has Applicant ever been his patient. EW conducted a "mostly" remote telephonic 73-minute examination of Applicant, a couple of follow-up calls, and reviewed Applicant's medical record from August 2015 and his prescription history detailed in AE C. Based upon these data points, WE concluded that Applicant has a "diagnosable condition that could and would potentially benefit from medical cannabis use" to wit, gastroparesis, as there are limited prescriptions available to treat this affliction, and Applicant has not tolerated them well. WE testified that he does not believe that Applicant's use of medical marijuana affects his trustworthiness. (Tr. 30-70; AE A-C)

Applicant presented briefs regarding the historical laws criminalizing the use of marijuana; the medical use of marijuana; the legalization of marijuana by various states; the medical necessity defense; marijuana's status as a Schedule I drug; and three Attorney General memos from 2009 to 2013 regarding the enforcement of the Controlled Substances Act concerning marijuana. (AE D-H; See also GE 5)

Applicant does not feel that his marijuana use affects his ability to be trustworthy or his job performance, which has been "usually above satisfactory." He is currently managing "an entire group" which consists of approximately 27 workers. He enjoys his job and wants to continue to work for his company. (Tr. 73, 87-94)

Policies

This case is adjudicated under Executive Order (EO) 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), which became effective on June 8, 2017.

Positions designated as ADP I/II/III are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will

apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

Also, SEAD 4 “establishes the single, common adjudicative criteria for all covered individuals who require initial or continued access to classified information or eligibility to hold a sensitive position.” SEAD 4 at ¶ B. [And see also ¶ D.8 and E.1 for similar language]

When evaluating an Applicant’s suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the Administrative Guidelines (AG) ¶ 2 (a). 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(c), 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 access to [sensitive] information will be resolved in favor of 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 as to obtaining a favorable trustworthiness decision.

A person who seeks access to sensitive 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 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

The security concern for drug involvement is set out 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.

Marijuana is a Schedule I controlled substance under federal law pursuant to Title 21, Section 812 of the United States Code. Schedule I drugs are those which have a high potential for abuse; have no currently accepted medical use in treatment in the United States; and lack accepted safety for use of the drug under medical supervision. Section 844 under Title 21 of the United States Code makes it unlawful for any person to knowingly or intentionally possess a controlled substance not obtained pursuant to a valid prescription.

On October 25, 2014, the then Director of National Intelligence (DNI) issued guidance that changes to laws by some states and the District of Columbia to legalize or decriminalize the recreational use of marijuana do not alter existing federal law or the National Security Adjudicative Guidelines, and that an individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security eligibility determinations.

Moreover, on December 21, 2021, the current DNI issued clarifying guidance concerning marijuana, noting that prior recreational use of marijuana by an individual may be relevant to security adjudications, but is not determinative in the whole-person evaluation. Relevant factors in mitigation include the frequency of use and whether the individual can demonstrate that future use is unlikely to recur.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (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;

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

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

Applicant illegally used and possessed marijuana on many occasions between 2005 and August 2020. He has used marijuana on numerous occasions since holding a position of trust in 2017, and he repeatedly expressed his intent to continue to use marijuana. AG ¶¶ 25(a), 25(c), 25(f), and 25(g) apply.

Conditions that could mitigate the drug involvement security concerns are provided under AG ¶ 26. 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; 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.

Applicant repeatedly expressed his intent to continue to use marijuana, with the full knowledge that his use of marijuana violates federal laws and DOD regulations for public trust holders. He appears to understand the gravity of his decision and its impact on his public trust position eligibility. Applicant did not mitigate the drug involvement and substance misuse concerns arising from his past and continued marijuana use, including while holding a public trust position.

Guideline E: Personal Conduct

The concern under this guideline 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. The following disqualifying condition applies 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.

On Applicant's January 2017 e-QIP, he omitted his illegal use of marijuana. He reported this illegal drug use on his June 2020 e-QIP and affirmed these admissions during his August 2020 interview. He admitted his falsifications in his Answer, but denied falsifying his e-QIP at the hearing. Based upon the totality of the evidence, including his continued concealment of his marijuana use; his fear of losing his job; and the basis for his 2020 disclosure (he thought his use would be revealed in a review of his medical records); I find that Applicant's omission was deliberate, and he falsified his 2017 e-QIP. AG ¶ 16(a) applies.

The following personal conduct mitigating conditions under AG ¶ 17 are potentially relevant:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.

Applicant's falsification on his January 2017 e-QIP raises serious concerns about his judgment, reliability, and trustworthiness. He failed to disclose his illegal marijuana use in his July 2018 SF 85P as well. He testified that he disclosed his drug use in his 2020 e-QIP, because he believed his company would discover his use when it reviewed his medical records. Although he continued to volunteer information regarding his drug use in his August 2020 interview and at the hearing, his failure to take responsibility for falsifying his 2017 e-QIP and 2018 SF 85P at the hearing, after admitting to falsifying his 2017 e-QIP in his Answer, leaves me with ongoing concerns as to his credibility and forthrightness; therefore, he does not receive full mitigation credit in the context of AG ¶ 17(a). Applicant did not sufficiently mitigate the personal conduct security concerns arising from his e-QIP falsification.

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 the 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 public trust position 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 the facts and circumstances surrounding this case, including Applicant's significant and debilitating medical condition.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a public trust position. He has used marijuana daily for the past ten years, over four of which while holding a public trust position, and he intends to continue to illegally use marijuana. For all these reasons, I conclude Applicant did not mitigate the trustworthiness concerns arising from his past and current use of marijuana and his failure to be honest and forthcoming about this use.

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 E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, I conclude that it is not clearly consistent with national security to continue Applicant's eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Caroline E. Heintzelman
Administrative Judge