



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



In the matter of:)
)
) ISCR Case No. 22-01483
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Ryan C. Nerney, Esq.

11/15/2023

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 February 22, 2022, Applicant submitted a Questionnaire for National Security Positions (SF-86). On October 27, 2022, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) [On June 17, 2022, the DCSA CAS announced the name change from Department of Defense (DOD) Consolidated Adjudications Facility (CAF) to DCSA CAS.] issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H. The SOR detailed reasons why the CAS was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On December 22, 2022, Applicant submitted his Answer to the SOR through counsel. On January 27, 2023, Department Counsel was ready to proceed. On January 31, 2023, the Defense Office of Hearings and Appeals (DOHA) assigned the case to

me. On February 6, 2023, DOHA issued a notice of hearing scheduling the hearing for March 21, 2023. The hearing was convened as scheduled. Department Counsel submitted Government Exhibits (GE) 1 through 5, which were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through P, which were admitted without objection. On March 29, 2023, DOHA received the hearing transcript (Tr.).

Findings of Fact

Background Information

Applicant is a 46-year-old senior manager of pricing and estimating, who has been employed by a defense contractor since May 2009. (GE 1; AE B; AE E; Tr. 16, 21-23) He has successfully held a Secret clearance since 2000. He was granted his most recent clearance in 2011. Applicant seeks to not only retain his eligibility for a clearance, which is a requirement of his continued employment, but also to upgrade his clearance from Secret to Top Secret. (GE 1; Tr. 16-17, 23-24, 49, 60-61) He has worked in support of the defense and aerospace industry for the past 34 years. (AE B)

Applicant graduated from high school in May 1995. He was awarded a Bachelor of Science degree in business administration and finance *cum laude* in May 1999. (GE 1; AE F; Tr. 17-18) He married in August 2009, and has three children, two daughters, ages 11 and 9, and a son, age 5. (GE 1; AE D; Tr. 19) From 2013 to 2016, Applicant's wife was a stay-at-home mom; from 2016 to 2020, she was a part-time fitness instructor; and she recently began a part-time job as an elementary school substitute teacher. (Tr. 54-55)

Drug Involvement and Substance Misuse

Applicant self-reported marijuana use on his February 22, 2022 SF-86. (GE 1; Tr. 46) He was subsequently interviewed on April 8, 2022, by an Office of Personnel Management (OPM) investigator regarding his marijuana use. He provided additional information regarding such use in his September 29, 2022 Response to DOHA Interrogatories, in his December 22, 2022 SOR Answer, as well as during his testimony. (SOR Answer; GE 2) The following findings summarize that marijuana use.

SOR ¶ 1.a alleges that Applicant used marijuana with varying frequency from about May 1995 to about November 2020, to include use after being granted a Secret clearance by the Department of Defense in approximately January 2011.

He admitted this allegation in part and denied it in part. In his SOR Answer, submitted through counsel, he stated:

[Applicant] admits to using marijuana sparingly, approximately two (2) dozen times from May 1995 to his last and most recent use in November 2020. [Applicant] voluntarily disclosed his past marijuana use on his first SF-86 application in 2000, During [Applicant's] personnel subject

interview, he was subsequently asked about his drug use. Candidly, [Applicant] explained that he had smoked marijuana approximately two (2) dozen times since 1995. [Applicant] was forthright with his responses and also indicated that he had not used any other illegal drugs, other than marijuana and had never tested positive on any drug test. Given the infrequent nature of [Applicant's] use over such a long period of time (over 20 years) he could not recall the specific details of each use. [Applicant] was also candid regarding his most recent use in November 2020. During this time, it was over Thanksgiving weekend, and he smoked marijuana at a family gathering with his wife's sister and her husband. This was a lapse in judgment on the part of [Applicant] and he has not used any drugs since November 2020, a period of over two (2) years. He also has no intention to use illegal drugs in the future as shown through his signed statement of intent and negative drug tests. [Applicant] takes full responsibility for his actions and poor judgment he exhibited over two (2) years ago over Thanksgiving weekend. He has taken several steps to ensure similar conduct is not repeated in the future through a favorable substance abuse evaluation and taking an online drug and alcohol awareness course. (December 22, 2022 SOR Answer, pgs. 7-8)

Applicant confirmed his marijuana use during his testimony. His first marijuana use occurred at a party in May 1995 when he was 18 years old. He did not recall specific details of his marijuana use over the years given the time lapses between infrequent use. Friends or acquaintances provided him with marijuana on the rare occasions that he did use it. (Tr. 25-27, 46-47, 56-58) Since he started working for his current employer in 2009, Applicant estimated he used marijuana "approximately once every other year" at social gatherings. (Tr. 28-29, 47, 56-58) Marijuana is legal in Applicant's state of residence under state law, but not under federal law. He does not have a medical marijuana card, nor has he ever purchased marijuana from a dispensary. He did not reimburse any of his friends or acquaintances for the marijuana they provided him. (Tr. 48)

