



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



In the matter of:)
)
) ADP Case No. 23-00672
)
Applicant for Public Trust Position)

Appearances

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

11/21/2023

Decision

HALE, Charles C., Administrative Judge:

Applicant did not provide sufficient information to mitigate trustworthiness concerns raised under Guideline H (Drug Involvement and Substance Abuse). Eligibility for assignment to a public trust position is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on September 22, 2022, seeking eligibility for a public trust position. On June 6, 2023, the Department of Defense (DoD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DoD acted under DoD Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4 (SEAD 4), National Security Adjudicative Guidelines (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on June 15, 2023, and requested a decision by an administrative judge from the Defense Office of Hearings and Appeals (DOHA) on the written record without a hearing. Department Counsel submitted the Government’s written

case, including FORM Items 1 through 3, on June 29, 2023. On June 29, 2023, DOHA sent a complete copy of the file of relevant material (FORM) to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on July 7, 2023, and submitted a Response comprised of a statement that was received by DOHA on July 10, 2023.

The case was assigned to me on November 6, 2023. The SOR and the answer, (Item 1) are the pleadings in the case. FORM Items 2 and 3 are admitted into evidence without objection.

Findings of Fact

Applicant admitted the sole allegation SOR ¶ 1.a. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is a 27-year-old employee of a defense contractor, where he has worked since 2021. He received a master's degree in 2020, has been married since 2019, and has one child. (Item 2 at 12-13, 14, 22.)

Guideline H

Applicant admits to a five-year history of marijuana use. In response to DOHA interrogatories issued to him after his January 2023 security clearance interview, he listed December 2022 as the last time he used marijuana. (Item 3 at 8.) The window of use extends several months after he submitted his September 2022 e-QIP. (Response; Item 3 at 4.) In his Response he modified his prior answers. He admitted he first tried marijuana in 2017 but because he was a football player and did not want to lose his scholarship, he did not use marijuana from April 2017 until May 2020. (Response.) He began using marijuana again in May 2020 to help mitigate the pains associated with a 2019 shoulder surgery and subsequent rehabilitation and exercises. He specified in his Response:

... I only used it for extremely painful times (i.e., once every couple of months). From May of 2020 - December of 2020, I used marijuana once (every) 3-4 months. The once every 3-4 months frequency of using marijuana is the same for January 2021 - December 2021. Lastly, January 2022 - December 2022 would follow the same frequency as years prior. As mentioned in my e-QIP, my last intake of marijuana was December of 2022. Prior to that date, I had not participated in marijuana since July of 2022.

Applicant admits to "vaping" marijuana with friends with whom he still associates. He volunteered he would mitigate his use of marijuana by changing his sleeping habits and seeking other medical relief for his pain and discomfort as well as stretching and modifying his workouts. (Item 3 at 4; Response.) There is no evidence of a prescription in the record.

Applicant in his Response stated he believed he could be deemed trustworthy to conduct his duties because his use of marijuana over the years between 2017 and 2022, was infrequent. He affirms that any participation in illegal drug use would “derail” him from being able to complete his job. He states since his last use in December of 2022, he has “disassociated” himself from the drug. (Response; Item 3 at 4, 8.)

Policies

The standard set out in the adjudicative guidelines for assignment to sensitive duties is that 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. SEAD 4, ¶ E.4. 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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. The administrative judge’s overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The protection of the national security is the paramount consideration. Under AG ¶ 2(b), any doubt will be resolved in favor of national security. The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). An applicant has the ultimate burden of demonstrating that it is clearly consistent with national security to grant or continue eligibility for assignment to a public trust position.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The record establishes use of marijuana between April 2017 to about December 2022 (SOR ¶ 1.a).

The concern under this guideline 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.

Applicant's admissions and the record establish the following disqualifying conditions under this guideline, as detailed in AG ¶ 25:

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

26: The following mitigating conditions are potentially applicable as detailed in AG ¶

- (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 ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The

standard applicable in security clearance decisions is that articulated in *Egan, supra*. “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2, [App. A] ¶ 2(b).

Possession of a Schedule I controlled substance is a federal criminal offense. Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substance. See Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

The Security Executive Agent (SecEA) promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications as follows:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a “whole-person concept.” This requires adjudicators to carefully weigh a number of variables in an individual’s life to determine whether that individual’s behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.

Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position (Dec. 21, 2021) at 2 (quoted in ISCR Case No. 20-02974 at 3-4 (App. Bd. Feb. 1, 2022)).

AG ¶ 26(a) is not established. Applicant’s use of marijuana may have ended in December 2022. However, he had submitted his security clearance application on September 22, 2022, and continued to use marijuana. His drug involvement is recent. Medicinal use of marijuana is not permitted under federal law. His actions cast doubt on his reliability, trustworthiness, and good judgment.

AG ¶ 26(b) is partially established. Applicant in his Response declared his

determination to disassociate from marijuana. He provided no evidence to support this declaration. He still socializes with the friends he vaped with. His issues with marijuana are too recent and too serious to be considered mitigated. Applicant did not provide sufficient evidence to establish that the security concern regarding his drug involvement is mitigated.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guideline H in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline H and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the trustworthiness concerns raised by his drug involvement. Accordingly, I conclude that he has not carried his burden of showing that it is clearly consistent with national security to grant him eligibility for a public trust position.

Formal Findings

I make the following formal findings on the allegation in the SOR:

Paragraph 1: Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for a public trust position is denied.

Charles C. Hale
Administrative Judge