



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



In the matter of:)
)
) ISCR Case No. 21-00766
)
Applicant for Security Clearance)

Appearances

For Government: William H. Miller, Esq., Department Counsel
For Applicant: Brittany D. Forrester, Esq.

11/09/2022

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H (drug involvement and substance misuse). Eligibility for access to classified information is denied.

Statement of the Case

On June 25, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H. Applicant responded to the SOR on July 20, 2021, and requested a decision based on the written record in lieu of a hearing. On November 23, 2021, he changed his request to a hearing before an administrative judge. The case was assigned to me on August 3, 2022. The hearing was convened as scheduled on October 26, 2022.

Procedural and Evidentiary Rulings

Evidence

Government Exhibit (GE) 1 was admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through Q, which were admitted without objection.

Motion to Amend SOR

Department Counsel's motion to amend the SOR by withdrawing SOR ¶¶ 1.e and 1.g was granted without objection.

Findings of Fact

Applicant is a 31-year-old employee of a defense contractor. He has worked for his current employer since April 2020. This is his first application for a security clearance. He has an associate's degree earned in 2013, a bachelor's degree earned in 2016, and a master's degree earned in 2019. He has never married, but he has cohabitated with his fiancée since 2018. He does not have children. (Transcript (Tr.) at 12-13, 41, 66; GE 1; AE M)

Applicant used a variety of illegal drugs from about 2006 through March 2020. He was cited in 2009 for possession of drug paraphernalia and in 2010 for possession of marijuana. He completed the requirements for a deferred adjudication, and both charges were dismissed. (Tr. at 22-23, 26-27, 37, 64-66; Applicant's response to SOR; GE 1)

Applicant used marijuana from about 2006, when he was in high school, through March 2020. He purchased marijuana from friends. He used marijuana at times as often as five times a week. He mainly used it to calm down at the end of the day and to help him sleep. He has not used or possessed marijuana since March 2020. (Tr. at 15, 42-48, 63; Applicant's response to SOR; GE 1)

From about 2008 through March 2018, Applicant purchased and used prescription narcotic painkillers without a prescription. He purchased them from friends "a few times every few years." He used them in 2008 to 2009 to help cope with depression. His later use was strictly for pain relief, not for recreational purposes. He has not used any unprescribed painkillers since March 2018. (Tr. at 18-22, 27, 57-61; Applicant's response to SOR; GE 1)

From about 2009 through February 2020, Applicant used Adderall without a prescription. He purchased the Adderall from friends. He used the Adderall to study and to focus when preparing papers and when working. He has not used Adderall since February 2020. He used cocaine on three occasions, most recently in about early 2017. He did not purchase the cocaine; it was provided by a friend. (Tr. at 23-26, 48-56, 63-64; Applicant's response to SOR; GE 1)

Applicant submitted a Questionnaire for National Security Positions (SF 86) in May 2020. He reported all of his illegal drug use. (GE 1)

Applicant has not used any illegal substances since March 2020. He matured, and he started a new job and realized that illegal drug use was not conducive to the job or a healthy lifestyle. He passed multiple drug tests. He stated that he is healthier, happier, and financially stable. His fiancée also gave up marijuana at the same time as Applicant. They no longer associate with people who use illegal drugs. He signed a statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of his national security eligibility. He testified that he does not intend to use marijuana or any other illegal drug in the future. (Tr. at 16-18, 28, 35-36, 66-68; Applicant's response to SOR; GE 1; AE A-C)

Applicant submitted documents and letters attesting to his excellent job performance and ethical standards. He is praised for his reliability, teamwork, work ethic, professionalism, trustworthiness, technical expertise, loyalty, and integrity. His references recommend him for a security clearance. (AE F-H, N)

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

The security concern for drug involvement and substance misuse is set out in AG ¶ 24:

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 notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition); and

- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant possessed and used marijuana, cocaine, Adderall, and narcotic painkillers. Marijuana and cocaine are illegal controlled substances. Adderall and narcotic painkillers are available with a prescription, but Applicant obtained them without a prescription. He was cited in 2009 and 2010 for possession of drug paraphernalia and possession of marijuana. AG ¶¶ 25(a) and 25(c) are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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.

There is no evidence of any illegal drug use after March 2020, and there is no reason to disbelieve Applicant. However, his illegal drug use involved multiple drugs over an extended period, and it did not end until shortly before he started his current position. It is sometimes easy to forget, particularly for drugs like Adderall and marijuana, that Applicant committed a crime every time he possessed and used controlled substances. There are no bright-line rules for determining when conduct is recent, and Applicant's disregard of the law remains troubling. 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."

Applicant's history of illegal drug use continues to cast doubt on his current reliability, trustworthiness, good judgment, and willingness to comply with laws, rules, and regulations. The above mitigating conditions, individually or collectively, are insufficient to alleviate those concerns.

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 have incorporated my comments under Guideline H in my whole-person analysis. I also considered Applicant's favorable character evidence. Applicant appears to have moved on to the next phase of his life, which does not involve illegal drugs. If he continues on his present course, a security clearance could be in his future, but that time is not yet here.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the security concerns under Guideline H (drug involvement and substance misuse).

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:	Against Applicant
Subparagraphs 1.a-1.d:	Against Applicant
Subparagraph 1.e:	Withdrawn
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Withdrawn

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge