



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



In the matter of:)
)
) ISCR Case No. 19-00732
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*
01/28/2020

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant mitigated the drug involvement and substance misuse security concerns due to the passage of time. National security eligibility for access to classified information is granted.

History of the Case

Applicant submitted a security clearance application (SCA) on April 11, 2017. On April 12, 2019, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (Drug Involvement and Substance Misuse). Applicant answered the SOR on April 25, 2019, and requested a hearing before an administrative judge (Answer). The Government was ready to proceed on May 31, 2019, and the case was assigned to me on August 21, 2019. On August 22, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for September 24, 2019, and I convened the hearing as scheduled.

Applicant testified, and one witness testified on his behalf. Government Exhibits (GE) 1 through 4 and Applicant Exhibits (AE) A and B were admitted without objection. Applicant also submitted four ISCR security clearance decisions, which I marked as Hearing Exhibit (HE) I, and appended to the record. I received the hearing transcript (Tr.) on October 2, 2019, and the record closed.

Findings of Fact

Applicant is 42, married, and has two young children. In 2001, he received a bachelor's degree in mechanical engineering, and in 2008, he received a master's degree in business administration. He previously held a security clearance from approximately 2003 until 2011. He has worked for a defense contractor (DC 1) as a program manager since February 2017. (GE 1; Tr. 9-12)

Applicant started experimenting with drugs while he was in college. He continued to use drugs after he graduated in 2001. The majority of his drug use occurred before 2001, but he continued to use drugs occasionally until 2006. (GE 1 at 52-53; GE 2 at 7; GE 3 at 2; AE A; Tr. 54-55)

Applicant used Ketamine two to three times between 1997 and 1998. He used and purchased LSD approximately five times in 1997 and 1998. He used psychedelic mushrooms once in 1998, and once in 2010 at his bachelor party. Applicant used Ecstasy 10 to 15 times between 2001 and 2003, prior to obtaining a security clearance. He used and purchased cocaine 10 to 20 times between 2004 and 2006, while holding a security clearance. Applicant's drug use primarily took place on the weekends while he was at parties with his friends. (GE 1 at 52-53; GE 2 at 7; GE 3 at 2; AE A; Tr. 30-31, 41-44)

Applicant purchased marijuana and used it approximately 15 to 25 times between 1999 and 2006. He used marijuana again approximately three to five times between July and November 2016. At that time, he lived in a state in which recreational marijuana use is legal, and he was employed as the vice president of product development for a small start-up company. He was not considering seeking further government employment. (GE 1 at 50-51; GE 2 at 6-7; GE 3 at 2; AE A; Tr. 29-30, 34, 40, 47-51, 53-54)

Applicant stopped using marijuana in late 2016, because he decided it was not conducive to his family life. He has not used any illegal drugs since late 2016, and he stopped using them prior to applying for and accepting a position with DC 1 in early 2017. (GE 1 at 50-51; GE 2 at 6-7; GE 3 at 2; AE A; Tr. 29-30, 34, 40, 49-51)

Applicant worked for DC 1 from March 2001 until October 2002, when his position was downsized. He applied for a security clearance during this employment, but was laid off before the clearance investigation was completed. At the hearing, Applicant admitted that he probably did not disclose his drug use between 1999 and 2001 when he completed this SCA. (GE 1; Tr. 31-33, 37-39)

Applicant was rehired by DC 1 in March 2003, and he almost immediately received a security clearance based upon his initial application. According to Applicant, the security clearance process "didn't really sink in," and he "continued a pattern of behavior that [he now realizes] is not becoming of individuals" who hold a security clearance. He was aware that drug use was inconsistent with his employment at DC 1 and inconsistent with holding a security clearance. (AE A; Tr. 31-32, 39-40, 47-48)

In late 2010, DC 1 sponsored Applicant for a top secret clearance with sensitive compartmented information access (TS/SCI). In 2011, during an interview, he disclosed all of his drug use, including his drug use while holding a security clearance. He also indicated that he intended to abstain from drug use in the future. Applicant left DC 1 in late December 2011, prior to the adjudication of this upgrade. Applicant worked for non-government-related companies from December 2011 until February 2017, when he was rehired by DC 1. (GE 1 at 55; Tr. 40, 45-47)

