



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [NAME REDACTED]) ISCR Case No. 11-12385
)
 Applicant for Security Clearance)

Appearances

For Government: Philip J. Katauskas, Esquire, Department Counsel
For Applicant: *Pro se*

09/16/2013

Decision

MALONE, Matthew E., Administrative Judge:

Applicant’s drug use is not recent and not likely to recur. The security concerns raised by his use of illegal drugs are mitigated. His request for a security clearance is granted.

Statement of the Case

On April 13, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (eQIP) to obtain a security clearance required for his job with a defense contractor. After reviewing the completed background investigation, Department of Defense (DOD) adjudicators issued Applicant interrogatories¹ intended to clarify or augment information obtained by investigators. Based on Applicant’s responses to interrogatories and the results of his background investigation, DOD

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

adjudicators were unable to find that it is clearly consistent with the national interest for Applicant to have access to classified information.²

On February 14, 2013, DOD issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed at Guideline H (Drug Involvement).³ Applicant timely responded to the SOR and requested a decision without a hearing. On June 25, 2013, Department Counsel issued a File of Relevant Material (FORM)⁴ in support of the SOR. Applicant received the FORM on July 1, 2013, and was notified that he had 30 days to file a response to the FORM. The record closed after Applicant failed to submit any additional information within the time allowed. The case was assigned to me on September 3, 2013.

Findings of Fact

Under Guideline H, the Government alleged (FORM, Item 1) that Applicant used ecstasy,⁵ once in February 2008, and weekly between December 2008 and May 2009 (SOR 1.a); and that he used ecstasy after he had been granted a security clearance in February 2007 (SOR 1.b). Applicant admitted these allegations, but claimed that he has not used any illegal drugs since 2009. (FORM, Item 4) In addition to the facts established by Applicant's admissions, I make the following findings of fact.

Applicant is 30 years old and works as a financial analyst for a large defense contractor. In 2005, after earning a bachelor's degree, he worked for a large retail company before being hired by his current employer in July 2006. From May 2008 until December 2008, Applicant worked for a smaller company doing the same work until he returned to his current employer in December 2008. In February 2007, Applicant received a DOD Secret clearance. In May 2009, he received a Top Secret clearance; however, in December 2009, his request for access to Sensitive Compartmented Information (SCI) was denied and his DOD clearance was revoked. That adverse action was taken because of his illegal drug use. (FORM, Items 5 and 6)

When Applicant submitted his eQIP in April 2011, he disclosed the information presented in the SOR. The information about his drug use was discussed in a June 2009 subject interview during a previous background investigation, as well as in a July 2011 subject interview during his most recent background investigation. According to the June 2009 interview, Applicant listed that his ecstasy use took place between February and April 2008. However, the same summary of interview also stated that his

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

³ See Directive, Enclosure 2. See also 32 C.F.R. § 154, Appendix H (2006).

⁴ See Directive, Enclosure 3, Section E3.1.7. The FORM included six documents (Items 1 - 6) proffered in support of the Government's case.

⁵ Ecstasy is chemically known as methylenedioxymethamphetamine. It has been illegal since 1988, and it is on the list of controlled dangerous substances. See www.deadiversion.usdoj.gov/schedules.

last use of ecstasy occurred in May 2009 (“three weeks ago from the date of this interview”). Applicant explained in his April 2011 eQIP and July 2011 interview that he used ecstasy once in February 2008 just to try it. He also stated that he used the drug between 10 and 12 times between December 2008 and May 2009, and that his drug use stemmed from his grief over the death of a cousin to whom he was very close. (FORM, Items 4 - 6).

Applicant has stated in his response to interrogatories and in his Answer, both of which were submitted with notarized signatures, his intent not to use any illegal drugs in the future. The record does not reflect any illegal drug use or other misconduct by Applicant since May 2009. He has been in a committed relationship since 2010, and he has developed new interests, such as travel, with his girlfriend with whom he cohabits. Applicant has been continuously employed since April 2005, and has been promoted by his current employer multiple times. He avers that he has a renewed commitment to his career and to living a mature, drug-free lifestyle, and that he understands use of ecstasy was a mistake. (FORM, Items 4 and 6)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁶ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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 presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁷ for an applicant to either receive or continue to have access to classified information. Department Counsel must produce sufficient

⁶ Directive. 6.3.

⁷ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

reliable information on which DOHA based its preliminary decision to deny or revoke a security clearance for an applicant. Additionally, Department Counsel must prove controverted facts alleged in the SOR.⁸ If the Department Counsel meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the case for disqualification.⁹

Because no one is entitled to a security clearance, an applicant bears a heavy burden of persuasion to establish that it is clearly consistent with the national interest for the applicant to have access to protected information.¹⁰ A person who has access to such information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, there is a compelling need to ensure each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the nation's interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of the Government.¹¹

Analysis

Drug Involvement

Applicant illegally used ecstasy, a controlled substance, once in February 2008, and between 10 and 12 times from December 2008 until May 2009. His drug use occurred while he held a DOD security clearance he first received in February 2007. This information raises a security concern articulated at AG ¶ 24, as follows:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

⁸ Directive, E3.1.14.

⁹ Directive, E3.1.15.

¹⁰ See *Egan*, 484 U.S. at 528, 531.

¹¹ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

More specifically, available information requires application of the disqualifying conditions at AG ¶¶ 25(a) (*any drug abuse (see above definition)*) and 25(g) (*any illegal drug use after being granted a security clearance*).

Applicant used illegal drugs after he was first granted a security clearance. The summary of a subject interview from a previous investigation in 2009 shows that he disclosed that drug use when applying for a Top Secret clearance and eligibility for SCI access. That application was denied because of his drug use. He also disclosed his use of ecstasy when he again applied for a security clearance in 2011. He has not used drugs or engaged in any other misconduct in more than four years. Applicant's responses to DOD interrogatories and to the SOR constitute notarized statements of his intent to abstain from future drug use and an understanding that he will lose his clearance if he repeats his past misconduct. Applicant is in a committed relationship that began in 2010, and he has developed new, more mature personal interests conducive to a sober, responsible lifestyle.

All of the foregoing supports application of the following AG ¶ 26 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; and
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) dissociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence;
 - (4) a signed statement of intent with automatic revocation of clearance for any violation.

On balance, I conclude the record shows that Applicant's drug use will not recur. He has mitigated the security concerns raised by the Government's information.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guideline H. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 30 years old, has been promoted multiple times by his employer, and lives a stable and mature lifestyle with his long-time girlfriend. His involvement with illegal drugs occurred over a relatively brief period of time more than four years ago. Applicant's improved personal and professional circumstances make it unlikely his drug use will recur. His intent to abstain from future drug use is supported by an understanding, born of the 2009 revocation of his earlier clearance, that he will again lose his clearance should he relapse. A fair and commonsense assessment of this record shows the Government's security concerns are mitigated.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H: FOR APPLICANT

Subparagraphs 1.a - 1.b: For Applicant

Conclusion

In light of all available information, it is clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is granted.

MATTHEW E. MALONE
Administrative Judge