



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 19-00994

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: Laurel Simmons, Esq.

10/30/2019

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated drug involvement. Eligibility for access to classified information is denied.

Statement of the Case

On May 15, 2019, the Department of Defense (DoD) Consolidated Adjudications facility (CAF) issued a Statement of Reasons (SOR) detailing reasons under the drug involvement and personal conduct guidelines why DoD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 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 Security Executive Agent, Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016) (SEAD 4), effective June 8, 2017.

Applicant responded to the SOR on June 5, 2019, and requested a hearing. The case was assigned to me on July 9, 2019, and scheduled for hearing on August 28, 2019. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At the hearing, the Government's case consisted of two exhibits (GEs 1-2). Applicant relied on one witness (himself) and five exhibits. The Government's exhibits were admitted without objection as GEs 1-2. Applicant's exhibits were admitted without objection as AEs A-E. The transcript was received on October 21, 2019.

Summary of Pleadings

Under Guideline H, Applicant allegedly (a) used marijuana with varying frequency between January 2013 and January 2018 and (b) used Adderall not prescribed to him between March 2018 and August 2018.

In his response to the SOR, Applicant admitted each of the allegations covering his drug activities with explanations. He claimed his use was infrequent (once a month or less) and recreational with friends and family. He claimed he has ceased using marijuana and has informed his friends and family of his decision. He also claimed that he disposed of all drug paraphernalia. Addressing his non-prescribed Adderall usage, he claimed his use was experimental (less than five times), and he has since stopped using the drug.

Findings of Fact

Applicant is a 35-year-old software engineer for a defense contractor. He seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant has never married and has no children. (GE 1) He earned a high school diploma in September 2013. He attended classes at an accredited university between September 2013 and June 2018 and earned a bachelor's degree in computer engineering in June 2018. (GEs 1-2) He reported no military service.

Between June 2016 and June 2018, Applicant worked for a defense contractor as a part-time summer intern. (GEs 1-2; Tr. 25-26) Since June 2018, he has been employed as a full-time software engineer with special concentration in projects for future simulations, as well as projects that address radio signal systems. (GE 2 and AE B; Tr. 19) Previously (June 2014-December 2014), he worked for two employers as a resident advisor and summer intern, respectively. (AE B) As a resident advisor, he developed, maintained, and coordinated social living conditions for his university. And, while a summer intern for a local utility firm, he tested his firm's satellite web page. (AE B) Applicant was denied an interim security clearance in 2016 while he was a summer intern, with no reasons given. (GE 1; Tr. 19, 32)

Applicant's drug history

Between January 2013 and November 2018, Applicant used marijuana with varying frequency. Altogether, he used marijuana about 20 times during this period. (GE 2) Marijuana is classified as a Schedule I controlled substance under the Federal Controlled Substance Act, and as such, its manufacture, use, possession, and distribution is federally regulated. In the electronic questionnaires for investigations processing (e-QIP), Applicant completed in November 2016, he admitted his use of marijuana in social situations "less than a dozen times" between January 2013 and August 2016. (GE 1)

In a follow-up personal subject interview (PSI) with an investigator of the Office of Personnel management (OPM in August 2018, Applicant increased his estimated marijuana use "to a total of approximately 20 times" from his first use in January 2013 to his last use in August 2018. (GE 2) And, when asked in a subsequent PSI convened in December 2018 to update his first and last use of marijuana and other drugs between January 2013 and December 2018, he confirmed his recreational use of marijuana with his mother in August 2018. (GE 2 and AE E; Tr. 20, 26-27) Asked to respond to interrogatories propounded by the government in April 2019, he expanded his use of marijuana with his mother to include additional use in November 2018. (GE 2) Accepted are his assurances that he has not used marijuana since his last admitted use of the substance in November 2018 (a period of less than nine months).

While Applicant has provided prior assurances that he will not use marijuana or any other illegal drugs in the future, his intentions are tempered by his recurrent use of marijuana in 2018 with full notice of the anti-drug policies in effect by the DoD and his employer. (GEs 1-2; Tr. 27, 30) Before accepting his internship with his employer in 2016, he was explicitly notified of the DoD's anti-drug policy. (Tr. 25-26)

Notice of the DoD's anti-drug policy was further impressed upon Applicant by the questions asked of him about drug use in the e-QIP he completed in 2016. (GE 1; Tr. 25-27) With this imputed notice, he told the OPM investigator in his December 2018 PSI interview that he had no intent to use marijuana in the future. (GE 2) Believing that marijuana is legal under his state's controlling law, he twice resumed his use of marijuana with his mother in November 2018 and continues to socialize with his mother and other persons who use marijuana, albeit out of his presence. (GE 2; Tr. 26, 30-31)

In his updated PSI interview of December 2018, Applicant was asked if he had ever misused non-prescribed medications. (GE 2) After initially answering no to the question, he was confronted with his misuse of prescription drugs. (GE 2) Once confronted by the OPM investigator, Applicant admitted to using Adderall not prescribed to him twice with friends for recreation purposes in August 2018. In his answers to interrogatories propounded by the government in April 2019, he expanded his use of Adderall not prescribed to him to include his use of Adderall not prescribed to him in November 2018. Accepted are his assurances that he has not used marijuana or Adderall not prescribed to him since his last admitted use of Adderall in November 2018. More recently in his hearing testimony, Applicant increased his recollected use of non-prescribed Adderall to five occasions in 2018. (Tr. 28-29)

