



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



In the matter of:)
)
) ISCR Case No. 21-00677
)
Applicant for Security Clearance)

Appearances

For Government: Michelle Tilford, Esq., Department Counsel
For Applicant: Troy Nussbaum, Esq.

07/05/2023

Decision

NOEL, Nichole L., Administrative Judge:

Statement of the Case

On May 17, 2021, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) detailing security concerns under the drug involvement and substance misuse guideline. The Agency acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on June 8, 2017.

Based on the available information, DOD CAF adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant’s security clearance and recommended that the case be submitted to a Defense Office of Hearings and Appeals (DOHA) administrative judge to determine whether to grant or deny his security clearance.

Applicant timely answered the SOR and requested a hearing. At the hearing convened on November 15, 2022, I included in the record as Hearing Exhibits (HE) I, the disclosure letter the Government sent to Applicant, dated September 14, 2021. I admitted Government's Exhibits (GE) 1 and 2, as well as Applicant's Exhibits (AE) A through I, without objection. I left the record open after the hearing to allow the Applicant to submit additional documentation. On December 14, 2022, Applicant indicated that he did not intend to do so, and the record closed. I have included Applicant's email in the record as HE II. DOHA received the hearing transcript (Tr.) on November 28, 2022.

Findings of Fact

Applicant, 31, has worked for his employer, a federal contracting company, as an engineer since August 2020. He completed a security clearance application, his first, in September 2020. He provided detailed disclosures about his use and purchase of illegal drugs and misuse of a prescription drug between 2009 and 2020. He also disclosed a June 2019 citation for possession of marijuana. The investigation confirmed this information and did not uncover any additional derogatory information. Applicant's history of illegal drug use and purchase, as well as his drug-related criminal history is alleged in the SOR. (GE 1)

Between 2010 and May 2020, Applicant completed his undergraduate, graduate, and post-graduate studies at a prestigious university in State 1. During the course of his education, he recreationally used illegal drugs. Applicant used marijuana a few times per month. He also purchased the drug on a few dozen occasions to include purchasing the drug at dispensaries in states where doing so was legal. He used hallucinogenic mushrooms and LSD on four occasions each. He also admitted purchasing these drugs. He used cocaine three times. Most of Applicant's drug use occurred in social settings such as music festivals and camping trips with friends. Occasionally, he would use marijuana alone. He also used Adderall without a prescription at least 10 times during his education to help him focus, so that he could meet strict deadlines, including preparing his dissertation defense. (Tr. 21, 24-25, 28, 31-39, 60; GE 1)

In June 2019, Applicant, who is also a musician, was traveling with his band when their van was stopped in State 2 as part of drug interdiction stop. He voluntarily told the officer about the THC cartridge in his bag. Applicant received a citation. He was placed in a pre-trial diversion program in November 2019. After completion of the program, the charges were dismissed in May 2020. Applicant had the charges expunged from his record in June 2020. (Tr. 40-42, 61-68, 74; AE A-C)

Initially, Applicant envisioned a career in academia. However, as he came to the end of his post-graduate studies, he started exploring options in private industry. In doing so, he realized that any employment in his area of study would require a pre-employment drug test. He also realized that future illegal drug use would be incompatible with such a career path. In May 2020, as he completed his doctorate, he decided to stop using illegal drugs. He informed his wife and friends of his decision. Although some of his friends

continue to use illegal drugs, they do not use them in Applicant's presence. (Tr. 26-27, 51, 70-73, 76)

As evidence of his commitment to abstain from illegal drug use, Applicant attended a 16-hour drug and alcohol awareness class. He voluntarily submitted to four urinalysis tests between June 2021 and September 2022, all of which were negative for illegal drug use. He also signed a statement of intent to abstain from future use of illegal drugs, agreeing to automatic revocation of security clearance eligibility in the case of future use. Applicant's current job also has a random urinalysis program. (Tr. 43-47, 74; AE D-F)

