



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



In the matter of:)
)
) ISCR Case No. 20-02092
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Alan Edmunds, Esq.

January 25, 2022

Decision

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns regarding Guideline H (drug involvement and substance misuse). Eligibility for access to classified information is granted.

Statement of the Case

On September 29, 2019, Applicant submitted a Questionnaire for National Security Positions (SF-86). On October 30, 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 29, 2021, Applicant submitted his Answer to the SOR through counsel. On March 24, 2021, Department Counsel was ready to proceed. On May 10, 2021, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On May 10, 2021, DOHA issued a notice of DCS video teleconference hearing scheduling the hearing for June 30, 2021. The hearing was convened as scheduled.

Department Counsel submitted Government Exhibits (GE) 1 and 2, which were admitted without objection. Applicant testified, did not call any witnesses to testify on his behalf, and submitted Applicant's Exhibits (AE) A through O, which were admitted without objection. AE A through H were attached to Applicant's SOR Answer. On July 12, 2021, DOHA received the hearing transcript (Tr.).

Findings of Fact

Applicant, through counsel, admitted "with clarification" the sole allegation that he used marijuana with varying frequency from about January 1996 to June 2019. (SOR Answer) His admissions are incorporated or adopted as findings of fact. Additional findings of fact follow.

Background Information

Applicant is a 45-year-old senior principal systems engineer employed by a defense contractor since June 2019. (GE 1; AE F; Tr. 13) He seeks a secret security clearance as a requirement of his continued employment. (GE 1; Tr. 13-14) He previously held a clearance from approximately 2000 to 2005 while employed by a previous defense contractor. (SOR Answer; GE 1)

Applicant received his high school diploma in May 1994. He was awarded a Bachelor of Science degree in engineering science in December 1998. Applicant was awarded a Master of Electrical Engineering degree in June 2003. He has received three patents and has three patents pending. (GE 1; AE F, AE G; Tr. 14-15, 27-28) He married in December 2018. (GE 1; Tr. 15-16) Applicant's wife is employed as a pediatric dentist at a children's hospital. At the time of the hearing, Applicant's wife was expecting their first child. (Tr. 16-17)

Drug Involvement and Substance Misuse

Applicant self-reported his drug use on his September 20, 2019 SF-86, when applying for a security clearance with his current employer. (GE 1; Tr. 10, 19-20) He was subsequently interviewed on November 11, 2019, by an Office of Personnel Management (OPM) investigator as part of his background investigation regarding his drug use. None of his drug use occurred while holding a security clearance. (GE 2) He further elaborated on his drug use in his January 29, 2021 SOR Answer as well as during his testimony. The following summarizes that drug use.

SOR ¶ 1.a alleged that Applicant used marijuana with varying frequency from about January 1996 to June 2019. During his testimony, Applicant clarified his past marijuana use. While in college, he used marijuana "probably half a dozen times or so." After college from 1998 to 2000, Applicant used marijuana "once, maybe twice." (SOR Answer; Tr. 19, 32-35) From 2000 to 2010, he did "not touch it at all." This included the five-year period he held a clearance. (Tr. 18-19) From 2010 to 2014, he used cannabis in conjunction with a vaporizer he developed "maybe every two to six months." (Tr. 35-38) From 2014 to 2019, Applicant characterized his marijuana use as "maybe one or

two puffs, maybe every six months. . . . Really infrequent.” (Tr. 39-40) The last time Applicant used marijuana was in June 2019 at a summer gathering. If offered marijuana today, Applicant credibly stated, “I would just walk away. It’s not part of my life.” (Tr. 22-23, 28)

Applicant does not use marijuana or cannabis-based products. His prior use was always personal and recreational. He never used marijuana when he previously held a clearance from 2000 to 2005 and does not currently use or intend to use marijuana or any cannabis-based products in the future. (SOR Answer; Tr. 19) Applicant reiterated his commitment during his hearing that he does not envision nor does he have any intent to use marijuana in the future. (Tr. 24, 29, 43)

He added that he would not use marijuana in the future even if marijuana were legalized at the Federal level. Applicant explained, “Fundamentally, it’s just not who I am. It’s not part of my life anymore.” Applicant stated, “And second part is my wife, [wife’s name], is from [South American country]. She is adamantly against marijuana. Her father was an ex-undercover detective, and her mother was a judge in [South American country]. So she grew up with very strong black-and-white morals and she’s very, very adamant on this subject. So no one would be anywhere near our house using marijuana, or anything else illegal.” (Tr. 24-25) Applicant does not associate with anyone who uses marijuana. (Tr. 44)

Applicant stated that his marijuana use was never the result of a medical prescription, nor for self-medication. He has never been referred to drug counseling for his past marijuana use. Applicant further stated that he does not now, nor has he ever, struggled with addiction for any illegal substance, including cannabis. He has never had a positive drug test. In his SOR Answer and during his hearing, Applicant submitted two separate signed statements 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. (SOR Answer; AE B, AE K; Tr. 23-24, 29-30) Applicant submitted three negative drug tests, one test collected on January 25, 2021, and two tests collected on June 10, 2021. (Tr. 24; AE C, AE J)

Applicant also submitted a comprehensive drug and alcohol assessment dated June 20, 2021, from a licensed clinical social worker, certified substance abuse counselor, and masters addiction professional and licensed substance abuse professional. She concluded that Applicant “is not at risk of relapse or return to his previous behavior. [Applicant] is fully capable of safeguarding classified information and [she] find[s] him fit for duty in a position affecting the national security.” (Tr. 28; AE I)

Character Evidence

Applicant submitted five reference letters from individuals who know Applicant well. Two of those references are former work colleagues and one is a former neighbor. One reference is his current supervisor, and one reference is his wife. Four of Applicant’s references are familiar with DoD security clearance regulations and policies. All references are familiar with the nature of the allegations against Applicant and fully

support him. Applicant's 2020 performance evaluation documents superior performance and his contribution to the national defense. Applicant's former colleagues and current supervisor corroborated the positive performance evaluation comments in their reference letters. (Tr. 24-27; AE D, AE E, AE M) Applicant submitted current photographs of his wife and him. (Tr. 30-31; AE H, AE L)

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 September 20, 2019 SF-86, and later during his November 12, 2019 OPM interview. 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 Applicant proved full mitigation of security concerns under 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 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 June 2019, about 24 months before his hearing and about six months before he self-reported his drug use on his SF-86. His marijuana use occurred in college and intermittently and infrequently in the following years until he stopped completely in June 2019. Applicant 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 statements 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 24 months of abstinence, 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, has made lifestyle changes, and has abstained from drug use for about 24 months with 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 evaluation reflects 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 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 behavior, 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. He recognizes that it is not prudent to associate with anyone who uses drugs or place himself in such an environment where drugs are used.

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 free of illegal drug involvement. 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

Subparagraph 1.a: 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