As noted, Applicant's last use of marijuana occurred in November 2020. His sister-in-law, her husband, and children were visiting from out of town over Thanksgiving weekend. Applicant's wife and her sister have "a complicated relationship" and had "a pretty intense argument" in front of the children on Thanksgiving Day. Applicant's in-laws had marijuana in their possession that they had legally purchased from a dispensary. On the Saturday evening after Thanksgiving, the four adults smoked marijuana after the children had gone to bed. Applicant "unfortunately" did not think about his clearance at the time of consumption. He had not worked on any classified projects up until that point. (Tr. 29-32)

Applicant has not been offered any marijuana since November 2020 and has no intention of using marijuana in the future. Since then, Applicant has not been in any environment where drugs were involved. He understands holding a clearance is a privilege and understands that those who are extended that privilege are required to abide by all the rules and regulations. He further understands that clearance holders are

required to abide by all the rules and regulations outside of work as well. Applicant stated that he will never use marijuana again. (Tr. 32-34) He elaborated:

The risks of using marijuana again is just – is – the consequences of doing so are too great. I have a much – much firmer understanding of the consequences of what – of what doing that kind of thing will do. It will be detrimental to my career. It will be detrimental to my ability to provide for my family. Furthermore, I am on a program right now where I do access classified information on a need-to-know basis. The responsibilities that you just outlined that come with the privilege of having a security clearance, I guess they are – they are in the forefront of my mind each and every single day. I – I am reminded on a daily basis that I am accessing classified information, that I have a responsibility to safeguard that information, so nothing to – I just simply don't want to do anything that could in any way, shape or form jeopardize my ability to continue growing in my current career path. (Tr. 34)

Applicant's wife does not use marijuana. She fully supports his abstinence from marijuana. He does not have any friends or acquaintances who use marijuana. If any of his friends or acquaintances ever did offer him marijuana, his answer would be a firm hard, "No. Please keep it away from me." (Tr. 48-49, 55-56) He understands that even though marijuana is legal in his state of residence, its possession and use are illegal under federal law. (Tr. 52)

Applicant was queried regarding an October 18, 1999 subject interview statement in which he stated that he had no intentions of using illegal drugs in the future. He was 22 years old in October 1999. (Tr. 35-36, 56; GE 5) He confirmed his testimony that he does not intend to use drugs in the future and explained the difference between "then and now":

A couple of things (are different). Number one, I just received a – received a promotion where I am supporting a classified program. I – again, I'm accessing classified information on a daily basis. In order to keep my job, I need to be granted a Top Secret clearance to get to my next caveat [sic] of – of program – level clearance. The consequences of – the consequences of not doing that – that transgression of smoking marijuana could cause or just – it's just too great of a price to pay. It's not – it is absolutely positively, no way worth the risk.

Other thing that has changed between then and now, I am married. I now have a family. I'm the sole breadwinner of my family. So providing income for my wife and three children is probably my – my number one priority in life and doing anything to jeopardize my ability to do that is not something I'm willing to do, especially something like smoking marijuana.

I think the other – the other thing that has changed since 1999 to today, this whole experience, reading the Statement of Reasons, hiring you,

coming into this courtroom for this – this hearing today, I have an absolutely crystal clear understanding of what the consequences of that – of those actions are going to be, I think. Past transgressions, I lost sight of the consequences. Being so firmly aware of what they are now, I – I cannot imagine ever doing it again. I don't – I don't want to ever do this again. I don't want to ever see a Statement of Reasons again. I don't want to ever be in this courtroom again. To be frank with you. (Tr. 36-37)

Applicant affirmed that he has grown as an individual over the past 30 years and learned from his past mistakes. (Tr. 37-38) His November 2020 use of marijuana occurred as a result of a stressful family situation. Since then, he has adopted a more disciplined approach to physical exercise, that he has “found is probably my single best thing I do to help cope with stress,” and spends more time with his children. (Tr. 38-39)

Applicant submitted a signed, sworn, statement of intent, dated November 11, 2022, to avoid any future drug use or other illegal drugs both presently and in the future, with the understanding that any drug violation will result in the automatic revocation of clearance. (Tr. 39-40; AE I) He completed a four-hour drug and alcohol awareness class on December 9, 2022, a four-hour behavior modification class on December 10, 2022, and a four-hour marijuana education class on December 10, 2022. (Tr. 40-41; AE K - AE M) A highly credentialed licensed psychologist (LP) completed a comprehensive substance abuse evaluation of Applicant. LP's summary of the psychological evaluation, dated December 14, 2022, states in part:

It appears, however, that the Top Secret investigative process gave [Applicant] pause to reflect on his marijuana use. He took time to process the matter in an intentional mindful way that brought him to new insight about it. He then acted by disclosing his past drug use despite the possible consequences for his career. As the process progressed to an SOR, the gravity of the situation seems to have set in for him. In colloquial terms, [Applicant] is sufficiently “freaked out” by the potential loss of his clearance, his job, and his financial security that it now seems exceedingly unlikely he will ever use marijuana again.

