



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



In the matter of:)
)
-----) ADP No. 23-01280
)
Applicant for Public trust Position)

Appearances

For Government: Cassie L. Ford, Esq., Department Counsel
For Applicant: *Pro se*

08/30/2024

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, and exhibits, Applicant mitigated drug involvement and substance misuse concerns. Eligibility for access to classified information or to hold a sensitive position is granted.

Statement of the Case

On July 6, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) issued a statement of reasons (SOR) to Applicant detailing reasons why under the drug involvement and substance misuse guideline the DCSA CAS could not make the preliminary affirmative determination of eligibility to hold a public trust position, d recommended referral to an administrative judge to determine whether eligibility to hold a public trust position should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, Department of Defense (DoD) Directive 5220.6 (January 2, 1992) (Directive); and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

Applicant responded to the SOR on August 25, 2023, and requested a hearing. The case was assigned to me on April 11, 2024. A hearing was scheduled for August 14, 2024, and heard on the scheduled date. At the hearing, the Government's case consisted of two exhibits (GEs 1-2). Applicant relied on three witnesses (including himself) and one exhibit (AE A). The transcript (Tr.) was received on August 23, 2024.

Summary of Pleadings

Under Guideline H, Applicant allegedly used marijuana and other federally controlled drugs with varying frequency between 2012 and December 2022. Allegedly, he (a) used marijuana with varying frequency from Summer 2014 through November 2022; (b) used cocaine with varying frequency from April 2018 through Summer 2020; (c) used LSD with varying frequency from Spring 2019 through Spring 2020; (d) used hallucinogenic mushrooms with varying frequency from Summer 2021 through October 2022; (e) misused prescription medication Adderall with varying frequency from Winter 2017 through Spring 2022; and (f) stated his intention to use marijuana in the future on his electronic questionnaires for electronic processing (e-QIP) he completed in February 2023.

In his responses to the SOR and amended SOR, Applicant admitted the allegations covered by Guideline H with explanations. He claimed he used the cited LSD only three to four times and the cited hallucinogenic mushrooms only three to four times with low dosage. He further claimed he would only resume his marijuana use in the future after he retires from his career.

Findings of Fact

Applicant is a 25-year-old employee of a defense contractor who seeks a security clearance. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant never married, has no children, and resides with his parents. (GE 1; Tr. 19) He earned a high school diploma in June 2017 and a bachelor's degree in December 2022. He reported no military service. (GEs 1-2; Tr. 20)

Since January 2023, Applicant has been employed by his current employer as an image analyst. (GE 1; Tr. 20) Previously, he worked for other employers in various jobs. (GEs 1-2) He reported unemployment between September 2012, between September 2020, and between August 2017 and May 2020 while in college. (GE 1) Applicant has never held a security clearance. (GE 1; Tr. 20)

Applicant's drug history

Applicant was introduced to marijuana in 2014 while in high school. (GEs 1-2) During his high-school and college years (Summer 2014 through November 2022), he

smoked marijuana with varying frequency (as much as three times a week), either at home by himself, in social situations, or in hanging out with friends. (GE 2; Tr. 21-22) Typically, he purchased enough marijuana to meet his personal needs. Applicant attributed his use of the substance to personal enjoyment. He cited his increased maturity when graduating from college to his abandoning his use of marijuana in November 2022. (GE 2; Tr. 35)

In college, Applicant also used cocaine with varying frequency. (GE 2; Tr. 23-24) More specifically, between Spring 2018 and Summer 2020, he used cocaine on several occasions with friends who supplied the drug. (GE 2; Tr. 23-24) He credited his cocaine use with enhancing his energy. (GE 2) Other illegal drugs used by Applicant in college were LSD (three to four times between 2019 and 2020), hallucinogenic mushrooms (four times in low dosages between Summer 2021 and October 2022), and prescription medications (Adderall) with varying frequency between Winter 2017 and Spring 2022.

Applicant obtained his Adderall from his brother while attending college. (GEs 1-2; Tr. 25-32) Use of the drug improved his ability to focus on his studies. At all times, he was aware that the drugs and non-prescribed prescription he used were illegal under both federal and state law. (Tr. 26-34)

Over time, Applicant became disenchanted with the effect that marijuana and the other illegal drugs were having on his health and career goals and quit using marijuana and non-prescribed prescription drugs (i.e., Adderall) following his college graduation in 2022 (GE 2; Tr. 24-23, 32-37) And, he no longer associates with persons he knows to use marijuana and other illegal drugs. (GEs 1-2; Tr. 35-36) Throughout the investigative process, Applicant has been completely honest and upfront about his past use of illegal drugs. His assurances of sustained abstinence from illegal drug use since December 2022, his expressed intentions to avoid illegal drugs in the future and disassociate from old friends who used drugs are sincere and credible, and accepted.

