



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



In the matter of:)	
)	
[NAME REDACTED])	ADP Case No. 23-00433
)	
Applicant for Public Trust Position)	

Appearances

For Government: A.H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

09/29/2023

Decision

MALONE, Matthew E., Administrative Judge:

Applicant did not mitigate the concerns raised by his extensive history of involvement with illegal drugs and by his deliberate omissions of information about that conduct from his security clearance application. His request for eligibility for a position of public trust is denied.

Statement of the Case

On August 25, 2022, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain or renew eligibility for an ADP I/II/III position for his employment with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators at the Defense Counterintelligence and Security Agency Consolidated Adjudications Services (DCSA CAS) were unable to determine that it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust, as required by Security Executive Agent Directive (SEAD) 4, Section E.4, and by DOD Directive 5220.6, as amended (Directive), Section 4.2.

On March 23, 2023, the DCSA CAS issued to Applicant a Statement of Reasons (SOR) presenting allegations of fact that raise trustworthiness concerns under the adjudicative guidelines (AG) for drug involvement and substance misuse (Guideline H) and personal conduct (Guideline E). The adjudicative guidelines applied in this matter were issued by the Director of National Intelligence on December 10, 2016, to be effective for all adjudications on or after June 8, 2017.

On March 27, 2023, Applicant responded to the SOR (Answer) and requested a decision without a hearing. On May 11, 2023, as provided for by paragraph E3.1.7 of the Directive, Department Counsel for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a File of Relevant Material (FORM). The FORM contains four exhibits (Items 1 – 4) on which the Government relies to support the factual allegations in the SOR. Applicant received the FORM on May 22, 2023, and was informed he had 30 days from the date of receipt to object to the use of the information included in the FORM and to submit additional information in response to the FORM. He did not submit any additional information and he did not raise any objections to any of the Government's exhibits. The record closed on June 21, 2023, and I received the case for decision on September 13, 2023.

Findings of Fact

Under Guideline H, the Government alleged that Applicant used marijuana between 1991 and at least February 2023 (SOR 1.a); that between 2015 and 2022, he purchased marijuana (SOR 1.b); that in October 2010, he used Vicodin without a prescription (SOR 1.c); and that in 1994, and between 2000 and 2007, he used methamphetamine (SOR 1.f).

It is further alleged that in December 1994, he was arrested and charged with the sale or transportation of a controlled substance and possession of methamphetamine (SOR 1.j); that from 1993 to 1996, he sold cocaine (SOR 1.i); that in 1998, he was arrested and charged with possession of a controlled substance for sale (SOR 1.h); that in 2007, he was arrested and charged with possession of a controlled substance and being under the influence of a controlled substance (SOR 1.g); and that in 2010, he was arrested and charged with possession of a narcotic controlled substance (SOR 1.d). Finally, it was alleged that in 2009, he was ordered to undergo treatment for his drug use, which he failed to successfully complete (SOR 1.e). (FORM, Item 1)

Under Guideline E, the Government cross-alleged the Guideline H allegations (SOR 2.a). It also was alleged that Applicant intentionally made false official statements in response to questions in Section 22 (Police Record – EVER) of his August 2022 e-QIP by failing to list the facts alleged in SOR 1.d, 1.g, 1.h, and 1.j (SOR 2.b). The SOR also alleged that Applicant intentionally made a false official statement in response to questions in Section 23 (Illegal Use of Drugs or Drug Activity) of his August 2022 e-QIP by failing to list the facts alleged in SOR 1.a (SOR 2.c). (FORM, Item 1)

In response to the SOR, Applicant admitted, without comment, each of the allegations. (Form, Item 1) All of the allegations are also supported by disclosures he

made in his e-QIP; by statements he made during a personal subject interview (PSI) on October 26 and 28, 2022; by a report of arrest information from the FBI's Criminal Justice Information Services Division; and by his responses to interrogatories from Department Counsel on March 15, 2023. (FORM, Items 2 – 4) After reviewing all of the available information, I make the following findings of fact.

