



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



In the matter of:)
)
) ISCR Case No. 20-03294
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Kevin Murphy, Esq.

October 26, 2021

Decision

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns regarding Guideline H (drug involvement and substance misuse). Clearance is granted.

Statement of the Case

On April 22, 2020, Applicant submitted a Questionnaire for National Security Positions (SF-86). On December 16, 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 DOD CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On January 11, 2021, Applicant submitted his Answer to the SOR through counsel. On March 11, 2021, Department Counsel was ready to proceed. On March 16, 2021, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On April 15, 2021, DOHA issued a notice of DCS video teleconference hearing scheduling the hearing for June 8, 2021. The hearing was convened as scheduled.

Department Counsel submitted Government Exhibits (GE) 1 and 2, which were admitted without objection. Applicant testified, called two witnesses to testify on his behalf, and submitted Applicant's Exhibits (AE) 1 through 6, which were admitted without objection. I held the record open until June 25, 2021, to afford the Applicant an opportunity to submit additional evidence. Applicant through counsel timely submitted AE 7, which was admitted without objection. On June 16, 2021, DOHA received the hearing transcript (Tr.).

Findings of Fact

Applicant, through counsel, admitted in part and denied in part the three SOR allegations with explanations. (SOR Answer) His partial admissions are incorporated or adopted as findings of fact. Additional findings of fact follow.

Background Information

Applicant is a 39-year-old senior principal engineer - electrical employed by a defense contractor since March 2020. (SOR Answer (Ex. 1); GE 1; Tr. 14-15, 38) He seeks a security clearance to enhance his position within his company. (GE 1; Tr. 15-16, 38-39) Applicant was previously employed by his current employer and held a clearance from 2007 to 2013. (SOR Answer (Ex. 1); GE 2 - June 10, 2020 Office of Personnel Management Personal Subject Interview (OPM PSI); Tr. 17)

Applicant received his high school diploma in June 2000. He was awarded a Bachelor of Science degree in mechanical engineering with a minor in electrical engineering in June 2004, and graduated *magna cum laude* with a 3.84 grade point average. (SOR Answer (Ex. 1); GE 1; Tr. 16, 37-38) Applicant married in March 2016, and has no children. (GE 1; Tr. 16-17)

Drug Involvement and Substance Misuse

Applicant self-reported drug use on his April 22, 2020 SF-86 when reapplying for a security clearance for reemployment with his current defense contractor. (GE 1; 36-37) He was subsequently interviewed on June 10, 2020 by an OPM investigator regarding his drug use. None of his drug use occurred while holding a security clearance or occurred anticipating renewal of a security clearance. (GE 2) He elaborated on his drug use in his January 11, 2021 SOR Answer as well as during his testimony. The following summarizes that drug use.

SOR ¶ 1.a alleged that from approximately September 2015 to October 2019, Applicant used marijuana with varying frequency. In his SOR Answer, Applicant admitted to using marijuana five times in the past seven years and disputed the characterization of "varying frequency." He noted that over the past several years, the legal restrictions on recreational use of marijuana have eased significantly, with numerous states decriminalizing marijuana entirely. (SOR Answer) During his testimony, Applicant confirmed the number of times he used marijuana as admitted in

his SOR Answer adding that his marijuana use occurred in 2015 and from 2016 to 2019 at music/art festivals. (Tr. 39-40, 45--55)

SOR ¶ 1.b alleged that from approximately September 2015 to October 2019, Applicant used LSD with varying frequency. In his SOR Answer, Applicant admitted to using LSD two times, once in September 2015 and once in October 2019. Applicant wanted to clarify that these two uses did not constitute “continued use and/or abuse” and were experimental, while attending music/art festivals. (SOR Answer; Tr. 45) During his testimony, Applicant confirmed the number of times he used LSD as admitted in his SOR Answer. (Tr. 39-40, 45-55)

SOR ¶ 1.c alleged that in approximately October 2019, Applicant used MDMA (“ecstasy”). In his SOR Answer, Applicant admitted to using MDMA once in October 2019 at a music/art festival. (SOR Answer) During his testimony, Applicant confirmed the number of times he used MDMA in his SOR Answer. (Tr. 39-40, 45-55)

