



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



In the matter of:)	
)	
)	ISCR Case No. 22-00977
)	
Applicant for Security Clearance)	

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: *Pro se*

08/27/2024

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to deny his eligibility for a security clearance to work in the defense industry. Applicant mitigated the financial and drug involvement and substance misuse concerns that arose from a short period of difficulty in his personal life. Clearance is granted.

Statement of the Case

On July 15, 2022, the DOD issued a statement of reasons (SOR) detailing security concerns under the financial considerations and drug involvement and substance misuse guidelines. This action was taken 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.

DOD adjudicators were unable to find that it was clearly consistent with the national interest to continue Applicant’s security clearance and recommended that the case be submitted to a Defense Office of Hearings and Appeals (DOHA) administrative

judge for a determination whether to grant his security clearance. Applicant timely answered the SOR and requested a hearing.

At the hearing, convened on October 26, 2023, I appended to the record as Hearing Exhibit (HE) I, the disclosure letter, dated Mach 21, 2023. I admitted Government's Exhibits (GE) 1 through 4 without objection. Applicant did not submit any documentation. After the hearing, I left the record open until November 30, 2023, to allow Applicant to submit additional documentation. He submitted 14 documents, which are admitted to the record as AE A through N, as follows:

AE A: 2018 Federal Income Tax Document, including Form 3531 Request for Missing Signature (17 pages);

AE B: United States Postal Service (USPS) Mail Receipt, dated October 26, 2023 (1 page);

AE C: Picture: USPS Priority Mail Envelope, dated October 26, 2023 (1 page);

AE D: USPS Mail Receipt, dated November 30, 2023 (1 page);

AE E: 2019 Federal Income Tax Return Filing Confirmation, dated November 9, 2022 (2 pages);

AE F: 2019 State Income Tax Return Filing Confirmation, dated November 9, 2022 (2 pages);

AE G: 2020 Federal Income Tax Return Filing Confirmation, dated November 14, 2022 (2 pages);

AE H: 2020 State Income Tax Return Filing Confirmation, dated November 14, 2022 (2 pages);

AE I: 2021 Federal Income Tax Return Filing Confirmation, dated November 17, 2023 (2 pages);

AE J: 2021 State Income Tax Return Filing Confirmation, dated November 17, 2023 (2 pages);

AE K: IRS Form 9325, Acknowledgment and General Information for Tax Payers who File Returns Electronically, tax year 2022. Dated November 28, 2023;

AE L: Bill SOR ¶ 1.c, dated January 20, 2022 (1 page);

AE M: Payment Receipt SOR ¶ 1.c, dated November 13, 2023 (1 page);
and

AE N: Payment History SOR ¶ 1.c, June 2022 to September 2022 (4 pages).

Department Counsel did not object to the documents. (HE II) DOHA received the hearing transcript (Tr.) on November 6, 2023.

Procedural Issues

SOR Amendment

At the hearing, Department Counsel moved to amend the SOR to conform with Applicant's testimony as allowed under Directive ¶ E3.1.17. The SOR is amended as follows:

1.d You failed to timely file your Federal income tax returns as required for the 2022 tax year.

Applicant admitted the allegation. (Tr. 34-38)

Findings of Fact

Applicant, 40, has worked for a federal contracting company since July 2019. He was initially granted access to classified information in November 2012, in connection with his military service. He served in the U.S. Navy from March 2013 to October 2018. He completed his most recent security application in March 2020, disclosing that he failed to file his federal and state income tax returns for 2018. He also disclosed two arrests for possession of marijuana in January 2004 and November 2019. The ensuing investigation revealed that he failed to file federal and state income tax returns for the 2018 through 2021 tax years and that he had one delinquent account for \$2,449. These issues are alleged in the SOR. (Tr. 14-16; GE 1-2)

Applicant's problems began in October 2018 when he separated from the Navy. He did so because his wife wanted him to leave the military so that they could start a business together. However, shortly after he separated from the Navy, she left the marriage and stopped talking to him. Despite his desire to reconcile, the couple divorced in December 2019. He was devastated. Around the same time, Applicant's mother became severely ill. He believed that her condition was terminal. She was able to recover after undergoing a major surgery, which required one year of recovery. During this time, Applicant took primary responsibility for her personal and financial issues, including the delinquent debt alleged in SOR (\$2,449, SOR ¶ 1.c). (Tr. 18, 20-21, 27-28, 50-51, 62-69)

