



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



In the matter of:)
)
) ISCR Case No. 14-04866
)
Applicant for Security Clearance)

Appearances

For Government: Caroline Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

08/20/2015

Decision

DAM, Shari, Administrative Judge:

From November 2010 to July 2013, Applicant illegally used marijuana, cocaine, mollies, and prescription medications while in college. He disclosed the illegal drug use in his security clearance application and during an investigative interview. He provided evidence that he no longer uses illegal substances or associates with people using illegal drugs. He is successfully performing in his employment position. He mitigated the drug involvement security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On November 6, 2013, Applicant submitted Questionnaires for Investigations Processing (e-QIP) (SF 86). (GE 1.) On December 15, 2014, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline H (Drug Involvement). The SOR detailed reasons why the DoD CAF was unable to find that it is clearly consistent with the national interest to grant a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be denied, granted, continued, or revoked.

On January 15, 2015, Applicant responded to the SOR and requested a hearing. On May 27, 2015, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me. On May 29, 2015, DOHA issued a hearing notice, setting the hearing for June 15, 2015. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered two exhibits; Applicant did not offer any exhibits. There were no objections to the Government's exhibits (GE), and I admitted GE 1 and 2. The record remained open until July 6, 2015, to give Applicant an opportunity to submit information. On June 22, 2015, DOHA received the transcript of the hearing (Tr.). Applicant timely submitted two exhibits, which I marked as AE A and B.

Findings of Fact

Applicant's SOR response admitted all SOR allegations. His admissions are accepted as factual findings.

Applicant is a 24-year-old information technology (IT) consultant. (Tr. 12) He graduated from high school in 2009. He has never married, and he does not have any children. (Tr. 13.) He attended college from August 2009 to May 2013, and graduated with a bachelor's degree. (GE 1.) In July 2013 he began a position with his current employer. (GE 1.)

When Applicant completed his November 2013 SF 86 (SF 86), he disclosed that he used marijuana from November 2010 to May 2013, approximately less than eight times. He noted that he used the marijuana at his fraternity house and parties. During an investigative interview in February 2014, Applicant candidly disclosed that he also used marijuana one time in July 2013, while at his former university.¹ He stated he never purchased marijuana. (GE 1, GE 2.) While testifying he said he estimated that he used it about five times. (Tr. 22.) He stated he does not intend to use marijuana in the future. (Tr. 15.) He was a college sophomore when he began using the illegal substance.

Applicant disclosed in his SF 86 that he used an illegal stimulant, "molly," less than five times between February 2011 and April 2013. While testifying, he said that he used it at college or concerts. He said he never purchased it. (Tr. 22; GE 1.)

Applicant disclosed in his SF 86 that he used cocaine less than three times between December 2011 and April 2012. He was a college junior at the time. He noted that he used it at his fraternity house and parties. He never purchased it. (GE 1.) He

¹ It is unclear if Applicant had started his employment at the time he used marijuana in July 2013.

testified that he used it fewer than five times. (Tr. 22.) He has no intention to use cocaine in the future. (Tr. 17.)

Applicant disclosed in his SF 86 that between December 2010 and April 2012 he used prescription medications, Adderall, Concerta, and Vyvanse, which were not prescribed to him. (GE 1.) He testified that he used the prescription medications about five times to help him stay awake and study.² Someone in his fraternity gave the medications to him. (Tr. 24, 27.)

Applicant repeatedly stated that he used marijuana, cocaine, and mollies for experimentation purposes while he was in social settings. (GE 1, GE 2.) He said he did not use illegal drugs during vacations. While working in summer internship programs, he underwent drug screenings and did not test positive for drugs. (Tr. 25.)

In June 2013 Applicant moved to another state to start employment with his current employer and removed himself from people illegally using drugs at college. (Tr. 15.) In October 2014 he moved to another state where he presently resides and works for the same employer. He does not want to jeopardize his career by coming into contact with illegal substances or associate with people who use them. (Tr. 17.) His family and friends are aware of his illegal drug use. (GE 2.) His girlfriend does not use illegal drugs. (Tr. 17.)

Applicant submitted his last quarterly performance evaluation from February 2015 to May 2015. His manager commented that Applicant is “operating above his current level.” (AE B.) He noted that Applicant is “one of my top performers this year.” (AE B.) He recently received a promotion. (Tr. 13.)

Applicant has never been arrested, charged, or convicted of a drug-related offense or any other offense. (GE 1.) He submitted a signed Letter of Intent not to use any illegal substance in the future. (AE A.) He expressed remorse while testifying.

Policies

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). 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 Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the

²During an investigative interview in February 2014, Applicant told the investigator that he used the prescription medication “on three different occasions during each semester.” (GE 2.)

possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Adverse clearance decisions are made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned.” See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995) § 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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. 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 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.” 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 should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Drug Involvement

AG ¶ 24 articulates the drug involvement security concern:

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.

Two drug involvement disqualifying conditions in AG ¶¶ 25(a), and 25(c) could raise a security concern and may be disqualifying in this case: “any drug abuse,”³ and

³AG ¶ 24(b) defines “drug abuse” as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

“illegal drug possession.” These two disqualifying conditions apply because Applicant admitted that he possessed and used four illegal substances from November 2010 to July 2013.⁴

AG ¶ 26 provides four potentially applicable drug involvement 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;
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence; and
 - (4) a signed statement of intent with automatic revocation of clearance for any violation.
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no “bright line” rules for determining when such 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.) Applicant disclosed in his SF 86 and during an investigative interview, that he possessed and used illegal substances a number of times from November 2010 to July 2013. His use of illegal substances occurred while he was in college and living in a fraternity. He has not used illegal substances since July 2013. Based on his honest

⁴AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including:

- (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.

disclosure and circumstances surrounding his usage, similar conduct is unlikely to recur. AG ¶ 26(a) provides mitigation. Applicant no longer associates with people who use illegal drugs and he avoids environments where drugs are present. He provided a signed statement of his intent not to use illegal drugs in the future. AG ¶ 26(b) also has application.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse drugs after being issued a prescription that is lawful under federal law. The legal substances he possessed and used were never lawfully prescribed for him under federal law. He did not provide proof of satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, or a favorable prognosis by a duly qualified medical professional.

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(a):

- (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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

The factors in favor of granting Applicant access to classified information are persuasive. When completing his November 2013 SF 86, he honestly disclosed his illegal drug use while he was in college. He explained it during an investigative interview in February 2014 and discussed it candidly during his hearing. He expressed remorse over his misconduct; he no longer associates with drug users; and he stated that he has not used illegal drugs for two years. He is now 24 years old and has matured since leaving college. He has worked successfully for his employer for two years and recently received a promotion. These factors outweigh any factors supporting denial of Applicant's clearance. Overall, the record evidence leaves me without concerns as to Applicant's present eligibility and suitability for a security clearance. He met his burden to mitigate the security concerns arising from his drug involvement.

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, Guideline H: FOR APPLICANT

Subparagraphs 1.a through 1.d: For Applicant

Conclusion

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

Shari Dam
Administrative Judge