



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 22-00392

Appearances

For Government:

Andrew Henderson, Esquire, Department Counsel

For Applicant:

Joseph M. Wager, Esquire
McConnell Wagner Sykes & Stacey, PLLC

April 20, 2023

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted his most recent Electronic Questionnaires for Investigations Processing (e-QIP) on March 8, 2021. (Government Exhibit 1.) On May 11, 2022, 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 June 1, 2022, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on July 7, 2022. The case was assigned to me on July 18, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on August 4, 2022. I convened the hearing as scheduled on September 7, 2022. The Government offered Government Exhibits 1 and 2, which were admitted without objection. Applicant testified on his own behalf and submitted Applicant Exhibits A through K. Applicant's exhibits were admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 16, 2022.

Findings of Fact

Applicant is a 37-year-old Pre-Sales Solution Architect with a defense contractor. He has worked for the company since 2015. He is recently married. Applicant has received a bachelor of science degree and a master's degree. He is seeking to retain a security clearance granted in approximately 2011 in connection with his work with the DoD. (Government Exhibit 1 at Sections 12, 13A, 17, and 25; Tr. 43-45, 52.)

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 allegation 1.a under this paragraph with explanations. He denied 1.b.

Applicant began using marijuana in edible form sometime between April 2017 and mid-2018. (Tr. 17-20.)

He stated in his e-QIP of March 8, 2021:

Shortly after [State A] legalized recreational marijuana I tried it. I was always scared of illegal drugs. I have experimented with it numerous times while in states where it has been legalized. I typically take edibles that are created for specific uses to support better sleep, creative thinking, stress relief and social anxiety. (Government Exhibit 1 at Section 23.)

Concerning his statements on the questionnaire Applicant testified, "I wanted to be truthful, and frank and open and honest. All of those things in this Questionnaire. I felt the most important thing was honesty." (Tr. 19.)

Applicant would use marijuana about once or twice a week until August 2018. At that time, he moved to State B, where it was still illegal to purchase or use marijuana

under state law. Applicant abstained from any marijuana use during the period he lived in State B. Instead of marijuana he used legal supplements to help him sleep. (Government Exhibit 1 at Section 11; Government Exhibit 2 at 4, 8-9; Tr. 20-21.)

Applicant returned to State A in November 2020. He once again purchased marijuana in pill form from state-approved stores and used it two to three times a week until approximately June 2021, when he stopped all marijuana use. Altogether Applicant used marijuana in pill or edible form about 50 times. Applicant has abstained from any marijuana use since that time and evinced a credible intent not to use marijuana in the future. He has returned to using legal supplements as a sleep aid and finds them effective. (Tr. 18-22, 26-29, 49-51.)

As stated, Applicant received a security clearance in 2011. That clearance was active during the time Applicant was using marijuana. (Government Exhibit 1 at Section 25; Applicant Exhibit A; Tr. 43-45.)

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 denied the single allegation under this paragraph because he felt it was too vague.

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.

Mitigation

Applicant is viewed as a solid performer by his employer. He has repeatedly received recognition for his job performance. Applicant is respected by his coworkers and supervisors. (Applicant Exhibits B, D, E, F, G, H, I, J, and K; Tr. 33-36, 38-40.)

Applicant has been singled out to be part of a special program by his employer. This program is limited to a small percentage of people throughout the company. (Applicant Exhibit C; Tr. 36-37.)

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.

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 for several months from approximately mid-to-late 2017 to August 2018, and again from November 2020 to June 2021. During that period, he used marijuana in pill or other edible form about 50 times. Applicant purchased marijuana from state-approved stores. He was employed in the defense industry and held a security clearance during that entire period of time. All three 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; 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.

In my analysis, I have taken administrative notice of the Security Executive Agent (SecEA) "Clarifying Guidance Concerning Marijuana for Individuals Eligible to Access Classified Information or Eligible to Hold a Sensitive Position," dated December 21, 2021. (Guidance.) In her Guidance, the SecEA noted the increased number of states that have legalized or decriminalized the use of marijuana (including State A) and sought to "provide clarifying guidance." She reaffirmed SecEA's 2014 memorandum regarding the importance of compliance with Federal law on the illegality of the use of marijuana by holders of security clearances. She provided further clarification of Federal marijuana policy, writing that this policy remains relevant to security clearance adjudications "but [is] not determinative." She noted that the adjudicative guidelines provided various opportunities for a clearance applicant to mitigate security concerns raised by his or her past use of marijuana.

Applicant used marijuana in pill form about 50 times over several years. He only purchased and used it in State A, where such purchase and use are legal under state law. When he lived in State B he abstained from purchase or use, since marijuana use was illegal in that state. This conduct was in the past and he stated convincingly that it will not be repeated. Applicant thoroughly understands the consequences of any future drug use or exposure. Viewing his marijuana use in the context of the whole person, Applicant has mitigated the security significance of his past drug involvement. 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. One is potentially applicable in this case:

(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.

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 is in the past, and he evinces a credible intent not to use marijuana in the future. He has mitigated any concern under subparagraph 2.a. Accordingly, 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 drug use. His forthright disclosures on his e-QIP, during an interview with an OPM investigator, and at his hearing 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 any 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:

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| Paragraph 1, Guideline H: | FOR APPLICANT |
| Subparagraphs 1.a and 1.b: | For Applicant |
| Paragraph 2, Guideline E: | FOR APPLICANT |
| Subparagraph 2.a: | 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