Applicant is a 48-year-old employee of a company contracted with the federal government to perform duties in support of a military facility. He requires eligibility for a public trust position to access his work location. He is a high school graduate, has never married, and has one child, now age 21. (FORM, Items 2 and 3)

Applicant started using marijuana in 1991, when he was about 15 or 16 years old. At times, he smoked as many as five joints a day. He reduced and eventually ceased his marijuana use by September 2022, because he was trying to find work and knew he might have to undergo urinalysis testing. In 2015, he started buying marijuana from medical marijuana dispensaries in his home state, where personal possession and use of marijuana has been legalized. Although he claims his use of marijuana has never caused him personal or professional difficulties, in 2009, as alleged in SOR 1.e, a local child protective services agency (CPS) ordered him to undergo rehabilitative drug treatment after his then-8-year-old child made remarks about his drug use to someone at her school. Because he did not complete the treatment, his daughter was placed in foster care and eventually adopted. In his response to DOHA interrogatories on March 15, 2023, he disclosed that he had last used marijuana a total of five times on two days in February 2023, six months after he submitted his e-QIP. He also averred that he does not intend to use marijuana in the future. In his e-QIP, he did not list his failed drug treatment (as required by Section 23) because he 'did not want to relive it.' He did not list his use of marijuana (also as required by Section 23) because he does not believe marijuana use is a bad thing. (FORM, Items 2 and 3)

Sua sponte, I take administrative notice of the fact that marijuana is a Schedule I controlled substance, the use and possession of which is a criminal violation of federal law. Guidance issued by the Office of the Assistant Secretary of Defense (OASD) in February 2013 makes clear that changes in the laws pertaining to marijuana by the various states, territories, and the District of Columbia do not alter the current National Security Adjudicative Guidelines. Because federal law supersedes state laws on this issue, Applicant's use of marijuana, regardless of location or medical justification in his state of residence, is illegal. Further, illegal drug use is prohibited in all federal workplaces and on all military installations by civilian federal employees and by persons employed for work on federal contracts.

Between 1994 and 2009, Applicant used and sold other federally controlled substances. Specifically, he sold, but did not use, cocaine from 1993 to 1996. He used methamphetamine (crystal meth) in 1994 because a girl he liked used it. He also used crystal meth between 2000 and 2007, again because his girlfriend used it. He used it daily but decided to stop using it when he noticed it affected his thinking and gave him what he referred to as a "light brain." (FORM, Items 1 and 3)

Applicant was arrested in 1994 and charged with possession of crystal meth and with possession of a controlled substance for sale. In 1996, he was sentenced to three years' probation. During probation, he was required to undergo random urinalysis testing. Twice he tested positive for marijuana. After the second positive test, he was ordered to complete a drug rehabilitation program and his probation was restarted pending completion of the rehab program. He completed rehab in 1998 and probation in 1999. Applicant disclosed his arrest, rehab, and probation in his e-QIP. (FORM, Items 2 – 4)

SOR 1.h alleges Applicant also was arrested in 1998 and charged with possession of a controlled substance for sale. In his PSI, he stated he did not remember such an arrest and there is no information about a disposition of this charge. It is likely the entry in the FBI report is related to the 1996 conviction discussed above. SOR 1.h is resolved for Applicant. (FORM, Items 3 and 4)

Applicant was arrested in November 2007 and charged with possession, and being under the influence, of a controlled substance (crystal meth). During a search incident to a traffic stop, a plastic bag containing crystal meth residue was found in Applicant's pocket. He acknowledged he had used crystal meth earlier that day but had forgotten to get rid of the bag. He spent three days in jail before the charges were dismissed. He did not disclose this arrest because he viewed it as a minor event when compared to his 1994 arrest. (FORM, Items 2 – 4)

In October 2010, Applicant used a pain reliever – Vicodin – without a prescription. Use of Vicodin requires a prescription because it is an opiate-based medication. Applicant's niece gave him three Vicodin pills after he developed a migraine headache. He took one of the pills and kept the other two. Later in the day, a friend of his asked him if he had anything for a headache and Applicant traded one of the Vicodin pills for a single dose of Oxycontin, also a prescription pain reliever. On October 19, 2010, Applicant was stopped by police on suspicion of selling illegal drugs. A consensual search produced unprescribed Vicodin and Oxycontin in his possession. After a few days in jail, the charges were dismissed. Applicant did not disclose this arrest in his e-QIP because he forgot about it. (FORM, Items 2 – 4)

Policies

Eligibility for a position of public trust must be based on a determination that it is "clearly consistent with the interests of national security" to grant such access. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines. (See Directive, 6.3) Decisions must also reflect consideration of the factors listed in ¶ 2(d) of the guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to sensitive information or protected facilities. This decision is intended only to resolve whether it is clearly consistent with the national interest for an applicant to either receive or continue to have access to sensitive information. (Department of the Navy v. Egan, 484 U.S. 518 (1988))

