



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 23-00103

Appearances

For Government:
Jeff Nagel, Esquire, Department Counsel

For Applicant:
Catie E. Young, Esquire
Griffith, Young, and Lass

04/26/2024

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted his most recent Electronic Questionnaires for Investigations Processing (e-QIP) on July 30, 2021. (Government Exhibit 1.) On February 3, 2023, the Defense Counterintelligence and Security Agency Central Adjudication Services issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines H (Drug Involvement and Substance Misuse), E (Personal Conduct), and F (Financial Considerations). The action was taken under Executive Order 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 effective within the Department of Defense after June 8, 2017.

Applicant answered the SOR in writing (Answer) on May 24, 2023, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on June 29, 2023. The case was assigned to me on July 6, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on July 17, 2023. I convened the hearing as scheduled on September 19, 2023. The Government offered Government Exhibits 1 through 4, which were admitted without objection. Applicant testified on his own behalf and submitted Applicant Exhibits A through S. Applicant's exhibits were admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 28, 2023.

Findings of Fact

Applicant is a 59-year-old senior systems engineer with a defense contractor. He has worked for the company since November 2022. He previously owned or was employed by another defense contractor from 1999 until approximately 2022. He is divorced with four children. He currently has a girlfriend who he lives with. Applicant has received a bachelor of science degree. He is seeking to retain a security clearance granted in approximately 2000 in connection with his work with the DoD. (Government Exhibit 1 at Sections 12, 13A, 17, and 25; Applicant Exhibit B; Tr. 22-25.)

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 the single allegation under this paragraph with explanations.

Applicant admitted that he used marijuana two times, once in March 2021 and again in May 2021. During those times he was employed by a defense contractor and held a security clearance. (Government Exhibit 3; Applicant Exhibit H.)

Applicant has suffered from severe stomach pains for several years, starting in approximately 2019. He submitted his medical records showing his attempts to resolve this issue with various doctors during that time. The pain, while not constant, was often debilitating. On two different occasions in 2021, in different states and with different people other than his girlfriend, he was offered and used very small amounts of marijuana that he believed would be good for his pain. He discovered it did not help with his pain issues and stopped the use after the second time. He has not used marijuana since that time and evinces a credible intent not to use marijuana in the future. He admits that his two-time use of marijuana was foolish and against Government policy and that of his employer. He stated that this experimentation was brought about by his continuing abdominal pain and frustration with the inability of normal medicine to resolve it. At the

time of this conduct, and since his birth, he lived in State A. He has since moved to State B and finds that the change in location has helped his health. (Government Exhibit 3; Applicant Exhibit H; Tr. 30-48, 56-74.)

Applicant admitted his use of marijuana on an e-QIP that he filled out in July 2021. This was two months after the last of his two uses. (Government Exhibit 1 at Section 23; Government Exhibit 3; Tr. 44-45.)

Applicant submitted recent negative drug-test results. He also submitted a signed statement of “his intent never to use illegal drugs again.” The statement also declared, “Should there be any violation with regard to illegal drug use, I hereby consent to automatic revocation of my security clearance.” (Applicant Exhibits Q and R.)

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. Specifically, the Government alleges in this paragraph that Applicant’s drug-use history, as set forth under Paragraph 1, above, is also cognizable under Guideline E. He denied the single allegation under this paragraph with explanations.

Paragraph 3 (Guideline F, Financial Considerations)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he is financially overextended and therefore potentially unreliable, untrustworthy, or at risk of having to engage in illegal acts to generate funds. Applicant admitted in part and denied in part the single allegation under this guideline with explanations.

This allegation concerned a lawsuit that was filed by the State A government against Applicant and 3,500 other people in 2021. This lawsuit was filed in connection with a grant that was given to Applicant and others due to a devastating natural disaster that occurred in 2005. The lawsuit was not due to misconduct by Applicant, but rather to the misconduct of a contractor hired by State A to manage the grant program. The lawsuit was eventually resolved with the contractor paying the State A government over \$100 million. State A dismissed the lawsuit filed against Applicant with prejudice at plaintiff’s costs in March 2023. A conformed copy of the order of dismissal is attached as Applicant Exhibit S. (Government Exhibit 4; Applicant Exhibits E and P; Tr. 48-55.)

Mitigation

Letters of recommendation were submitted by Applicant’s coworkers and personal friends. Each of them has known Applicant for over five years. Applicant stated all of them have knowledge of the allegations in this case. They all state that Applicant is trustworthy

and believable. They find him to be a hard-working person of integrity and recommend him for a position of trust. (Applicant Exhibit A; Tr. 62.)

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

Applicant used marijuana twice in 2021, while he was employed in the defense industry and held a security clearance. Both 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;

(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 and issued the Guidance 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 experimentally used marijuana twice in 2021. This was a result of his continuing medical issues and the inability of his doctors to control it. This conduct was in the past and has not been repeated. Applicant thoroughly understands the consequences of any future drug use or exposure, and has taken several steps to avoid it. He has submitted a signed statement of intent. Viewing his extremely minor 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 was infrequent, in the past, and he evinces a credible intent not to use marijuana in the future. He has mitigated the single allegation under this guideline. Paragraph 2 is found for Applicant.

Paragraph 3 (Guideline F, Financial Considerations)

The security concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An

individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

AG ¶ 19 describes two conditions that could raise security concerns and may be disqualifying in this case:

- (a) inability to satisfy debts; and
- (c) a history of not meeting financial obligations.

The guideline includes three conditions in AG ¶ 20 that could mitigate the security concerns arising from Applicant's alleged financial difficulties:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances; and
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant was a defendant in a lawsuit filed by the State A government in connection to a grant given to him due to a devastating natural disaster. The evidence is clear that the lawsuit was not due to misconduct of Applicant, but of a State A contractor. While the disqualifying conditions are minimally applicable, the negative inference is more than overcome by the evidence showing the lawsuit has been dismissed with prejudice on the motion of the State A government. The mitigating conditions apply, and this allegation is also 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 minor drug use and the lawsuit brought against him by State A. His forthright disclosures 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:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline F:	FOR APPLICANT
Subparagraph 3.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