Applicant explained his use of drugs during this timeframe was “a spiritual event, it was opening my mind to different experiences, different viewpoints, it was a way of connecting with others there, it was a different way to experience the music and art.” (Tr. 40, 52-53) He was not working for a defense contractor nor did he have a security clearance at any time that he used these drugs. Applicant understands that use of drugs when he did not have a security clearance was illegal, but “it felt like a low risk at the time. I realize now it was a mistake. . .” This experience has impressed on Applicant that drug use is not acceptable and that youthful experimentation is viewed quite differently as an adult. (Tr. 40, 48-49, 57-58)

Applicant credibly stated that he disclosed all of his drug use on his SF-86. (Tr. 42-43) He understands that any form of drug use is not permitted under federal law and as such, he will comply with the law. (Tr. 55-56) Applicant’s wife is aware of his past drug use and fully supports him maintaining sobriety. (Tr. 61)

Applicant noted that the process to obtain a clearance has definitely affected his motivation regarding any future drug use. He stated, “I will not be using drugs in the future.” (Tr. 43) Applicant’s motivation to obtain a security clearance is, “I do love the job. I like working with [described project] very much, and it would enable me to better help my company and the customer, the Navy or the Government.” (Tr. 44) He requested the hearing because, “I want to convince the Judge and the Government that I am trustworthy and can safely hold a security clearance.” (Tr. 44)

Applicant described time spent with individuals that he used drugs with in the past as varying and dependent on the individual. Some individuals he sees annually or less, and some individuals he sees on a more frequent basis, but does not use drugs with them. These individuals understand and respect the fact that Applicant’s current employment does not allow him to use drugs. Applicant regrets his prior drug use and acknowledged that using drugs in his profession was “not smart.” (Tr. 55, 58-60)

Applicant submitted two negative drug tests dated February 9, 2021, and March 29, 2021. (Ex. 3) Post-hearing, Applicant submitted a signed, sworn statement of intent, dated June 23, 2021, to avoid any future drug use or other illegal use of drugs both presently and in the future, with the understanding that any drug violation will result in the automatic revocation of clearance. He added that it is his intention to abstain completely from all intoxicating substance abuse, including, but not limited to disassociation from events and people that promote the usage of illegal intoxicants and avoidance of drug-using associates and/or contacts. (AE 7)

Character Evidence

Applicant called two character witnesses to testify on his behalf:

Co-worker (CW-1) and mechanical engineer. CW-1 has known Applicant since 2008 when he hired on as a new employee with their present employer. CW-1 described Applicant as a “very approachable, technically capable individual.” He further stated that Applicant was cognizant of balancing the competing interests of management and the customer making “the correct decision for both the customer and the company’s sake.” CW-1 reached out to Applicant to return to their company because of his expertise in key areas. CW-1 never observed Applicant drink to excess or use drugs. CW-1 is aware of Applicant’s admitted drug use and the Government’s concerns. Based on observing Applicant on a personal and professional basis, CW-1 stated that Applicant is a person of “very good character” who could be trusted to safeguard classified information. CW-1 also submitted a reference letter on Applicant’s behalf. (AE 6; Tr. 17-27)

Co-worker (CW-2) and mechanical engineer. CW-2 has known Applicant since the “mid 2000s when he joined the group and we worked on production equipment together.” CW-2 described Applicant as a “very bright individual . . . willing to wade into complex situations and sort them out . . .” Applicant was well liked and trusted by his peers and management. CW-2 added that Applicant was good-natured, punctual, and handled stress very well. CW-2 is aware of Applicant’s admitted drug use and the Government’s concerns. CW-2 never observed Applicant drink to excess. CW-2 stated Applicant is a valued and trusted employee and does not pose a security risk. CW-2 also submitted a reference letter on Applicant’s behalf. (AE 5; Tr. 28-35)

Applicant submitted four reference letters at his hearing: (1) Self-employed piano instructor and professional musician (PI); (2) Applicant’s wife (W); (3) CW-1 (testified at his hearing; and (4) CW-2 (testified at his hearing).