Applicant continues to socialize with friends who use non-prescribed Adderall, but assured that he has not returned to using the drug since his last admitted use in November 2018. (GE 2) He has no plans to resume his use of the drug in the future due to his employment concerns. (GE 2 and AE D)

Endorsements

Applicant is well-regarded by his manager, former classmates, family. (AEs C and E) Former classmates who have remained good friends describe him as honest, highly responsible, trustworthy, reliable, and hard-working. (AE E) They recount the many instances where he has prioritized helping his classmates over resting. (AE E) Applicant's former classmates who have known him for many years ((one of whom is in a current romantic relationship with him) credit him with doing so much for his friends and family while being a role model for those around him. (AEs A and E) Acknowledging their awareness of his clearance situation, they believe his past mistakes are more compensated by his contributions to his work, friends, and family. (AEs A and E) Nonetheless, because his mother shared marijuana with him on at least two occasions in 2018, it is unclear at this point what positive influence she may choose to impose on him in his future efforts to sustain his committed abstinence.

Applicant received solid performance evaluations for calendar year 2018. (AE C) He received excellent ratings in each of the rated categories: knowledge, skills and ability; problem solving, discretion/latitude, and interrelationships with staff and customers. He is credited by his manager with being an overall excellent performer who has demonstrated strong leadership with personal integrity in his company relationships and in his conforming to company standards. (AE C)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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 chances; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

Drug Involvement

The Concern: Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. AG ¶ 24.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security

clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Analysis

Applicant is a well-regarded software developer who presents with a considerable history of drug involvement. Principal security issues in this case center on his use of marijuana in various frequency over a five-year period (2013-2018) and more recent use of non-prescribed Adderall on at least two occasions in 2018.

Drug concerns

Over a five-year period between January 2013 and November 2018, Applicant used marijuana in varying frequencies in social settings with friends and his mother. Some of his marijuana use occurred during periods of part-time employment in violation of his employers’ anti-drug policies. And, on at least two occasions in 2018, he used non-prescribed Adderall.

Applicant’s admissions to using illegal drugs raise security concerns over risks of recurrence as well as judgment issues. On the strength of the evidence presented, two disqualifying conditions of the AGs for drug abuse are applicable: DC ¶ 25(a), “any drug abuse,” and DC ¶ 25(c), “illegal possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.”

Applicant’s recurrent use of marijuana over a five -year period and recent use of non-prescribed Adderall raises questions over the strength of his abstinence commitment. To be sure, Applicant has made noticeable gains in his efforts to mitigate his past drug activities. Still, his multiple drug activities covered a considerable period (over five years), and have not been accompanied by any cognizable counseling or programmatic rehabilitation.

Considering Applicant’s varying use of marijuana over a considerable period of time, with less than nine months of sustained abstinence, compounded by his recent use of Adderall not prescribed to him, none of the mitigating conditions for drug involvement are available. While his signed statement of intent to abstain from all drug involvement is encouraging, he has made similar assurances before only to return to the illegal use of marijuana and Adderall not prescribed to him in 2018.

Given Applicant's recurrence history, his assurances alone without evidence of more sustained abstinence are not enough to warrant any mitigation credit from, MC ¶ 26(b)(3), or any of the other mitigating conditions potentially available under Guideline H. Without more time to establish a pattern of sustained abstinence from the use of illegal drugs and non-prescribed controlled substances, none of the other mitigating conditions covered by the drug involvement guideline are available to Applicant. Put differently, with less than nine months of demonstrated abstinence from illegal and non-prescribed controlled substances drugs, raised security concerns over Applicant's past illegal drugs are not mitigated.

Whole-person assessment

From a whole-person perspective, Applicant has established independent probative evidence of his overall honesty, trustworthiness, and understanding of DoD policy constraints on the use of illegal substances. He lacks enough positive reinforcements, however, to facilitate safe predictions he is at no risk of recurrence. Considering the record as a whole, at this time there is insufficient probative evidence of sustainable mitigation to make predictable judgments about his ability to avoid drugs and related activities in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant's drug activities over a five-year period, raised security concerns with respect to the allegations covered by subparagraphs 1.a and 1.b of the SOR are not mitigated.

In evaluating all of the circumstances surrounding Applicant's continuing drug activities while employed by a current employer with known anti-drug policies, his explanations, and whole-person considerations, his disclosures are insufficient to enable him to convincingly mitigate illegal drug involvement concerns associated with his past use of illegal drugs and Adderall not prescribed to him. Overall, Applicant's explanations of his past drug use are not persuasive enough to warrant conclusions that his judgment lapses associated with his past use of illegal drugs and non-prescribed drugs are mitigated.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE H (DRUG INVOLVEMENT):	AGAINST APPLICANT
Subparas. 1.a and 1.b:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge