



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



In the matter of:)
)
) ISCR Case No. 19-03278
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel
For Applicant: Frederic Nicola, Esq.

July 27, 2021

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline H (drug involvement and substance misuse). Clearance is denied.

Statement of the Case

On December 2, 2017, Applicant submitted a Questionnaire for National Security Positions (SF-86). On February 7, 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. The SOR detailed reasons why the CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On February 20, 2020, Applicant submitted his Answer to the SOR through counsel. On August 12, 2020, Department Counsel was ready to proceed. On August 25, 2020, the Defense Office of Hearings and Appeals (DOHA) assigned the case to another administrative judge. On December 17, 2020, DOHA reassigned the case to me. On October 29, 2020, DOHA issued a notice of hearing scheduling the hearing for

January 12, 2021. The hearing was convened as scheduled. Department Counsel submitted Government Exhibits (GE) 1 through 8, which were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A and B, which were admitted without objection. On January 27, 2021, DOHA received the hearing transcript (Tr.).

Findings of Fact

The Government alleges under Guideline H that Applicant is ineligible for a clearance because he has used illegal drugs. He admitted through counsel "with clarifications" the two allegations in the SOR under this paragraph. (SOR Answer) Those admissions are accepted as findings of fact.

Background Information

Applicant is a 46-year-old senior principal engineer, who has been employed by a defense contractor since January 2005. (GE 1; Tr. 12-13) He seeks a secret security clearance to enhance his employability and upward mobility within his company. (GE 1; Tr. 13-14, 25-26, 28-30)

Applicant never received his high school diploma. He "had some hardship growing up with a single mother." He quit high school, left home, and got a full-time job at a grocery store when he was "about 17 years old," after his mother attempted suicide in 1992. (SOR Answer; Tr. 14-15, 23-24) Applicant "tested" into a prestigious university, and was awarded a bachelor of science degree in mechanical engineering in June 2003. He was awarded a master's degree in mechanical aerospace engineering in June 2005. He completed one year of coursework towards his Ph.D. in engineering; however, he withdrew from the program "due to family considerations." (Tr. 15-18, 24-29)

Applicant married in June 1998 and divorced in April 2017. He remarried his wife in 2018, month not recalled. He has two minor sons. At the time of the hearing, Applicant's wife was unemployed, having previously worked as an administrative assistant for a university. (GE 1; Tr. 19-22, 46) Applicant's annual income averages about \$150,000. However, 2020 was an exception, and his annual income in 2020 was \$207,000. (Tr. 22)

Drug Involvement and Substance Misuse

SOR ¶ 1.a alleges that Applicant used marijuana on various occasions between approximately 1993 and June 2017, and SOR ¶ 1.b alleges that he used marijuana on various occasions between approximately January 2005 and September 2008, while granted access to classified information. (SOR; SOR Answer)

This is not Applicant's first DOHA hearing for drug-related security concerns. On August 23, 2011, DOHA issued Applicant an SOR, followed by a hearing on February 15, 2012, discussed below. He explained that his failure to be "fully truthful about some past drug use" led to the denial of his clearance after that 2012 hearing. However, since

that experience, he has been “totally truthful” throughout these proceedings since his reapplication for a security clearance. (Tr. 32-35) Applicant’s marijuana use began when he was 17 or 18. Before his mother’s suicide attempt, he was a good student and athlete. He was involved in the community with tutoring and mentoring. After his mother’s suicide attempt, he began associating with individuals who used marijuana. (Tr. 35-36)

Applicant broke down his drug use into two timeframes, from 1993 to 2005, and from 2005 to the present. Applicant stopped using marijuana in 2005 at age 30 when he started his current job and was trying to be responsible in the workforce. (Tr. 36-38) He could not recall during direct examination the precise number of times he used marijuana during college. His wife does not drink, smoke, or use any illegal drugs. (Tr. 46-47) After beginning his current job in 2005, he stated that he used marijuana three times. (SOR Answer; Tr. 38-39) The last time he used marijuana was in 2017 at his father-in-law’s funeral. His family was in a circle sharing memories, and a “joint was passed around.” Applicant had previously held a clearance from January 2005 to September 2008 and had used marijuana a “few times” during that period. (Tr. 39-40) Applicant knew it was wrong to do that and self-reported his marijuana use. (Tr. 40)

Applicant has disassociated himself “100 percent” from the individuals with whom he smoked marijuana. He submitted a signed statement of intent to abstain from all drug involvement and substance abuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility. He also submitted a Certificate of Completion for a four-hour Drug and Alcohol Awareness Class completed on September 18, 2017. Applicant stated that he has no desire to use marijuana, and he does not have any intent to use marijuana in the future. He took a privately administered drug test on January 11, 2021, the day before his hearing that was negative. (Tr. 40-42, 57; SOR Answer (Exhibits 1 and 2); AE B)

Applicant acknowledged that he was informed of his company’s zero tolerance drug-use policy when he was hired in 2005. He has never been required to take a random drug test since he began his employment. (Tr. 47-49)

During cross-examination, Department Counsel elicited further details from Applicant regarding his past marijuana use. During his first year of employment in 2005, he used marijuana “about five times during holidays and visits with friends.” The next year in 2006, he used marijuana “about three times during holidays with friends.” In addition, in 2007, he used marijuana “a couple of times also during the holidays.” In 2008, he used marijuana “about one time.” (GE 2; Tr. 49-50) When Applicant completed an SF-86 on February 8, 2005, he denied any prior drug use. He completed an SF-86 on May 15, 2008, and again denied any prior drug use. However, during an August 3, 2009 Office of Personnel Management (OPM) interview preceding a polygraph, he disclosed his prior marijuana use. (GE 3, GE 6, GE 8; Tr. 50-51)

As noted, Applicant appeared at a DOHA hearing on February 15, 2012. His SOR listed three allegations of drug use to which he admitted. The Administrative Judge noted in his findings that Applicant had used illegal drugs from about 1993 to

September 2008. His SOR also listed four allegations under personal conduct to which he admitted. In particular, he denied using marijuana in the previous seven years and using any controlled substance while possessing a security clearance. Applicant had been granted a security clearance in November 2005, and eligibility for access to sensitive compartmented information (SCI) in July 2008. His clearance and SCI access were revoked in January 2010 because of drug involvement and personal conduct issues. Applicant stated at his 2010 hearing that he did not currently use drugs and had no desire to use drugs in the future. (GE 8, Tr. 52)

After his polygraph interview, Applicant stated that he did not use marijuana until November 2016 when his father-in-law was placed in hospice care, then again in April 2017 at the birthday party for his wife and father-in-law, and again in June 2017 when the family spread his father-in-law's ashes. Applicant knew at the time that using marijuana could affect his security clearance. He added that he was "a bit ignorant and naïve . . . believing that the laws had changed," but knew it was wrong because his employer had a zero tolerance drug policy. (Tr. 53-56) Applicant stated that he did not use marijuana in 2018, 2019, 2020, or 2021. (Tr. 57) He also stated that he has been truthful about all of his past marijuana use. (Tr. 57-58)

Character Evidence

Applicant is active in his community. He has always sought to find a family within the community. To that end, he coaches legal robotics and soccer, and has done so in underrepresented communities. He was the team manager for his son's soccer team for the past four years. He also mentors junior engineers at his job site. Applicant earns a good income and enjoys his work, but his career "hit a plateau" because of his inability to work on classified projects. He considers himself a talented engineer who helped win a "multi-billion-dollar program," a program that he worked on for six years. (Tr. 22, 32, 42-44)

Applicant submitted several pre- and post-employment certificates, awards, and academic scholarships. (SOR Answer, Exhibits, 3-6, 9) His 2017 and 2018 annual evaluations reflect sustained superior performance and document Applicant's contributions as a trusted and valued employee. His 2018 evaluation notes that Applicant's technical skills are "top notch" and that "he is always willing to help." The same evaluation gave him an overall rating of "Exceptional Contribution." Applicant also submitted nine work-related certificates from 2006 to 2009 that acknowledge his contributions on various company projects. He has received three patents and one innovation award. (SOR Answer, Exhibit 7; Tr. 29-31) Applicant considers his accomplishment of consistently receiving Technical Honors Awards every four years, a total of three, as his most distinguished professional recognition. His personnel file indicates that he has received 29 awards for various accomplishments from November 2016 to January 2020. (SOR Answer; Exhibit 8)

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 AG ¶ 2 describing 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."