Now married, Applicant focuses his attention on projects around the home he owns with his wife. He occasionally performs as a musician. As a working professional, the motivation to use Adderall to focus no longer exists. As a student, he was required to complete all his work on his own. Now, he has a team of coworkers and managers to ask for help and support when needed. (Tr. 30)

Applicant provided eight character letters from family, friends, and professional contacts. Both Applicant's wife and his close friend attest that he has not used drugs since 2020. Both also attest to his intention to abstain from illegal drug use in the future. A professor with whom Applicant worked for as a research assistant discussed Applicant's work on a research project funded by DOD. He described Applicant as being "honest, ethical, and extremely dependable with respect to entrusted responsibilities." These sentiments were echoed by Applicant's long-time friends and family members who also wrote letters on his behalf. (AE G)

Policies

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(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." In reaching this decision, I have

drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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

The SOR alleges disqualifying conduct under the drug involvement and substance misuse guideline and the criminal conduct guideline. The government has established a *prima facie* case.

Drug Involvement and Substance Misuse

The illegal use of controlled substances . . . that cause physical or mental impairment . . . raises 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. (See AG ¶ 24).

Applicant, admits to a history of illegal drug use and purchase, as well as prescription drug misuse between 2009 and May 2020. The following disqualifying conditions apply:

AG ¶ 25(a) any substance misuse; and,

AG ¶ 25(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant submitted sufficient evidence to mitigate the alleged concerns. His last use occurred over three years ago. His illegal drug use was recreational and mostly took place in social settings. The concerns that motivated his misuse of prescription drugs are no longer present and he has better support in place to address any feeling of stress or overwhelm. Applicant's illegal drug use, while extensive, is not indicative of a substance abuse problem, and does not reflect on his current security worthiness.

Furthermore, Applicant's drug use took place during his time as a student. As he transitioned from academia to private industry, Applicant determined that future drug use was not compatible with being a working professional. Although he still has friends that continue to use illegal drugs, he has clearly communicated his intent not to use illegal drug and they no longer use drugs in his presence. Applicant has also voluntarily provided a signed statement of intent to abstain from future illegal drug use to the Government. His promise not to use in the future is credible, given his change in circumstances. The following mitigating conditions apply:

AG ¶ 26(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 reliability;

AG ¶ 26 (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 nation security eligibility.

Criminal Conduct

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability and willingness to comply with laws, rules, and regulations. The SOR alleges that Applicant was arrested in June 2019 and charged with possession of marijuana. However, this is incorrect. Applicant was not arrested but given a citation to appear in court on a charge of marijuana possession. He was ordered to complete a pre-trial diversion program. The following disqualifying condition applies:

AG ¶ 31(b) evidence (including but not limited to, a credible allegation, an admission, and matters of official record of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or trustworthiness.

The following mitigating conditions apply:

AG ¶ 32(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

AG ¶ 32(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time, without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant citations occurred four years ago. He completed the terms of a pre-trial diversion program, the charges were dismissed, and have been expunged from his record. Because he has decided to abstain from future drug use, it is unlikely that Applicant will engage in similar criminal conduct again.

Based on the record, I have no doubts regarding Applicant's ongoing security worthiness. In reaching this conclusion, I have also considered the whole-person factors listed in AG ¶ 2(d). Applicant acknowledges his poor judgment in deciding to use illegal drugs. It is not the purpose of a security clearance case to punish or sanction a person for their past actions. Rather, it is a predictive risk assessment based on the past conduct. He is aware of the prohibition against such use as a clearance holder. By providing full, frank, and honest disclosure about his history of illegal drug use, and prescription misuse, Applicant has shown that he is likely to self-report adverse information even when doing so may be against his personal, professional, and financial interests.

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, Drug Involvement and Substance Misuse:	FOR APPLICANT
Subparagraphs 1.a – 1.g:	For Applicant
Paragraph 2, Criminal Conduct:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented in this case, it is clearly consistent with the national interest to grant Applicant's security clearance. Eligibility for access to classified information is granted.

Nichole L. Noel
Administrative Judge