



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



In the matter of:)
)
) ISCR Case No. 21-02104
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: *Pro se*

January 27, 2023

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 February 15, 2021, Applicant submitted a Questionnaire for National Security Positions (SF-86). On February 25, 2022, 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.

Applicant provided an undated response to the SOR. On April 25, 2022, Department Counsel was ready to proceed. On April 27, 2022, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On May 13, 2022, DOHA issued a notice of hearing scheduling the hearing for June 22, 2022. The hearing was convened as scheduled. Department Counsel submitted Government Exhibits (GE) 1 and 2, which were admitted without objection. Applicant testified and did not call any witnesses. He submitted Applicant Exhibit (AE) A, which was admitted without objection. On July 11, 2022, DOHA received the hearing transcript (Tr.).

Findings of Fact

Background Information

Applicant is a 26-year-old material pricing analyst, who has been employed full-time by a defense contractor since July 2018. He seeks a Secret security clearance to enhance his position within the company. (Tr. 11-13, 38; GE 1)

Applicant graduated from high school in June 2015. He was awarded a Bachelor of Science degree in business information technology in May 2019. (Tr. 13-15; GE 1, GE 2) Applicant has never married and has no dependents. (Tr. 15)

Drug Involvement and Substance Abuse

Applicant's history of drug involvement and substance abuse is established by disclosures in his February 15, 2021 SF-86, in his January 24, 2022 response to DOHA interrogatories that contained his March 30, 2021 Office of Personnel Management (OPM) Personal Subject Interview (PSI), in his undated SOR Answer, and in his hearing testimony. (GE 1, GE 2) A summary of that drug involvement and substance abuse follows.

SOR ¶ 1.a alleges that from about October 2012 through the present, Applicant purchased and used marijuana with varying frequency, adding that he intends to continue using marijuana in the future unless he holds a security clearance. In his SOR Answer, Applicant admitted this allegation, adding that there was "no evidence of psychological or physical dependence on the drug." He stated his use of marijuana would end upon being granted a security clearance. (SOR Answer)

At his hearing, Applicant testified that he began using marijuana in high school in March 2012. While in high school, he purchased marijuana from a friend and described his use as "[m]aybe twice a year." While in college from 2015 to 2019, he purchased marijuana "[a]bout half of the times" he used it, and described his use as "once a week on the weekends." The use of marijuana was not legal in his state of residence at any point during the years 2012 to 2019. (Tr. 16-18)

After graduating from college in 2019, until March 2022, Applicant's marijuana use was the "most frequent . . . a couple times a week." During the period from 2019 to January 2021, he drove to a location where he could purchase marijuana legally about "once a month." In January 2021, he moved to his current state of residence where marijuana is legal under state law. (Tr. 18-20) After this move, he purchased all of his marijuana from state-licensed dispensaries. (Tr. 20-21)

Applicant stopped using marijuana in March 2022 because he is more productive when not using marijuana. His career, relationships, health, and fitness are all better without the habitual use of marijuana. He described the security clearance process as "eye-opening." He stated that he planned to reach out to a substance abuse therapist to

“stay consistent with this transition” of a drug-free lifestyle. Applicant added that he has “mostly avoided” associating with friends who still use drugs. (Tr. 21-22; AE A)

SOR ¶ 1.b alleges that from about January 2016 through at least March 2021, Applicant purchased and used the prescription medication Adderall that was not prescribed to him, adding that he intends to continue using Adderall without a prescription. In his SOR Answer, Applicant admitted this allegation, but denied that he intends to continue using Adderall without a prescription in the future. He stated that he has not used Adderall since March 2021. (SOR Answer)

At his hearing, Applicant testified that he first used Adderall when he was a freshman in college. A friend gave it to him when he was “cramming” for an examination. Applicant stated that the Adderall helped him “with staying on task and being able to study for as long as [he] needed to study for and to retain the information to regurgitate that onto the test.” The last time Applicant used Adderall was in March 2021 when he was studying for a certification. He used Adderall infrequently in college, once every two months or whenever he had a big project to complete. After college, he used Adderall “maybe once a quarter.” (Tr. 26-29)

Applicant corrected the number of times he used Adderall from the 50 times he listed on his SF-86 to approximately 30 times. Applicant stopped using Adderall in March 2021 because, after evaluating the negative versus the positive benefits of using Adderall, he decided the negatives outweighed the positives. He obtained Adderall from friends who had prescriptions for it. He previously stated that he intended to continue using Adderall out of “stubbornness.” As previously stated in his SOR Answer, he does not intend to use Adderall in the future. (Tr. 29-31; AE A)

