



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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)
) ISCR Case No. 22-02593
)
)
Applicant for Security Clearance)

Appearances

For Government: Andrea M. Corrales, Esq., Department Counsel
For Applicant: *Pro se*

01/11/2024

Decision

MALONE, Matthew E., Administrative Judge:

Applicant did not mitigate the security concerns raised by his past use of illegal drugs, and by his intentional false statements to the government about his use of illegal drugs. His request for eligibility for access to classified information is denied.

Statement of the Case

On March 15, 2022, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to renew his eligibility for access to classified information as part of his employment with a federal contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Counterintelligence and Security Agency (DCSA) could not determine that it was clearly consistent with the interests of national security for Applicant to have access to classified information.

On May 3, 2023, the DCSA issued a Statement of Reasons (SOR) alleging facts that raise security concerns addressed under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct). The DCSA acted as required by Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*

(February 20, 1960), as amended; Department of Defense (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.

Applicant timely responded to the SOR and requested a decision without a hearing. As provided for by paragraph E3.1.7 of the Directive, Department Counsel for the Defense Office of Hearings and Appeals (DOHA) issued a File of Relevant Material (FORM) that Applicant received on July 27, 2023. The FORM proffered seven exhibits (Items 1 – 7) on which the Government relied to support the SOR allegations. Applicant had 30 days from receipt of the FORM to object to any of the Government’s exhibits or to provide other additional information. He responded to the FORM by providing a three-page exhibit included in the record, without objection, as Applicant Exhibit (AE) A. I received the case for decision on November 15, 2023.

Findings of Fact

Under Guideline H, the SOR alleged that Applicant used marijuana between May 2017 and April 2022 (SOR 1.a); and that he used marijuana after being granted a security clearance in approximately March 2007 (SOR 1.b). (FORM, Item 1)

Under Guideline E, the SOR alleged that Applicant deliberately made false statements of relevant and material facts to the government by failing to disclose his illegal drug use as required by e-QIPs he submitted in September 2006 (SOR 2.a) and in January 2017 (SOR 2.b). Additionally, it was alleged he made false statements of relevant and material facts to the government by failing to disclose his illegal drug use while possessing a security clearance as required by his January 2017 e-QIP (SOR 2.c). The SOR also cross-alleged as disqualifying personal conduct the illegal drug use addressed in SOR 1.a and 1.b (SOR 2.d). (FORM, Item 1)

In response to the SOR, Applicant admitted each of the allegations with explanations. A review of his response to the allegations of intentional false statements, he also expressly denied that he “intended to make false claims or falsify documents.” (FORM, Item 2) Accordingly, I have interpreted his response as a denial of SOR 2.a, 2.b, and 2.c. As such, those allegations presented controverted issues of fact and the burden of proof for those facts remained with the Government. (See Directive at E3.1.14) In addition to the facts established by Applicant’s admissions to the remaining allegations, and based on my review of the information presented in the FORM and AE A, I make the following findings of fact.

Applicant is a 40-year-old employee of a federal contractor located in State A, where he has lived since September 2005. He has worked for that employer since August 2006. He graduated from high school in 2001 and received a college degree in May 2005. He and his wife have been together since about 2003 and married in 2013. They have two children under ten years old. (FORM, Item 3)

Applicant has held at least a secret-level security clearance for his entire tenure with his current employer. He submitted an e-QIP in September 2006 to obtain eligibility

for a security clearance when he was first hired. He submitted another e-QIP in January 2017 to renew his eligibility. The e-QIP he submitted in March 2022 appears to have been intended to qualify him for a top secret-level clearance. In response to the FORM, Applicant indicated he no longer requires eligibility at the top-secret level. (FORM, Items 3 – 5, 7; AE A).

Applicant first used marijuana in high school. He used it once in May 2001 and did not use it again until 2009. In 2009, his then girlfriend and future wife was receiving chemotherapy as part of her cancer treatment. At the time, it was legal in State A to use marijuana with a medical prescription, which she was given to help her tolerate the effects of her cancer treatments. Applicant started using some of her medical marijuana with her to help him cope with the stress of their situation. It was still illegal in State A for him to do so at that time. (FORM, Items 2, 3 and 6; AE A)

In November 2016, State A legalized the personal possession and use of marijuana for persons over 21 years of age. Subsequently, Applicant began using marijuana a few times monthly to alleviate back pain and other aches and pains he was experiencing. (FORM, Items 2, 3 and 6; AE A)