Endorsements and performance evaluations

Applicant's parents who testified on his behalf extolled his growth and maturity and commitments to avoid illegal drugs in the future. His parents expressed full confidence in his ability to avoid all illegal and non-prescribed drugs in the future. (Tr. 56) They credited him with being reliable, trustworthy, hardworking, and steadfast in his personal and professional pursuits. (Tr. 48-56) They believe he learned valuable lessons about the risks and dangers to using illegal drugs and will not return to the college lifestyle he left behind. (Tr. 51, 56)

Policies

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." [public trust position]. As Commander in Chief, "the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at

527. Eligibility for access to classified information [public trust position] may only be granted “upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility to hold a public trust position is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These AG guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified and privacy information.

The AG guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate public trust concerns, if any. These guidelines must be considered before deciding whether or not eligibility to hold a public trust position should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant’s life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant’s conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Drug Involvement and Substance Abuse

The Concern: The illegal use of controlled substances, to include the misuse of 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.

Burdens of Proof

The Government reposes a high degree of trust and confidence in persons holding public trust positions, as well as those with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours.

Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard privacy or classified and information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of privacy and classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See *also* Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information, or to hold a public trust position. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531.

"Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security [public trust] suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance" and eligibility (implicitly) to hold a public trust position. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations [and implicitly public trust position eligibility] should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Security concerns are raised over Applicant’s recurrent use of federally controlled marijuana and other illegal drugs while in high school and college. All of the drugs that Applicant either used or misused in the case of prescription drugs (like Adderall) are federally controlled under the Controlled Substances Act (21 U.S. C. §§ 801-971 (1970) and preempt any conflicting state laws.

Acknowledging his awareness of the illegality of the drugs he was using, he committed to abstaining from all illegal drug use and association with those who use illegal drugs. His commitments are found to be sincere, credible, and worthy of acceptance.

Jurisdictional issues

Holding a public trust position involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor in protecting and guarding personally identifiable information (PII). DoD Manual 5200.02, which incorporated and canceled DoD Regulation 5200.2-R, covers both critical-sensitive and non-critical sensitive security positions for civilian personnel. See 5200.02, ¶ 4.1a(3)(c)

Definitions for critical-sensitive and non-critical sensitive positions provided in 5200.02, ¶ 4.1a(3)(c) contain descriptions similar to those used to define ADP I and II positions under DoD Regulation 5200.2-R. (32 C.F.R. § 154.13 and Part 154, App. J) ADP positions are broken down as follows in C.F.R. § 154.13 and Part 154, App. J): ADP I (critical-sensitive positions covering the direction, design, and planning of computer systems) and ADP II (non-critical-sensitive positions covering the design, operation, and maintenance of computer systems). Considered together, the ADP I and II positions covered in DoD Regulation 5200.2-R refine and explain the same critical-sensitive positions covered in DoD Manual 5200.02, ¶ 4.1a(3)(c) and are reconcilable as included positions in 5200.02.

So, while ADP trustworthiness positions are not expressly identified in DoD Manual 5200.02, they are implicitly covered as non-critical sensitive positions that require “access to automated systems that contain active duty, guard, or personally identifiable information or information pertaining to Service members that is otherwise protected from disclosure by DoD 5400.11-R . . .” DoD 5200.02, ¶ 4.1a(3)(c) See DoD Directive 5220.6, ¶¶ D5(d) and D8. By virtue of the implied retention of ADP definitions in DoD Manual 5200.02, ADP cases continue to be covered by the process afforded by DoD 5220.6.

Drug concerns

Applicant's admissions of his involvement with marijuana and other illegal drugs warrant the application of two disqualifying conditions (DCs) of the AGs for drug involvement and substance misuse to Applicant's situation. DC ¶¶ 25(a), "any substance misuse" and 25(c), "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of illegal drugs or drug paraphernalia," apply to Applicant's situation.

To his credit, Applicant abandoned all use and involvement with federally controlled drugs and non-prescribed prescription drugs. His commitments to avoid any use of illegal and non-prescribed drugs are credible and convincing. While the Appeal Board has not provided any bright lines for the sustaining of abstinence of illegal and non-prescribed drugs, it has consistently stressed the importance of vigilance and caution when assessing recurrence risks for dangerous drugs like cocaine, LSD, and hallucinogenic mushrooms.

In Applicant's case, consideration of his abstinence commitments and all of the surrounding circumstances are enough to facilitate safe predictions that any risks of recurrent use of illegal drugs in the future are minimal. So, based on Applicant's furnished abstinence timeline of his past use of illegal and non-prescribed prescription drugs, he may rely fully on the mitigation benefits of MC ¶ 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 good judgment."

Whole-person assessment

From a whole-person perspective, Applicant has established enough independent probative evidence of his ability to avert the use of illegal and non-prescribed prescription drugs in the foreseeable future. Considering the record as a whole, and granting due weight to Applicant's positive commitments to abstinence and his defense contributions, there is sufficient probative evidence of sustainable mitigation in the record to make safe, predictable judgments about his ability to avoid illegal and non-prescribed prescription drugs in the foreseeable future.

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 abuse public trust concerns are mitigated. Eligibility to hold a public trust position is granted.

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:

GUIDELINE H (DRUG INVOLVEMENT): FOR APPLICANT

Subparagraphs 1.a-1.f: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility to hold a public trust position. Eligibility to hold a public trust position is granted.

Roger C. Wesley
Administrative Judge