SOR ¶ 1.c alleges that from about November 2016 through at least February 2021, Applicant purchased and used ecstasy with varying frequency. In his SOR Answer, he admitted this allegation, adding that his use of ecstasy was purely experimental and mostly occurred while he was in college. He stated that he has not used ecstasy since February 2021. (SOR Answer)

At his hearing, Applicant reiterated that, as he stated in his SOR Answer, he last used ecstasy in February 2021. He described his ecstasy use as “experimental.” He used ecstasy while in college “during a big party,” and later at a “few music festivals.” He estimated that he used ecstasy four times. He purchased ecstasy one time and obtained it the other times from friends. He stopped using ecstasy because the negatives outweighed the positives. (Tr. 31-33)

SOR ¶ 1.d alleges that from about March 2019 through November 2020, Applicant purchased and used hallucinogenic drugs with varying frequency. In his SOR Answer, Applicant admitted this allegation, adding that his use of hallucinogenic drugs was purely experimental. He has not used hallucinogenic drugs since November 2020. (SOR Answer)

At his hearing, Applicant reiterated what he wrote in his SOR Answer that he last used hallucinogenic drugs in November 2020. He compared his hallucinogenic drug use to that of ecstasy, “extremely infrequent, purely experimental.” He estimated that he used hallucinogenic drugs three times. He purchased hallucinogenic drugs one time and obtained it the other times from friends. (Tr. 33-34)

SOR ¶ 1.e alleges that from about November 2016 through at least February 2021, Applicant purchased and used cocaine with varying frequency. In his SOR Answer, Applicant admitted this allegation, adding that his use of cocaine was occasional and mostly occurred in college. He has not used cocaine since February 2021. (SOR Answer)

At his hearing, Applicant reiterated what he stated in his SOR Answer, testifying that the first time he used cocaine was in November 2016 and the last time he used it was in February 2021. He characterized his cocaine use as “occasional,” estimating that he used it “about 40 times.” His cocaine use was “mostly in college and always during social gatherings.” He infrequently purchased cocaine from a college friend and the other times he obtained it from friends. He stopped using cocaine because the negatives outweighed the positives. (Tr. 34-36; AE A)

Applicant has never participated in a drug rehabilitation program, nor has he ever been diagnosed with a substance abuse disorder. (Tr. 36) During his hearing, he submitted a statement claiming he “will be consulting with a substance abuse therapist in [location] to ensure I stay consistent.” (AE A) From 2012 to 2022, the only time period that he was totally abstinent from drug use was a three-month period before his 2018 summer internship. That was in part to ensure he would pass his drug-screening test. (Tr. 37) Applicant never sold drugs, but reciprocated with individuals who had provided him drugs by doing the same for them. (Tr. 37-38)

Applicant works for an employer who requires a drug-free environment. His explanation to continue using drugs, contrary to this policy, was because of “stubbornness” and for no good reason. He understood at the time when his employer hired him they had a drug-free policy. After passing his entry-level drug test when he was hired in 2018, he has not been tested since. (Tr. 22-24) His job is full time remote, and he has no expectation that he will be required to report to an office environment. (Tr. 24-25)

Applicant submitted 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. (AE A) Applicant stated that he swallowed his pride and determined that a drug-free life is better than a life spent misusing and being involved with drugs. He believes that “turning this page” will greatly improve his overall health and enhance his career and his relationship with his family. (Tr. 38-39; AE A) Applicant’s family is aware of his drug use and is supportive of him remaining drug-free. (Tr. 39-40)

Character Evidence

In his free time, Applicant enjoys surfing, playing basketball, and hiking. He also enjoys reading and spending time with friends and family. (Tr. 40)

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 concerning 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.

One drug involvement disqualifying condition, in AG ¶ 25(a) could raise security concerns and may be disqualifying in this case: “any substance misuse (see above definition).” These proceedings were initiated after Applicant self-reported his history of drug involvement and substance misuse on his SF-86, in his responses to his DOHA Interrogatories, and during his OPM PSI. His drug use was further affirmed or clarified in his SOR Answer, and during his hearing testimony. Consideration of the applicability of mitigating conditions is required.