CONCLUSION: Based on all the available data, [Applicant] does not have any substance use condition or behavioral tendencies that could impact his reliability, trustworthiness, or judgment in the context of safeguarding classified information or working in a cleared setting. (Tr. 41-42; AE N, AE O)

Applicant submitted negative drug tests for urine samples collected on December 6, 2022, December 20, 2022, February 13, 2023, February 28, 2023, and March 13, 2023. (AE J, AE O) Applicant has never been disciplined by his employer. He considers himself to be an honest and trustworthy person with high moral character. He does not consider himself to be a threat to national security and could not be coerced into divulging national security secrets based on the SOR allegations. Applicant's employer promotes a drug-free workplace. Apart from the entry level drug test he took in 2009, he

has not been drug tested by his employer. He has never used drugs while at work or on company property. (Tr. 52-54; GE 4)

Character Evidence

Applicant submitted his most recent work performance reviews from 2019 to 2021. Those reviews document sustained superior performance and rate him as a “top performer.” Management views him as a subject matter expert and placed him in leadership roles and positions of responsibility. Applicant is a trusted employee within his company as well as with his company’s customer base. (AE H)

Applicant was awarded a global credential in project management professional certificate on December 15, 2017. He was also awarded a professional certificate in project management by a state university on December 13, 2018, for having completed a curriculum of 210 hours of study. (AE G)

Applicant submitted six work-related reference letters from managers and directors or former directors in his employer’s corporation. All of these individuals are or were senior company executives. They have worked with Applicant and know him well. They are also familiar with his SOR allegation and self-reported marijuana use. The collective sense of these letters conveys a number of positive attributes, to include his integrity, trustworthiness, work ethic, value to the company, contribution to the national defense, dedication, and valuable service. These individuals fully support the continuation and upgrade of Applicant’s security clearance. (AE C, AE P; Tr. 58-61)

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 conditions that could raise a security concern and may be disqualifying in this case: “(a) any substance misuse (see above definition);” and “(f) any illegal drug use while granted access to classified information or holding a sensitive

position.” The record established these two disqualifying conditions. Further review is required.

DNI Memorandum ES 2014-00674, “Adherence to Federal Laws Prohibiting Marijuana Use,” October 25, 2014, states:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines An individual’s disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual’s judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

On December 21, 2021, the Security Executive Agent (SecEA) promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications. The SecEA memorandum states in pertinent part:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a “whole-person concept.” This requires adjudicators to carefully weigh a number of variables in an individual’s life to determine whether that individual’s behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions. (*Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, dated December 21, 2021 (SecEA Clarifying Guidance), ES 2021-01529, at page 2.)

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), 26(b)(1), 26(b)(2), and 26(b)(3) is appropriate and mitigating.

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 self-reported marijuana use of approximately two dozen times spanned a 25-year period from 1995 to 2020, to include use after being granted a Secret clearance in 2011. Appellant volunteered the information about his marijuana involvement. His marijuana involvement was not detected in a urinalysis, in a post-polygraph interview, through OPM interviews of his associates, or through a law enforcement investigation. I am confident that he will keep his commitment not to possess and or use marijuana in the future.

The record contains persuasive evidence that Applicant has turned the corner on achieving drug abstinence. He recognizes the importance of being a responsible family member and employee, 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, in addition to his 27 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 eliminate doubts about his current reliability, trustworthiness, and good judgment with respect to abstaining from illegal drug use. Applicant’s statements are further corroborated by a comprehensive and thorough drug and alcohol assessment.

AG ¶ 26(b) lists three ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. 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 to disassociation from drug-using contacts and avoiding any environment where drugs are used. Lastly, he 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.

Applicant’s reference letters 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, 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.

I evaluated Applicant’s credibility 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 his assertion that he will not use any illegal substance in the future to be credible. AG ¶¶ 26(a), 26(b), 26(b)(1), 26(b)(2), and 26(b)(3) 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 is now willing to maintain conduct expected of one entrusted with a security clearance. He honestly and voluntarily self-reported his infrequent past drug use knowing that such disclosure could jeopardize his clearance eligibility and future employment. Applicant's employer, friends, and family support him and vouch for his trustworthiness. He has a history of stable employment and a strong work ethic. This level of support and self-introspection makes his continued success more likely. 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 cooperated fully during his background investigation and provided truthful information throughout the security clearance process. I find that 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 or continue Applicant's eligibility for a security clearance. National security eligibility is granted.

Robert Tuidier
Administrative Judge