



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 20-01870
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

May 27, 2021

Decision

GLENDON, John Bayard, Administrative Judge:

Applicant failed to mitigate security concerns regarding drug involvement and substance misuse. Based upon a review of the pleadings, the documentary evidence, and the testimony, national security eligibility for access to classified information is denied.

Statement of the Case

On October 3, 2019, Applicant submitted a security clearance application (SCA) seeking a clearance. On October 27, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H (Drug Involvement and Substance Misuse). The CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended (Exec. Or.); Department of Defense (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) (AG) effective for all adjudicative decisions within DoD on or after June 8, 2017.

On December 22, 2020, Applicant responded to the SOR (Answer). He requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On March 4, 2021, the case was assigned to me. DOHA issued a notice of hearing on March 29, 2021, scheduling the hearing on April 9, 2021.

I convened the hearing as scheduled. Department Counsel presented three proposed exhibits, marked as Government Exhibits (GE) 1 through 3. GE 1 and 3 were admitted without objection. Applicant objected to that admission of GE 2, a report of summarizing his background interview on November 25, 2019. Since the exhibit was not authenticated by a Government witness as required by Directive ¶ E3.1.20, I sustained Applicant's objection. During Department Counsel's cross-examination of Applicant, Applicant testified that the details of his interview in the report were accurate on all but three specific points. I have given Applicant's testimony on the accuracy of the facts recited in GE 2 and his corrections and updates appropriate weight in my findings of fact, below. I did not change my earlier ruling regarding the inadmissibility of GE 2. (Tr. at 9-11, 36-37.)

Applicant attached 12 exhibits to his Answer. I marked the documents as Applicant Exhibits (AE) A through L. In addition, Applicant offered two exhibits at the hearing, which I marked as AE M and N. All of Applicant's proposed exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on April 16, 2021. (Tr. at 12-13.)

Findings of Fact

Applicant's personal information is extracted from his SCA unless otherwise indicated by a parenthetical citation to the record. After a thorough and careful review of the pleadings, Applicant's testimony, the testimony of his wife, and the documentary evidence in the record, I make the following findings of fact.

Applicant is 35 and was married in October 2019. He and his wife have no children, but they hope to start a family in the near future. He earned a bachelor's degree in May 2008. Since his graduation, he has worked at three major U.S. manufacturing companies as an engineer. He began working for his current employer, a defense contractor, in August 2019 as a senior engineer. This company sponsored Applicant for his first security clearance, and shortly after beginning this job, he submitted his SCA. (Tr. at 13-14, 30, 39-40.)

Drug Involvement

Applicant testified that he never used any illegal drugs or misused any prescription medications of third parties during his high school or college years. In his SCA, he disclosed multiple instances of illegal drug use commencing in December 2012 when he was 27 years old and ending in July 2019 when he was 34. He began working at his second post-college job in August 2011. All of his illegal drug use occurred during the period he was employed by this company. His employer had a strict policy prohibiting alcohol and illegal drugs in the workplace. It tests all prospective employees for drug use.

Under certain circumstances described in its policy, the employer tests its employees for illegal drug use, including random drug use. (Tr. at 15, 20-21, 32-37, 39-40; GE 1 at 14, 54-57; GE 3 at 1-4.)

Notwithstanding his employer's drug-free workplace policy, Applicant began using cocaine in December 2012. He used cocaine on about 15 occasions in social settings and at home with his girlfriend, who is now his wife. At the hearing, he described the frequency of his cocaine use as two times or less per year for eight years. His last use was July 2019, about one month before he began working for his security clearance sponsor. That use occurred at his bachelor's party prior to his wedding in 2019. Before that, he used cocaine once in September 2018 at a music festival. Most of his cocaine use was during the period 2012 to 2016 in social settings. He testified that cocaine use was common in his local social scene. (Tr. at 15, 20-21, 32-37, 39-40.)

In addition to cocaine, Applicant disclosed in his SCA and testified at the hearing that he had used marijuana on three occasions during the period April 2014 to April or June 2017. He also disclosed and testified that he used ecstasy on four occasions during the period April 2014 to September 2018. He explained in his SCA and at the hearing that his drug use was largely associated with attending music festivals and with three individuals. He no longer associates with those individuals. One was a former roommate who has died. The second was a friend who moved to a different state far from Applicant's home. The third was a friend with whom Applicant no longer associates due to changes Applicant has made in his lifestyle, particularly with respect to drug use. He also testified that he is no longer involved in his local, drug-using social scene. (Tr. at 20-22; GE 1 at 55-56.)

In addition to Applicant's illegal drug use, he has also misused prescription Adderall belonging to a third party. He wrote in his SCA and testified at the hearing that this illegal drug use occurred on two occasions, in April 2014 and April 2017. He has no intention of ever misusing this prescription drug again. (Tr. at 20-21; GE 1 at 57.)