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 clearance 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

Drug Involvement and Substance Misuse

AG ¶ 24 describes the security concern about drug involvement and substance misuse:

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.

AG ¶ 25 provides two conditions that could raise a security concern and may be disqualifying in this case:

- (a) any substance misuse (see above definition); and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The Applicant admitted and the record established these two disqualifying conditions. Applicant used marijuana on various occasions between 1993 and June 2017. He also used marijuana on various occasions between January 2005 and September 2008, while granted access to classified information. Consideration of mitigating conditions is required.

AG ¶ 26 lists two conditions that could mitigate security concerns:

- (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.

I have considered all of the mitigating conditions under drug involvement and substance misuse and especially considered AG ¶¶ 26(a) and 26(b).

Concerning AG ¶ 26(a), there are no “bright line” rules for determining when conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the Directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows, “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge’s decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis, the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.”) (citation format corrections added).

Applicant’s most recent abuse of marijuana occurred in June 2017, about three-and-one-half years before his hearing. Applicant asserts that he has turned his life around, no longer wants to use marijuana, and will not use it in the future. The problem here is that he appeared at a DOHA hearing on February 15, 2012, for drug involvement and drug-related falsification personal conduct concerns. At that hearing, Applicant made similar promises and then used marijuana after his 2012 hearing.

Additionally, Applicant did not provide a convincing account of his past marijuana use. After minimizing his past marijuana use on direct examination, he added additional instances of marijuana use when pressed by Department Counsel. Even now, I am not confident that he has revealed all of his marijuana use. He was unable to adequately explain his continued marijuana use after being employed in the defense industry and receiving a security clearance. Applicant's previous 2012 DOHA hearing failed to make a convincing impression on him. In light of Applicant's failure to live up to his past promises of future abstinence from marijuana, I do not have the confidence that he will live up to his most recent promises. Additional time is required to evaluate Applicant's sincerity and trustworthiness. Accordingly, mitigation credit under AG ¶ 20(a) is not warranted at this time. Applicant established some mitigation under AG ¶ 20(b) for compliance with subsections (1), (2), and (3); however, the overall circumstances do not warrant full mitigation of security concerns under Guideline H.

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 the 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.

The ultimate determination whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). The discussion under Guideline H is incorporated in this whole-person section. However, further comments are warranted.

Applicant is a 46-year-old senior principal engineer, who is an intelligent and accomplished individual. There is little doubt that he is well regarded by his company and is a valued employee. In addition to his multiple professional benchmark successes, he is involved in his two son's lives, and contributes to his community.

However, the fact that Applicant has returned to this venue for another hearing is of concern. The previous DOHA hearing apparently failed to convince Applicant that drug use is not compatible with access to classified information. While Applicant receives credit for self-reporting his drug use, such credit is overshadowed by the poor judgment he exercised by continuing to use marijuana on multiple occasions after his 2012 DOHA hearing. Applicant's violation of past promises to abstain from using marijuana, before and during his 2012 DOHA hearing, has brought his reliability and

trustworthiness into question and raises questions about his willingness to comply with laws, rules, and regulations. See, e.g., ISCR Case No. 19-02499 at 4 (App. Bd. July 7, 2021) (An applicant's use of illegal drugs after having completed an SCA (SF-86) or after otherwise having been placed on notice of the incompatibility of drug use and clearance eligibility raises questions about his or her judgment, reliability, and willingness to comply with rules and regulations.)

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines.

Formal Findings

The formal findings on the allegations set forth in the SOR are as follows:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. National security eligibility is denied.

Robert Tuidor
Administrative Judge