



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



In the matter of:

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ISCR Case No. 22-01069

Applicant for Security Clearance

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: *Pro se*

08/07/2024

Decision

WHITE, David M., Administrative Judge:

Applicant used marijuana several times per month from about August 2018 until May 2021. He falsified his February 2021 security clearance application by denying his illegal drug use. He did not realize, nor apparently did his employer, that he possibly retained national security eligibility when he began his employment from his prior service in the Marine Corps. Resulting security concerns were not mitigated. Based upon a review of the full record, national security eligibility for access to classified information is denied.

History of Case

On December 2, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct). The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Security Executive Agent Directive (SEAD) 4 National Security Adjudicative Guidelines (AG), which came into effect on June 8, 2017.

Applicant submitted his written Answer to the SOR on December 23, 2022. He admitted the allegations in SOR ¶¶ 1.a, 2.a, and 2.c; denied SOR ¶¶ 1.b and 2.b; and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on February 17, 2023, and I received the case file on February 28, 2023. DOHA issued a Notice of Hearing on March 8, 2023, setting the hearing for March 23, 2023. On that date, Department Counsel offered Government Exhibits (GE) 1 through 4 into evidence. Applicant testified but offered no documentary evidence. All exhibits were admitted without objection. I granted the parties' request to leave the record open until April 14, 2023, for possible submission of additional documentary evidence in mitigation or rebuttal. Neither party submitted any additional evidence, and the record closed as scheduled. DOHA received the hearing transcript (Tr.) on March 31, 2023.

Findings of Fact

Applicant is 32 years old. He married a citizen of The Gambia in September 2020. His wife is working with an immigration attorney to apply for legal resident status after her original visa expired. They do not live together and keep their finances completely separate. Applicant has no children. He earned a high school diploma in June 2010 and a Certificate of Completion from a two-year trade school program in July 2015. He began his current employment as an aviation maintenance technician with a major defense contractor in August 2018. He served in the Marine Corps from November 2012 to November 2016, when he was honorably discharged. He held a security clearance during his Marine Corps service. (GE 1; GE 2; GE 4; Tr. 26-29, 31-34.)

On February 5, 2021, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) to apply for national security eligibility that he needed to move into a position involving access to classified information. His work for the defense contractor up to that point had comprised only commercial projects that did not involve access to sensitive or classified information. His Facility Security Office (FSO) required him to submit the 2021 e-QIP to clarify or renew his eligibility because it had been more than four years since he left the Marine Corps and was involved with any duties requiring a clearance. Applicant's belief that his previous security clearance was no longer active in any way was affirmed by his interactions with his managers and the FSO. (GE 1; GE 4; Tr. 26-29, 35-36, 41-44, 65-66.)

As alleged in SOR ¶ 2.a, Applicant responded, "No," to the question in Section 23 of his February 2021 e-QIP that asked, "**In the last seven (7) years**, have you illegally used any drugs or controlled substances? Use of a drug or controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any drug or controlled substance." He was still regularly using marijuana at the time. Although it was legal under his state's laws to use the marijuana, he knew that this conduct remained illegal under Federal law and was directly covered by this question. (GE 1; GE 2, Tr. 44, 49-50.)

Applicant was interviewed, under oath, by an investigator from the Office of Personnel Management (OPM) on July 7, 2021. In his sworn September 2022 response to DOHA interrogatories, he attested to the accuracy of, and adopted the interviewer's summary of their July 7, 2021 discussion. He further confirmed in response to interrogatory questions that he had used marijuana several times per month from about August 2018 to May 2021, which he knew to be in violation of his employer's no-drug-use policy. During the July interview, he admitted his knowing illegal use of marijuana, as well as his intentional concealment of this conduct from his employer and on his 2021 e-QIP in order to avoid known potential adverse consequences. These facts were also confirmed by his hearing testimony. (GE 2; Tr. 44, 49-50, 52-56.)

Applicant's hearing testimony was forthright and credible. The evidence in this case strongly confirms that he was not employed in a national security sensitive position and had no access to classified information during his 2018-2021 period of marijuana use. It further establishes that he had neither knowledge nor reason to believe that he possessed a security clearance at the time. (Tr. 8-9, 27-29, 34-36, 41-44, 65-66.)

As noted above Applicant admitted that he knew he was violating employer's written no-drug-use policy to which he had agreed. He was subject to pre-employment, random, and potential incident-related urinalysis testing during his assignments to work on some projects. (GE 3; Tr. 44-53, 57.)

