



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



In the matter of:)
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Applicant for Public Trust Position)

ADP Case No. 23-02160

Appearances

For Government:
Tara Karoian, Esquire, Department Counsel

For Applicant:
Pro se

10/03/2024

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted his initial Electronic Questionnaires for Investigations Processing (e-QIP) on February 12, 2023. (Government Exhibit 1.) On December 28, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services issued a Statement of Reasons (SOR) to Applicant, detailing trustworthiness concerns under Guidelines H (Drug Involvement and Substance Misuse) and E (Personal Conduct). 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 January 4, 2024, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on January 29, 2024. The case was assigned to me on February 13, 2024. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on February 23, 2024. I convened the hearing as scheduled on April 4, 2024. The Government offered Government Exhibits 1 through 3, which were admitted without objection. Applicant testified on his own behalf and submitted Applicant Exhibit A, which was admitted without objection. DOHA received the transcript of the hearing (Tr.) on April 15, 2024.

Findings of Fact

Applicant is a single, 30-year-old Software Test Developer with a defense contractor. He has worked for the company since December 2021. He has received a bachelor of science degree. He is seeking eligibility to occupy a position of trust in connection with his work with the DoD. This is his first application for a finding of trustworthiness. (Government Exhibit 1 at Sections 12, 13A, 17, and 25.)

Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)

The Government alleges in this paragraph that Applicant is ineligible for a finding of trustworthiness because he has used illegal drugs. Applicant admitted both allegations under this paragraph with explanations.

1.a. Applicant admitted that he used marijuana on an occasional basis from approximately April 2012 until March 2023. He used marijuana on three occasions after obtaining his current employment, with the last use being after he submitted his e-QIP (Government Exhibit 1). (Government Exhibit 2; Tr. 32-38.)

Applicant discussed his past marijuana use at length in various forums. It was heaviest during his college years from 2012 to 2017. From 2017 until 2023 his use was approximately four times a year. He testified that he had absolutely no future intent of using marijuana. (Government Exhibit 1 at Section 23, Exhibit 2; Tr. 32-38, 41-47.)

He was interviewed by an investigator from the DoD in April and May of 2023. At that time Applicant became fully informed of the DoD proscription against using marijuana. The investigator reported, "Subject [Applicant] does not intend to use drugs in the [future] because his job is his top priority and he did not previously consider how drug use could affect his career choices." (Government Exhibit 2.)

1.b. Applicant admitted working at a legal marijuana farm during the period November 2018 through March 2019. When I asked why he worked on a marijuana farm he replied, "Because I needed work. I needed a paycheck. I had not graduated from

college at that the time. I was looking for months for full-time employment. . . This was the first full-time position I found, and I took it.” (Tr. at 47.)

Paragraph 2 (Guideline J, Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for a finding of trustworthiness because he has engaged in criminal conduct that creates doubt about a person’s judgment, reliability, and trustworthiness. Applicant admitted both allegations under this paragraph.

2.a. Applicant was arrested in September 2018 for Solicitation of Prostitution. He answered an advertisement for escort services and was arrested when he entered the hotel room. He pled no contest to Disorderly Conduct/Prostitution and received a \$60 fine and probation. However, his name and picture were also publicized in the small city where he lives. He testified that he was “publicly humiliated” and, “I found out who my real friends were.” He also stated, “It’s definitely not going to happen again.” (Government Exhibit 1 at Section 22, Exhibit 2, Exhibit 3; Tr. at 28-30.)

2.b. Applicant was arrested in 2016 and charged with Fight/Challenge Fight Public Place and Battery. He was in college at that time, 21 years old, and he got angry with a person he thought had lied about him to the dean of his college. When he saw that person later, he spit in that person’s face. He pled no contest to Battery and received a fine and probation. He freely admits that he overreacted to this situation and that a similar incident will not happen in the future. (Government Exhibit 1 at Section 22, Exhibit 2, Exhibit 3; Tr. at 24-28.)

Mitigation

Two letters of recommendation were submitted by coworkers. The first one is from the Software Capability Manager at Applicant’s employer. He has known Applicant since high school and recommended him for employment. The letter writer goes on to state, “As a friend I am aware of the legal hiccups [Applicant] has had, I truly believe that his past mistakes do not reflect the person he is today. . . He is orientated on his career, he works hard to keep the past behind him, and I know he regrets what he did.” (Applicant Exhibit A.)

Applicant’s Team Lead for two years also submitted a letter that states, “[Applicant] has consistently impressed me with his skills, positive attitude and dedication to the success of our project. . . In my opinion, [Applicant] is a highly trustworthy and reliable individual with a strong and ethical moral compass, and he regularly demonstrates sound judgment.” (Applicant Exhibit A.)

Policies

Positions designated as ADP I/II/III are classified as “sensitive positions.” The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to the DoD and DOHA by the Defense Security Service and Office of Personnel Management. DoD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made.

When evaluating an applicant’s suitability for national security eligibility 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 the factors listed in AG ¶ 2(d), describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny 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 that “[a]ny 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. Likewise, I have avoided drawing inferences grounded 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. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable national security eligibility decision.

A person who applies for access to sensitive information seeks to enter 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 access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of 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
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant used marijuana on an occasional basis from 2012 to 2023. He worked on a legal marijuana farm for several months in 2018 and 2019. 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 and positions of public trust. 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 or public trust position applicant to mitigate security or trustworthiness concerns raised by his or her past use of marijuana.

The SecEA's Guidance also addresses the importance of educating "prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process." Applicant was informed of this proscription during the interview process that followed his completion of the e-QIP.

Applicant last used marijuana a year before the record closed in this case. Once he became aware of the Government's policy on drug use, he evinced a credible intent not to use marijuana in the future. I view his credible testimony, his statements on his e-QIP, along with his statements to an investigator during his background investigation, and responses to DOHA interrogatories, as the equivalent of a signed statement of intent not to use marijuana in the future. His work on a legal marijuana farm occurred several years ago and has no current security significance. He thoroughly understands the consequences of any future drug use or exposure, and has taken several steps to avoid it.

Viewing his marijuana use in the context of the whole person, Applicant has mitigated the trustworthiness significance of his past drug involvement. Paragraph 1 is found for Applicant.

Paragraph 2 (Guideline J, Criminal Conduct)

The security concerns relating to the guideline for criminal conduct are set out in AG ¶ 30, which states:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 31 describes two conditions that could raise security concerns and may be disqualifying in this case:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant was arrested and convicted in 2016 and 2018. Both of the above disqualifying conditions have application in this case.

The guideline includes four conditions in AG ¶ 32 that could mitigate the security concerns arising from Applicant's alleged criminal conduct. Two have possible application to the facts of this case:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant's last arrest occurred in 2018, six years ago. Both incidents are relatively minor. The evidence shows that he has matured since these incidents. Paragraph 2 is found for Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a finding of trustworthiness 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 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 drug use and minor criminal conduct. 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.

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:

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| Paragraph 1, Guideline H: | FOR APPLICANT |
| Subparagraphs 1.a and 1.b: | For Applicant |
| Paragraph 2, Guideline J: | FOR APPLICANT |
| Subparagraphs 2.a and 2.b: | 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. Eligibility for access to sensitive information is granted.

WILFORD H. ROSS
Administrative Judge