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke an applicant's eligibility. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a position of public trust, an applicant bears a heavy burden of persuasion. (See Egan, 484 U.S. at 528, 531) A person who has access to sensitive or protected information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any unresolved doubt about an applicant's suitability for eligibility in favor of the Government. (See Egan; AG ¶ 2(b))

Analysis

Drug Involvement and Substance Misuse

Available information shows that Applicant has purchased, possessed, used, and sold controlled substances on multiple occasions since 1991. He also has been arrested and charged with drug-related offenses at least three times over the past 19 years. Although he claims he will not use marijuana in the future, his use since he was a teenager has been frequent and extensive, occurring most recently six months after he applied for a position of trust and while working at a military installation. On two occasions, he was ordered – first as a term of probation, then by CPS out of concern for the welfare of his minor child – to complete drug treatment. He twice tested positive for marijuana in the first instance and his probation was extended. In the second instance, he failed to complete the program and he lost custody of his daughter. This information reasonably raises a trustworthiness concern that is stated at AG ¶ 24 as follows:

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.

More specifically, available information requires application of the following AG ¶ 25 disqualifying conditions:

- (a) any drug abuse (see above definition);
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (e) failure to successfully complete a drug treatment program prescribed by a duly qualified medical or mental health professional; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

I also have considered the following pertinent mitigating conditions under AG ¶ 26:

- (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;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; 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.

The Government's information constitutes sufficient evidence to support the SOR allegations and raise trustworthiness concerns under this guideline. It thus fell to Applicant

to present information that warrants application of any pertinent mitigating conditions. In response, Applicant did not present information that would support any of the aforementioned mitigating conditions. His claim that he will no longer use marijuana is undermined by the fact that his last known use of marijuana occurred well after he applied for a position of trust, after he was interviewed about his drug involvement, and while he was working for the sponsor of his application. While Applicant's marijuana use may be legal under the laws of his state, it is still impermissible under federal controlled substances laws and DOD industrial security policy guidance. Applicant did not present any information in support of any of the pertinent AG ¶ 26 mitigating conditions, and he has not mitigated the trustworthiness concerns established by the Government's information.

Personal Conduct

The Government's information reasonably raises the trustworthiness concern stated at 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 following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

More specifically, available information requires consideration of the following AG ¶ 16 disqualifying conditions:

(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

(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.

As to AG ¶ 16(c), SOR 2.a cross-alleges the conduct addressed under Guideline H, at SOR 1.a – 1j. Because the Guideline H trustworthiness concerns are sufficient to disqualify Applicant from a position of trust, AG ¶ 16(c) does not apply and SOR 2.a is resolved for Applicant.

As to AG ¶ 16(a), Applicant omitted from his e-QIP his arrest for possession of Vicodin and Oxycontin in 2010, because he forgot about that event. However, he omitted his use of marijuana, because he does not regard the use of marijuana to be “a bad thing.” He omitted his failed drug treatment in 2009 because he did not want to relive it. He omitted his 2007 arrest for possession of crystal meth because he deemed it a minor event in comparison his 1994 arrest for possession and sale of a controlled substance. The foregoing is sufficient to show that Applicant made conscious decisions to withhold from the government relevant, adverse information that would be material to an accurate assessment of his trustworthiness. AG ¶ 16(a) applies.

I also considered the following pertinent AG ¶ 17 mitigating conditions:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

The Government’s information constitutes sufficient evidence to support SOR 2.b and 2.c, and raises trustworthiness concerns under this guideline. Again, it fell to Applicant to present information sufficient to support application of any pertinent mitigating conditions. He did not present any such information and has not mitigated the concerns about his trustworthiness that have been raised by his deliberate falsifications.

In addition to my evaluation of the facts and application of the appropriate adjudicative factors under Guidelines H and E, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Significant doubts about his suitability for a position of public trust remain because of his extensive involvement with illegal drugs, and because of his willingness to falsify his answers to the government’s necessary and reasonable inquiries into his background. Because the protection of the national interest is the principal goal of these adjudications, those doubts must be resolved against the Applicant.

Formal Findings

Formal findings 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.g, 1.i – 1.j:	Against Applicant
Subparagraph 1.h:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraphs 2.b – 2.c:	Against Applicant

Conclusion

In light of all available information, it is not clearly consistent with the interests of national security for Applicant to have access to sensitive information. His request for eligibility for a public trust position is denied.

MATTHEW E. MALONE
Administrative Judge