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

- (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;
- (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 involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; 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) can mitigate security concerns when drug offenses are not recent. There are no “bright line” rules for determining when such 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 made).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board affirmed the administrative judge’s decision to revoke an applicant’s security clearance after considering the judge’s recency analysis, stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

See *also* ISCR Case No. 02-10454 (App. Bd. Nov. 23, 2004) (sustaining denial of security clearance for Applicant who used marijuana five times while holding a security clearance with four years between most recent marijuana use and hearing).

The passage of time after ending drug use is not considered in isolation. Applicant's drug use after starting his current job with a drug-free defense contractor in July 2018, again after completing his February 2021 SF-86, and then using marijuana one month after receiving his February 2022 SOR, is more significant in this case. See ISCR Case No. 06-18270 at 3 (App. Bd. Nov. 7, 2007) (marijuana use after completing an SF-86 "undercuts" favorable application of the drug involvement recency mitigating condition).

Applicant acknowledged that he purchased and used marijuana from October 2012 to March 2022, purchased and used Adderall from January 2016 to March 2021, purchased and used ecstasy from November 2016 to February 2021, purchased and used hallucinogenic drugs from March 2019 to November 2020, and purchased and used cocaine from November 2016 to February 2021. Applicant's drug use continued while knowing that his employer required a drug-free work place, and until one month after receiving his SOR.

Applicant has recently recognized the adverse impact of drug abuse on his life, and in connection with access to classified information. I accept Applicant's statements as credible, and that he sincerely intends to abstain from future drug possession and use. AG ¶ 26(a) applies, in part, to his illegal drug-related conduct because it was somewhat infrequent. However, his continued drug use after accepting a position with a defense contractor in July 2018 and use of marijuana one month after receiving his SOR, shows a profound lack of judgment.

Applicant demonstrated his intent not to abuse illegal drugs in the future. His most recent drug use was in March 2022, he has disassociated from drug-using associates and contacts, he has avoided the environment where drugs were used, and he has provided 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. AG ¶ 26(b) applies. AG ¶¶ 26(c) and 26(d) are not applicable under the facts of this case.

In conclusion, Applicant possessed and used a variety of drugs on multiple occasions from October 2012 to March 2022. The motivations to stop using illegal drugs

are evident. He understands the adverse consequences from illegal drugs. Approval of a security clearance, potential criminal liability for possession of drugs, and adverse health, employment, and personal effects resulting from drug use are among the strong motivations for remaining drug free. More time without drug use is necessary to assure that drug use is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, or good judgment. A longer period of abstinence without any drug use is necessary to demonstrate a sufficient track record of no drug abuse, to establish rehabilitation, and eliminate drug involvement as a bar to his access to classified information.

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.

Under AG ¶ 2(c), the ultimate determination of whether to grant national security 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. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

The factors supporting continuation of Applicant's national security eligibility are noteworthy; however, they are insufficient at present. Applicant achieved some important education and employment goals, demonstrating his self-discipline, responsibility, and dedication. He served successfully as a summer intern during the summer of 2018 until being granted full-time status with a defense contractor. His employer had enough confidence in him to allow him to telework remotely in January 2021. By all accounts, he is an honest, caring, diligent, intelligent, and responsible person. He disclosed his drug use on his SF-86 and was forthright throughout his background investigation. He also disclosed his drug use to his family. Applicant understands why his drug possession and use was improper, and he does not intend to use illegal drugs in the future.

The rationale for denying Applicant's clearance eligibility is more substantial. His decisions to possess and use illegal drugs beginning in October 2012, and continuing

after gaining employment with a defense contractor in July 2018, were imprudent, irresponsible, reckless, and illegal. Resulting security concerns were further compounded by the variety and duration of his drug abuse. He did not complete a drug rehabilitation or counseling program. His extensive use of drugs over a ten-year period, and his most recent marijuana use three months before his hearing, raise questions about his ability or willingness to comply with laws, rules, and regulations. (See AG ¶ 24.) More time without illegal drug use is necessary to find him to be fully rehabilitated, and to entrust him with eligibility for access to classified information.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude drug involvement and substance misuse concerns are not mitigated. For the reasons stated, Applicant is not eligible for access to classified information at this time.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H: AGAINST APPLICANT

Subparagraphs 1.a – 1.e: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. National security eligibility for access to classified information is denied.

Robert Tuidier
Administrative Judge