Applicant testified that he was aware that his illegal drug use was inconsistent with the policies of his second employer where he worked from 2011 to 2019. He knew that he was taking a risk that he might fail a random drug test required by the employer or if he was arrested for possession of an illegal drug. (Tr. at 35-37.)

Since Applicant began his new job with his DoD contractor in August 2019, he has committed to making changes and living a drug-free lifestyle. His employer drug-tested him before he began his job. He has not used any illegal drugs since August 2019. He offered into evidence three negative drug-test reports that were taken over the last four months. In December 2020, Applicant also voluntarily attended an eight-hour drug and alcohol awareness class. In his Answer, he provided a signed statement in which he wrote that he had no intention to ever use illegal drugs again and acknowledged that any future drug use would be grounds for the automatic revocation of his security clearance eligibility. He married his long-time girlfriend in October 2019 with a view to having

children with her. They plan to purchase a home in the near future. (Answer at 8; Tr. at 23, 39-40; AE K - N.)

Character Evidence

Applicant's wife testified on his behalf as a character witness and about his past drug use. She said that she was aware of her husband's drug use. She learned about this behavior from Applicant after he spent time with his friends. She does not believe that her husband's past drug use ever affected his professional or personal life in any way. She admitted that the two of them have also used cocaine, ecstasy, and marijuana together on rare occasions. The last time they used any illegal drugs was in 2017. She testified that since Applicant began his current job, he has taken his career more seriously. Around the same time, they also became engaged. Due to the Covid-19 pandemic, he works from home and she sees first-hand how hard he works to perform well in his job. She views Applicant as honest and trustworthy. She noted that she is presently a student and is not employed. As a result, she is relying solely on her husband to support her financially. She believes he is sincere about his decision to live a drug-free lifestyle and is firmly committed to this change in his life. (Tr. at 13-19.)

Applicant also offered ten character reference letters. Six of the letters are personal references from friends, including his wife, who are aware of Applicant's past drug use. The other four letters are professional references. These individuals are unaware of Applicant's history of using illegal drugs. His friends describe him as honest, trustworthy, reliable, loyal, and dependable. In his youth, he was an Eagle Boy Scout, evidencing his character and dedication to hard work. They do not view his past drug use as a habit or an abuse. His professional references praise Applicant's technical skills, dedication, reliability, and trustworthiness. Significantly, Applicant made a full disclosure of his past drug use in his SCA and during his background interview. (Tr. at 24; AE A-J.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr.20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern under this guideline is set out in AG ¶ 24 as follows:

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.

The guideline at AG ¶ 25 contains seven potentially disqualifying conditions that could raise security concerns. One condition applies to the facts found in this case:

(a): any substance misuse (see above definition).

The record evidence establishes that Applicant has used cocaine, ecstasy, marijuana, and a third-party's prescription Adderall on a number of occasions. His first use of an illegal drug, cocaine, occurred in December 2012. His last use of an illegal drug was also cocaine and that occurred in July 2019, less than two years ago. Accordingly, further review is required.

The guideline in AG ¶ 26 contains four conditions that could mitigate security concerns arising from Applicant's drug involvement. Three of the conditions potentially apply:

(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; and

(d): satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

AG ¶ 26(a) is not established. Applicant's last use of cocaine was less than two years ago and was only two or three months before he submitted his October 2019 SCA

in which he sought eligibility for access to classified information. Insufficient time has passed to permit a conclusion that Applicant's abstinence from using illegal drugs is unlikely to recur. Although his drug use could be viewed as somewhat infrequent, his recent behavior casts doubt on his reliability, trustworthiness, and judgment.

AG ¶ 26(b) is partially established. Applicant has acknowledged his past drug use and has provided evidence taken to overcome his many years of drug abuse. He no longer associates with friends who use drugs. He also avoids situations where drugs might be used. He has provided a signed statement pursuant to AG ¶ 26(b)(3). He has not, however, established a pattern of abstinence of sufficient duration to permit a conclusion that his drug use will not be repeated. I found his testimony that he no longer intends to use illegal drugs to be sincere and credible, but words alone are insufficient under these circumstances. A longer period of abstinence is required to establish full mitigation under AG ¶ 26(b).

AG ¶ 26(d) is not established. Applicant's completion of an eight-hour drug and alcohol awareness class evidences Applicant's sincerity in refraining from future illegal drug use. The class, however, does not meet any of the requirements of this mitigating condition.

Whole-Person Concept

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. In applying the whole-person concept, an 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 and applying the adjudicative factors in AG ¶ 2(d). These factors are:

- (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.

I have incorporated my comments under Guideline H in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Some factors warrant additional comments. I have considered Applicant's age and the variety of illegal drugs he has used since he was 27 years old. While I have considered the fact that Applicant's drug use was not a regular part of his lifestyle, I have weighed the fact that he is not someone who recently graduated from college and needed a little time to adjust to adult life where compliance with rules, particularly criminal drug laws, is an important responsibility. This factor imposes a significant burden on Applicant to establish mitigation of the security