Applicant submitted no documentary evidence in extenuation or mitigation of the security concerns raised by his conduct, after acknowledging his opportunity to do so while the record remained open after his hearing. He testified that he has substituted a healthy routine of physical activities as his preferred alternative to marijuana use for recreation and stress reduction. (Tr. 54-55, 57-63, 67-69.)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, each guideline lists potentially disqualifying and mitigating conditions. 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. According to AG ¶¶ 2(b) and 2(c), the entire process is a conscientious scrutiny of several variables known as the whole-person concept. The administrative judge must consider all available, pertinent, and reliable information about the person, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that any doubt concerning personnel being considered for national security eligibility 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 avoided drawing inferences grounded on mere speculation or conjecture.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states, "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 applies for national security eligibility seeks to enter 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 eligibility for access to classified information or assignment in sensitive duties. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified or sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of protected information.

Section 7 of EO 10865 provides, "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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H: Drug Involvement and Substance Misuse

The security concerns under the guideline for drug involvement and substance misuse are 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.

AG ¶ 25 describes two conditions that could raise security concerns and may be disqualifying based on the SOR allegations in this case:

- (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 admittedly used marijuana on a regular basis from about August 2018 to May 2021. He knew that his marijuana use was illegal under Federal law and violated his company's employee substance abuse policies. The record evidence establishes that he was neither granted access to classified information nor holding a national security sensitive position during the period at issue. This establishes security concerns under AG ¶ 25(a) but negates any concerns under AG ¶ 25(f). Accordingly, the burden to mitigate the established concerns shifts to Applicant.

AG ¶ 26 provides two conditions that could mitigate the drug-related security concerns raised in this case:

- (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. In her *Guidance*, the SecEA noted the increased number of states that have legalized or decriminalized the use of marijuana. She reaffirmed the 2014 SecEA 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 failed to mitigate the security concerns raised by his regular recreational marijuana use from about August 2018 through May 2021. He knew that his drug involvement was illegal under Federal law and contrary to his employer's safety and security policies, yet it continued until at least three months after he submitted his e-QIP seeking to obtain national security eligibility. He claimed to have no intention to abuse drugs in the future, and to have only used the marijuana at home by himself. However, only his statements support these assertions, which were not corroborated by any evidence from those who work with or otherwise know him. His admitted history of drug abuse ended less than two years before his personal appearance hearing, and only when he knew that he would soon undergo an OPM background investigation.

This evidence does not sufficiently establish that drug abuse is unlikely to recur, and it casts continuing doubt on Applicant's current reliability, trustworthiness, and judgment. Substantial mitigation under AG ¶¶ 26(a) and 26(b) was not established.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concerns pertaining to personal conduct:

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 the national security investigative or adjudicative processes.

AG ¶ 16 describes three conditions that could raise security concerns and may be disqualifying under the facts alleged in the SOR:

(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;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing; and

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Applicant deliberately falsified his 2021 e-QIP concerning his regular use of marijuana since 2018, because he knew it to have been illegal under Federal law and violative of his employer's no-drug-use policy for employees. He sought to avoid significant risks to his potential for continued employment with the defense contractor, as well as his ability to obtain national security eligibility to open new opportunities there. He admits that he intended to conceal this drug involvement because, at the time, it was an ongoing course of conduct, and he knew that it would negatively affect his personal and professional standing. He honestly denied that this drug use occurred while possessing a security clearance because he actually and reasonably believed that his previous clearance had lapsed. The record evidence clearly establishes "special interest" security concerns under AG ¶¶ 15, 16(a), 16(e), and 16(f).

AG ¶ 17 includes three conditions that could mitigate the security concern arising from Applicant's personal conduct:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (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
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant provided insufficient evidence to establish mitigation under any of the foregoing conditions. He finally admitted the falsification in July 2021 when asked to confirm its truth during his OPM interview, but this was neither a prompt nor a good faith effort to correct the concealment of drug use that he had attempted to continue for the preceding five months. This was not the type of "positive step" that would demonstrate trustworthiness or significantly reduce vulnerability. Applicant's falsification and concealment were not minor offenses. They occurred over a recent three-year period, and under circumstances that were not unique. He engaged in purposeful deception concerning information that he knew to have security significance, in pursuit of his perceived self-interest. This recent conduct casts continuing doubt on his reliability, trustworthiness, and judgment, despite his subsequent admissions.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable 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 is a mature adult, who intentionally attempted to conceal his ongoing drug abuse, failing to demonstrate either rehabilitation or accountability for his misuse of marijuana before and during the time he was working for a defense contractor and after applying for a security clearance. He failed to convincingly demonstrate his intention to abstain from further substance misuse. He provided insufficient evidence to demonstrate his trustworthiness, responsibility, and willingness to comply with rules and regulations. The potential for pressure, exploitation, or duress remains undiminished.

Overall, the evidence creates significant doubt as to Applicant's national security eligibility and suitability for a security clearance. He did not meet his burden to mitigate the security concerns arising under the Drug Involvement and Substance Misuse and the Personal Conduct guidelines.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 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 and 2.c:	Against Applicant
Subparagraph 2.b:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's security clearance. National security eligibility for access to classified information is denied.

DAVID M. WHITE
Administrative Judge