On April 21 and May 11, 2022, Applicant completed personal subject interviews (PSI) with a government investigator as part of his current background investigation. In his April PSI, he affirmed his intent to continue using marijuana because it is legal in State A. In his May PSI, he was confronted with the fact that the use and possession of marijuana are still illegal under federal law, and that as a federal contractor he is required to follow federal law. He claimed that he had not been made aware by his company of the need to follow federal laws regarding marijuana but stated he would seek advice from his employer. (FORM, Item 6)

I take administrative notice of the fact that the psychoactive ingredient of marijuana is tetrahydrocannabinol (THC), a federally controlled substance, the unauthorized possession and use of which are criminal violations of the Controlled Substances Act, 21 U.S.C. § 802 et seq. During his May PSI, he acknowledged his understanding that use of marijuana is still a violation of federal criminal law. Guidance issued by the Office of the Assistant Secretary of Defense (OASD) in February 2013, which was updated by the Director of National Intelligence (DNI) in December 2021, 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 even medical justification in his state of residence, was illegal. Further, federal workplaces prohibit illegal drug use by civilian federal employees and by persons employed for work on federal contracts.

Applicant has not used marijuana since April 2022. In his response to being asked through DOHA interrogatories why he stopped, he stated:

I realized I was making a mistake and that federal laws need to be held in higher regard than my local state laws. I chose to find another method for

pain relief that follows all federal laws. My career is important to me, and I do not want to do anything to jeopardize that, especially not when other means of pain relief are readily available. (FORM, Item 6)

When Applicant was hired by his employer in 2006, he was administered a urinalysis drug test, which he presumably passed. Thereafter, he submitted an e-QIP to obtain a secret-level security clearance. He did not disclose in that application, as required by questions in e-QIP Section 24 (Your Use of Illegal Drugs and Drug Activity), that he had used marijuana in high school. He subsequently received a security clearance. (FORM, Items 5 and 7)

Applicant's eligibility for access to classified information was renewed in 2017 based, in part, on the information he submitted in a second e-QIP on January 11, 2017. In that e-QIP, he again did not disclose his use of marijuana as required by questions in Section 23 (Illegal Use of Drugs or Drug Activity). By this time, he had been using marijuana with his wife since 2009 and once it became legal in late 2016, he was using it several times a month. It was not until he submitted his most recent e-QIP in March 2022, that he responded "yes" to Section 23 questions, thereby disclosing that he used marijuana as discussed herein, above. (FORM, Items 3 – 5)

In response to the SOR, Applicant stated he "was a young kid who made a stupid mistake" in omitting his drug use from the first e-QIP. He also stated that he made mistakes by completing the form too quickly. As to his second e-QIP, he stated he did not think he needed to change any of the pre-populated information from his first e-QIP and that he probably rushed his completion of that form as well. However, in his second e-QIP, he took enough time to provide new information about his passport, his residences, personal references, his marital status, foreign travel, and his prior background investigation. In response to the FORM, he admitted that he was "scared of what might happen if [he] told the truth" when he submitted his first e-QIP, and that he wishes he "had been strong enough to be honest." As to his second e-QIP, he avers he "failed to do [his] due diligence 10 years later." (FORM, Items 2, 4 and 5; AE A)

In response to the FORM, Applicant also provided a signed statement stating he intends to abstain from all illegal drug use in the future, and with the understanding that any future use could result in the loss of his security clearance. He further described his efforts (e.g., yoga, exercise, dietary changes) at alternative pain and stress relief. His wife provided a statement to the effect that she believes Applicant is "100% honest," and she corroborated the lifestyle changes he has made. (AE A)

Policies

Each security clearance 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 (AG). (See Directive, ¶ 6.3) Decisions must also reflect consideration of the factors listed in AG ¶ 2(d). 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 classified information. A security clearance 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 classified 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 a security clearance for an applicant. 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 security clearance, an applicant bears a heavy burden of persuasion. (See *Egan*, 484 U.S. at 528, 531) A person who has access to classified 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 reasonable doubt about an applicant's suitability for access in favor of the Government. (See *Egan*; AG ¶ 2(b))

Analysis

Drug Involvement and Substance Misuse

Available information reasonably raises the security concern about drug involvement 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); and

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

Applicant first used marijuana in high school. Starting in 2009, he used it extensively over the next 13 years until April 2022. His use violated federal law even though marijuana for personal consumption has been generally legal in State A since 2016. His frequent illegal drug use began three years after receiving a security clearance in 2006 and continued after his clearance eligibility was renewed in 2017. In an April 2022 PSI, he stated he would continue using marijuana because it was legal to do so under state law. In May 2022, when advised of the continuing illegality under federal law, he said only that he would have to seek his employer's advice. This information supports both of the above-named disqualifying conditions.