PI has known Applicant since 1994 when they met in junior high school. PI described Applicant as being “without question one of the most trustworthy people I have ever known.” W is a veterinary surgeon, has known Applicant since 2003, began dating him in 2010, and married him in 2016. She stated, “I am lucky to be [Applicant’s] wife.” W discussed Applicant’s decision to self-report his drug use realizing that adverse consequences could follow. She noted that Applicant is “most certainly aware now that these were poor decisions.” As a veterinarian, she noted that any drug use on her part

would jeopardize her license and career. W is fully supportive of Applicant maintaining a life of sobriety. She described Applicant as “one of the most honest, trustworthy, and empathetic people I have ever known. Our relationship has been an immense source of strength and support for me. While I may hold some bias, I also feel that I know [Applicant] the best of anyone and can attest to his character.” CW-1 and CW-2’s letters were consistent with their testimony. (AE 4, AE 5, AE 6)

Applicant submitted several performance evaluations from his previous and current employers. They document a 16-year history in which Applicant has excelled in his professional capacity and his contributions to the national defense. He is technically competent, well liked, trusted, and respected by his peers and management. (SOR Answer; AE. 2, AE 3)

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 one condition that could raise a security concern and may be disqualifying in this case:

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

These proceedings were initiated after Applicant self-reported his history of drug use on his April 22, 2020 SF-86, and later during his June 10, 2020 OPM PSI. These self-disclosures establish AG ¶ 25(a). Further review 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.

Considering the totality of the circumstances in this case, I find application of AG ¶¶ 26(a) and 26(b) (1)(2)(3).

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 change 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 last drug use was October 2019, about 18 months before his hearing and about six months before he self-reported his drug use on his SF-86. His drug use occurred while attending music/art festivals with friends where it was common to experiment with mood-altering substances, in order to increase visual and audio stimulation and to be more interpersonally connected with other festival attendees. Applicant clarified that his drug use was infrequent and limited to these venues. He has engaged in a significant amount of self-reflection regarding his behavior and recognizes that such behavior is incompatible with holding a security clearance. Applicant has committed, as noted in his post-hearing statement of intent, to disassociating from events and people that promote the usage of illegal intoxicants and avoiding drug-using associates and contacts.

The record contains persuasive evidence that Applicant has turned the corner on achieving drug abstinence. He recognizes the importance of being a responsible husband and colleague, and that his actions can affect others. He also fully recognizes that there is no room for any drug use while holding a security clearance. Applicant’s self-reflection, change in behavior, and support from his family, friends, and associates, not to mention 18 months of sobriety, are indicative of an individual who wants to right his course. The absence of evidence of more recent or extensive drug use, and his promise not to use illegal drugs in the future, eliminates doubts about his current reliability, trustworthiness, and good judgment with respect to abstaining from illegal drug use. In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

AG ¶ 26(b) lists three ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. He has maintained a drug-free environment, achieved ongoing personal growth, and changed his own life with respect to drug use. He does not associate with anyone who uses marijuana and made lifestyle changes consistent with sobriety. He has abstained from drug use for about 18 months and has had no problem in doing so.

Applicant’s letters of support from his wife, friends, and colleagues document that he is an individual who possesses character and integrity. Applicant’s work performance evaluations reflect the caliber of the contribution he is making as an employee. His performance further reflects his work behavior is not indicative of someone with a drug problem. As an employee and as a member of his community, he is viewed as reliable, a constant learner, and an individual with integrity. At his hearing, Applicant acknowledged that future drug abuse is incompatible with his future career and family plans, and manifested a steadfast commitment to continue lifestyle changes consistent with total abstinence of involvement with all other illegal drugs.

In evaluating Applicant's credibility, I did so after assessing his demeanor, overall candor on other matters, and reputation among his superiors and peers. Given the circumstances of Applicant's background, his explanation for his actions, and his subsequent actions, I find credible his assertion that he will not use any illegal substance in the future. AG ¶¶ 26(a) and 26(b) apply. Drug involvement and substance misuse security concerns are mitigated.

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 has been and is willing to maintain conduct expected of one entrusted with a security clearance. He self-reported his drug use knowing that such disclosure could jeopardize his clearance eligibility. I note that his drug use did not occur while he held a clearance. Applicant's drug use occurred infrequently at music/art festivals at events where a misplaced acceptance of normalcy was created by his peer group and environment. He has since recognized that it is not prudent to place himself in such an environment.

Applicant's employer, friends, and family support him. He has a history of stable employment and a strong work ethic. This level of support and self-introspection should ensure his continued success. Applicant demonstrated the correct attitude and commitment to remaining drug free. He has multiple indicators of a mature, stable, responsible, and trustworthy person. He was serious, candid, and credible at the hearing. He appears to have cooperated fully and provided truthful information during the security clearance process and during his OPM PSI. He made a good impression on me during the hearing. I believe Applicant has learned from this experience, and is committed to remaining drug-free.

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: FOR APPLICANT

Subparagraphs 1.a – 1.c: For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. National security eligibility is granted.

Robert Tuider
Administrative Judge