Applicant was drug tested by DC 1 in 2001, 2003, 2007, and in 2017. He did not test positive for any drugs on any of these tests. He was drug tested by a non-government employer in 2011 or 2012. (Tr. 29, 45)

Applicant's supervisor (Supervisor) from 2017 until early 2019 testified that he had daily contact with Applicant. He reviewed Applicant's SOR two weeks before the hearing. Supervisor currently holds a TS/SCI security clearance. He has held a security clearance since 2002 as a military service member, government service employee, and defense contractor. He has no concerns with Applicant's behavior at work, and he has only seen "nothing but reasonable, honorable behavior in the years" that he has known him. (Tr. 20-28)

Applicant no longer associates with individuals who use drugs. (AE A; Tr. 31, 33, 52-53) He accepts full responsibility and the consequences for his prior actions, which reflect "very poor judgment and a lack of understanding and respect [for] the severity of holding a [security] clearance." Applicant signed a statement acknowledging that future drug use would subject his security clearance to revocation. He does not intend to use drugs in the future. (GE 3 at 2; AE A; Tr. 29, 31, 33, 52-53)

Applicant currently volunteers at a bicycle co-op providing teaching and mentoring for an under-privileged local community. He volunteered from 2006 to 2013 in another state with the Park Rangers at a National Monument. He went through a background investigation and a drug test for this work. Since August 2019, Applicant has sought weekly mental-health treatment to address stress, personal insight, and communication skills. (AE A; AE B; Tr. 17-18, 35-36)

Policies

This case is adjudicated 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 adjudicative guidelines (AG), which became effective on June 8, 2017.

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 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(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."

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

Guideline H: Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

Applicant’s admissions and the record evidence established the following disqualifying conditions under AG ¶ 25:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The burden shifted to Appellant to prove mitigation of the resulting security concerns. AG ¶ 26 provides conditions that could mitigate security concerns 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.

Applicant started using marijuana and other illegal drugs while he was in college. His illegal drug use continued after he graduated in 2001. He largely discontinued using drugs in 2006, and he last used drugs while holding a clearance in 2010. His marijuana use in 2016 occurred in a state where recreational use is legal, and he was not employed by the U.S. Government or a federal contractor.

Applicant’s decision to use illegal drugs after he was granted a security clearance in 2003, was a lapse in judgment. He understood that his continued drug use was inconsistent with his employer’s drug policy, inconsistent with the responsibility of holding a security clearance, and illegal under federal law.

Applicant admitted at the hearing that he most likely did not disclose his drug history in his 2001 SCA, nor did he disclose any of his subsequent drug use until 2010, when he was sponsored for an upgrade to a TS/SCI security clearance. Starting in 2010, Applicant has been forthright and open with the government regarding his history of drug use, including his 2010 use of mushrooms and his 2016 use of marijuana. He credibly testified that his lifestyle has changed, and he understands the importance of following the rules and regulations associated with holding a security clearance. He no longer associates with individuals who use drugs, and he signed a letter of intent promising never to use illegal drugs in the future

It has been almost ten years since Applicant used drugs while holding a security clearance, and it has been over three years since he last used marijuana. Given the passage of time since his last criminal drug-related behavior and Applicant's credible testimony regarding his future intent to abstain from any illegal drug use, it is unlikely that this behavior will recur, and it does not cast doubt on his current reliability, trustworthiness, or good judgment. Mitigation under AG ¶¶ 26(a) and 26(b) was established.

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 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guideline H in my whole-person analysis.

Applicant forthrightly disclosed adverse derogatory information, and he was not evasive during his testimony. He has met his burden of proof and persuasion. He mitigated the drug involvement security concerns and established his eligibility for a security clearance.

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, Guideline H:	FOR APPLICANT
Subparagraph 1.a – 1.g:	For Applicant

Conclusion

It is clearly consistent with the interests of national security of the United States to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is granted.

CAROLINE E. HEINTZELMAN
Administrative Judge