



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



In the matter of:)
)
) ISCR Case No. 18-00835
)
Applicant for Security Clearance)

Appearances

For Government: Andrea Corrales, Esq., Department Counsel

For Applicant: Troy L. Nussbaum, Esq.,
05/20/2019

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to deny his eligibility for a security clearance to work in the defense industry. Although the criminal conduct concerns are mitigated by the passage of time, Applicant failed to mitigate the negative whole-person assessment established by his 2013 and 2015 drug-related arrests. Clearance is denied.

Statement of the Case

On May 11, 2018, the DOD issued a Statement of Reasons (SOR) detailing security concerns under the criminal conduct and personal conduct guidelines.¹ DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant’s security clearance and recommended that the case be submitted to a Defense Office of Hearings and Appeals (DOHA) administrative judge for a determination whether to grant or deny his security clearance.

¹ The DOD acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive), and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on June 8, 2017.

Applicant timely answered the SOR and requested a hearing. At the hearing, convened on November 29, 2018, I admitted Government's Exhibits (GE) 1 through 3, and Applicant's Exhibits (AE) A through H without objection. Applicant testified at the hearing, as did two character witnesses. After the hearing, the parties timely submitted additional documentation. Accordingly, GE 4 and AE I, were admitted to the record without objection from either party. DOHA received the transcript (Tr.) on December 7, 2018.

Procedural Matters

SOR Amendment

At the hearing, Department Counsel moved to amend the SOR to correct an error in SOR ¶ 1.b, which indicated Applicant was placed on unsupervised parole after a February 2015 drug offense. Without objection from Applicant, the SOR allegation was amended to reflect that Applicant was sentenced to unsupervised probation after the February 2015 offense.

Findings of Fact

Applicant, 32, began working for federal contracting companies as an information technology professional in the healthcare sector in 2013. He has worked for his current employer since January 2016. His job requires him to work with personally identifiable information (PII) and he holds public trust eligibility. His client considers him a valuable asset to the agency he supports, citing his technical abilities and professionalism. He is seeking eligibility for access to classified information in an effort to obtain employment closer to his home. He completed a security clearance application in July 2017. In response to questions about his police record, he disclosed a February 2014² arrest for possession of a Schedule III substance. He did not disclose any derogatory information in response to questions about his history of illegal drug use or other drug activity. The ensuing investigation revealed another drug-related arrest in December 2013.³

Between January and December 2013, Applicant worked for a federal contracting company. Although the nature of the job is unclear from the record, Applicant admitted that it required public trust eligibility, which another government agency granted in July 2013. In December 2013, Applicant received a phone call from his older brother asking for help changing a tire after a minor car accident. When Applicant arrived at his brother's location, he found his brother's car unattended while the police arrested his brother further down the block. Applicant approached his brother's car and began to clear the street of the tools his brother had been using to change the tire. When Applicant returned the tools to the trunk of the car, he discovered a stash of the marijuana hidden in the trunk. Not wanting his brother to get in any more trouble, Applicant moved the marijuana from his brother's car into his car. At the time of the incident, Applicant was aware of his employer's zero-tolerance drug policy. After

² The date Applicant reported of the security clearance application was a mistake.

³ Tr. 22-26, 29-30, 33-34; GE 1-2; AE C-D.

picking his brother up from the police station, Applicant was stopped by the police who discovered the marijuana in Applicant's car. He was arrested and charged with possession of marijuana with the intent to distribute. Ultimately, the charge was not prosecuted. Applicant claims that he will not act similarly in the future.⁴

Between December 2014 and January 2016, Applicant was working for a different federal contracting company. At the hearing, he testified that his position required access to PII and he was required to maintain public trust eligibility. In February 2015, Applicant and his friends were traveling to a concert in another state. As he passed through a neighboring state, Applicant was stopped for a moving violation. During the stop, the police discovered Ketamine, a Schedule III substance, in Applicant's possession. Applicant claims that he did not purchase the drug, but that it was given to him by "a friend of a friend." When questioned about the substance, Applicant lied and told the officer it was cocaine. At hearing, Applicant explained that he thought having cocaine would be considered a lesser offense. He also admitted that, but for his arrest, he intended to use the ketamine at the concert in knowing violation of his employer's drug policy. The court sentenced Applicant to a deferred-adjudication program and required him to serve 100 hours of community service, attend substance-abuse classes, and pay the fees assessed by the court. He completed terms of his sentence and was released from unsupervised probation in July 2016.⁵

Applicant did not report either of his arrests to his respective employers. He claims that he did not believe that he had an obligation to do so. In particular, Applicant did not believe that he was required to report his 2015 unsupervised probation to his employer because it did not affect the quality of his work. Applicant did not list the 2013 arrest on his security clearance application because he believed the arrest was expunged and his criminal defense lawyer advised him that he did not need to disclose the arrest in the future. Despite his two drug-related arrests, Applicant claims that his history of illegal drug use is limited to experimenting with marijuana two or three times in high school. He claims that he has no intent to use or possess illegal drugs in the future. In anticipation of the hearing, Applicant completed a second substance-abuse course. Applicant believes that he has matured since his last arrest five years ago. He moved away from what he described as an unhealthy environment and is now living in his childhood home with his wife. He spends his free time with his wife or on home projects.⁶

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially

⁴ Tr. 34-39, 44-45, 50, 58-60; GE 4; AE A.

⁵ Tr. 34-39, 44-45, 51-53, 57-60; GE 3; AE I.

⁶ Tr. 30-31, 42-43, 53-55, 61-62; AE B, H.

disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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.

Under Directive ¶ E3.1.14, the Government must 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 to obtain a favorable security 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 access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "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

Criminal activity creates doubts about a person's judgment, reliability, and trustworthiness... and calls into question a personal ability or willingness to comply with law, rules and regulations.⁷ Applicant's drug-related arrests in 2013 and 2015 are

⁷ AG ¶ 30.

disqualifying under the criminal conduct guideline as evidence of criminal conduct,⁸ as well as a pattern of minor offenses that when considered together cast doubt on the individual's judgment, reliability, or trustworthiness.⁹ Although the conduct is not enough on its own for disqualification under the drug involvement guideline, it is disqualifying conduct under the personal conduct guideline. Applicant's multiple instances of drug-related misconduct support a negative whole-person assessment of questionable judgment, untrustworthiness, unreliability, and an unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard against classified or sensitive information.¹⁰

While the criminal conduct concerns may be mitigated by the passage of time,¹¹ the personal conduct concerns about Applicant's credibility, judgment and trustworthiness remain. On at least two occasions, Applicant willingly and knowingly engaged in drug-related criminal conduct while working in positions that required public trust eligibility and in violation of his employers' drug policies, showing a pattern of poor judgment. His behavior at the time of the arrests and his handling of each incident reveals an ongoing credibility issue. During the 2015 arrest, he lied to a police officer, intentionally reporting false information in hopes of minimizing the potential consequences of his actions. In his current attempt to obtain a security clearance, he did not properly disclose his arrest history or drug involvement on his security clearance application despite the plain language of the relevant questions.¹² In addition, Applicant's testimony about his history of illegal drug use was not credible. It is unlikely that an individual would give an illegal substance to an acquaintance who was not a known drug user. Likewise, it is not credible that Applicant, who claims to have no history of illegal drug use since high school, would accept any illegal drugs from an acquaintance, let alone plan to use it. The favorable evidence in the record about Applicant's technical abilities or his value to his government client do not overcome the negative whole-person assessment raised by his misconduct and lack of credibility.

Based on the record, I have significant reservations about Applicant's current security worthiness. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(d) in addition to the mitigating conditions available under the personal conduct guideline. The present adjudication highlights ongoing concerns about Applicant's credibility, reliability, and trustworthiness. When confronted with a conflict of interest between his fiduciary duty as a public trust holder and those of his personal

⁸ AG ¶ 31(b).

⁹ AG ¶ 31(a).

¹⁰ AG ¶ 16(c).

¹¹ AG ¶ 32(a).

¹² Although the SOR does not allege that that Applicant engaged in drug-related criminal conduct while holding public trust eligibility or that he falsified the police record or drug history questions on his security clearance application, both can be considered in the analysis of the applicability of the relevant mitigating conditions.

circumstances, he resolved the conflicts in his self-interest. Of particular concern is Applicant's failure to report his criminal conduct to his respective employers at the time the incidents occurred. His claim that he unaware of his duty to report such adverse information is disingenuous. It is more likely that Applicant was trying to avoid the professional consequences of his off-duty misconduct. Furthermore, Applicant's failure to report prevented his employers and the government from assessing his continued public trust eligibility at the time the misconduct occurred. In deciding that his off-duty misconduct did not affect his work, Applicant made himself, not the government, adjudicator of any potential security risks associated with his misconduct.

The purpose of the security clearance adjudication is to make "an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk."¹³ Given Applicant's past conduct, he has not demonstrated that he is a suitable candidate for access to classified information at this time.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Criminal Conduct	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Paragraph 2, Personal Conduct	AGAINST APPPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Nichole L. Noel
Administrative Judge

¹³ AG ¶ 2(d).