The emotional distress from Applicant's separation, divorce, and his mother's illness left him preoccupied and contributed to his failure to file his federal and state income taxes. He knew he did not owe additional tax liabilities, so he did not prioritize filing his 2018 through 2022 federal and state income tax returns. (SOR ¶¶ 1.a, 1.b, and 1.d) He also did not understand that even though he did not owe income taxes, that

failure to timely file the returns would adversely impact the status of his security clearance. He began working with a CPA in 2022 to complete and file his outstanding income tax returns. The 2019 and 2020 federal and state income tax returns were filed in November 2022. The 2018 federal income tax return, the 2021 and 2022 federal and state income tax returns were filed after the hearing October 2023. He received refunds for each of the returns filed. The status of the 2018 state income tax return is unknown. He resolved the debt alleged in SOR ¶ 1.c (\$2,449) in August 2022. (Tr. 18-19, 22-30, 32—34, 38-42; AE A – N; HE II)

Applicant used marijuana to cope with the stress in his personal life. Even though the drug has been legalized in the state in which resides and can be purchased legally at dispensaries, he bought the drug “from people in the street that I know in the neighborhood.” He used the drug alone at home in the evenings after work. Though he did not know his employer’s drug policy, he was aware that marijuana use was not permitted. Although he was arrested for possession of marijuana while in college in January 2004, he explained that he did not actually use marijuana for the first time until October 2019. During the January 2004 arrest, he was arrested with other students who were gathered in a dorm room where some people were smoking marijuana. The charge against Applicant was ultimately dismissed. (Tr. 19, 11-49, 51, 55-58, 60-61, 70)

In November 2019, Applicant was arrested for possession with intent to distribute marijuana. He was traveling to a city in a neighboring state approximately three hours away from his home for legal proceedings related to his divorce. He was tired, pulled off the road to relieve himself, and then fell asleep in his car. While he was napping, a police officer approached his car. During a search of his car, the officer found less than half of an ounce of marijuana in a metal tin with some cigarettes in the center console. He was initially charged with a misdemeanor, but the charge was downgraded to a civil citation. In September 2020, he pleaded *nolo contendere* and received a \$25 fine, which he paid. He has not used the drug since his arrest, but he reported his last date of use as December 2019 on his March 2020 security clearance application. (Tr. 17, 51-55; GE 4)

In his response to DOHA interrogatories, Applicant has indicated his intent not to use marijuana in the future. He does not associate with other marijuana users. He believes he has developed better mechanisms for dealing with stress. He exercises more and has found a group of trusted individuals in whom he confides and seeks advice, including a men’s group comprised of former military members. (Tr. 57-59, 71-72; GE 3)

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

Guideline F, Financial Considerations

Failure to meet one's financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. An individual who is financially overextended is at a greater risk of having to engage in illegal or otherwise questionable acts to generate funds. (AG ¶ 18) The record establishes the Government's *prima facie* case that Applicant owed

\$2,449 in delinquent debt. The following financial considerations disqualifying conditions apply:

AG ¶ 19(c) a history of not meeting financial obligations; and

AG ¶ 19(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns, or failure to pay annual Federal, state, or local income tax as required.

The following mitigating conditions apply:

AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(g) the individual has made arrangement with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant has since filed his outstanding federal and state income tax returns. He has paid his one delinquent debt. The alleged financial issues were not the result of irresponsible spending or financial mismanagement, but the result of distraction because of the events in his personal life, and they do not negatively affect his ongoing security worthiness.

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). The record establishes that Applicant used marijuana between October 2019 and November 2019 after being granted access to classified information in November 2012. His possession of marijuana resulted in a November 2019 arrest, which the court resolved with a civil citation. He was previously arrested in January 2004 for possession of marijuana. The following disqualifying conditions apply:

AG ¶ 25(a) any substance misuse;

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

AG ¶ 25(f) any illegal drug use while granted access to classified information or holding a sensitive position.

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; and

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.

Applicant used marijuana for a limited time, 3 months, during a period of emotional distress.

While Applicant's use of marijuana is serious, he does not have a history of marijuana use and the use seems to be out of character. He self-reported the drug use, as required, on his March 2020 security clearance application. His last use occurred before he completed his security clearance application. He has not used the drug in four years. He no longer associates with individuals who use marijuana. He has developed better coping mechanism for difficult emotions. His stated intent to abstain from use in the future is credible.

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 while holding a security clearance. 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 voluntarily disclosing his marijuana use, he 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, Financial Considerations:	FOR APPLICANT
Subparagraphs 1.a – 1.d:	For Applicant
Paragraph 2. Drug Involvement and Substance Misuse	FOR APPLICANT
Subparagraphs 2.a – 2.d	For Applicant

Conclusion

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

Nichole L. Noel
Administrative Judge