SOR 1.b alleges that Applicant used marijuana "after being granted a security clearance." The pertinent disqualifying condition at issue here is AG 25(f) (any illegal drug use while *granted access to classified information* or holding a sensitive position). (Emphasis added.) The DOHA Appeal Board has held that to be disqualifying, the drug use at issue must have occurred while actually having access to that information. See ISCR Case No. 20-03111 at 3 (Appeal Board, August 10, 2022) (*[I]t is important to note the distinction between possessing a security clearance and being granted access to classified material.*) The SOR did not on its face allege a disqualifying condition (AG ¶ 25(f)) and the Government's information did not establish that Applicant had access to classified information concurrent with his use of marijuana. SOR 1.b is resolved for Applicant.

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.

Appellant provided a sworn statement of his intent to abstain from illegal drug use in the future. He also has made lifestyle changes to address his stated reasons for using marijuana; namely, stress and physical pain. The persuasive value of this information is attenuated by an absence of medical documentation about his ailments, and by his deliberate omissions (discussed under Guideline E, below) of his drug use when he applied for a security clearance in 2006 and in his request for renewal thereof in 2017. Additionally, because he used drugs on a frequent basis over a long period of time, his apparent abstinence since April 2022 does not constitute a sufficient period from which to conclude it will not recur. On balance, available information does not show the security concerns raised by Applicant's protracted use of illegal drugs are mitigated.

Personal Conduct

The security concern about personal conduct is 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.

Based on the discussion of SOR 1.b, above, the allegation at SOR 2.c is resolved for Applicant. Further, the cross-allegation at SOR 2.d of Applicant's illegal drug use as disqualifying personal conduct is resolved for Applicant. Having concluded that the security concerns about his drug use are disqualifying under Guideline H, it is duplicative to address it under this guideline.

As to SOR 2.a and 2.b, Applicant did not disclose his use of marijuana as required by both his first and his second e-QIPs. He denied in response to the SOR any intent to submit false statements. However, in response to the FORM, he acknowledged he feared the consequences that might ensue if he told the truth about his drug use when he first applied for a clearance. As to his second e-QIP, he regretted not exercising “due diligence” when he reapplied for eligibility for access to classified information. It is unclear from his statement what “due diligence” was required to answer the questions correctly. Nonetheless, it is clear that he knew he was using marijuana within the scope of the relevant questions and that he decided to repeat his omission of that information. Further, his explanation that he was somehow careless in his second e-QIP is belied by the fact that he updated his information in several other aspects of that application. I conclude from all of the information probative of his intent when he submitted his e-QIPs shows he intended to withhold relevant material information from the government. As a result of his omissions, the government did not have sufficient information required to make an accurate, well-informed decision about his suitability for access.

The foregoing requires application of the disqualifying condition at AG ¶ 16(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.

I also have considered the following 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;

(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; and

(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.

Applicant did not try to correct his omissions until he applied for a higher level of clearance in his third e-QIP. His first e-QIP could have been corrected at any time after he was hired in 2006; however, he continued to illegally use marijuana and did not disclose his conduct. When he reapplied for clearance eligibility in 2017, he again chose to conceal his conduct. He did so on both occasions because he was afraid of the

consequences of telling the truth about his drug use. Further, there is no indication here that he sought guidance in how to answer the e-QIP questions at issue or that he may have received legal or other professional counsel about these matters when he was completing the forms.

Finally, his falsifications cannot be considered minor offenses. These facts undermine the government's confidence in the accuracy of the first two adjudications of his clearance eligibility because they were based on incomplete information. It was not until this third assessment of Applicant's background, that the government has learned that he illegally used drugs in violation of federal law and that he intentionally lied about his drug use the first two times he was asked to disclose that information. This information demonstrates that he has been willing to put his own concerns ahead of the national interest, and precludes the application of any mitigating conditions under this guideline.

In addition to my evaluation of the facts and my 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). Applicant's continued and frequent drug use, and his willingness to withhold information from the government are directly at odds with the government's compelling interest in trusting that those who have access to classified information will put the national interest ahead of their own. Significant doubts about Applicant's judgment and suitability for clearance persist. Because protection of the national interest is the principal focus 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	For 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 classified information. Applicant's request for security clearance eligibility is denied.

MATTHEW E. MALONE
Administrative Judge