



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



In the matter of:)
)
) ISCR Case No. 18-02398
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: John Scorsine, Esq.
02/05/2020

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant did not mitigate the drug involvement and personal conduct security concerns. National security eligibility for access to classified information is denied.

History of the Case

Applicant submitted a security clearance application (SCA) on March 1, 2017. On November 9, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guidelines H (Drug Abuse and Substance Misuse) and E (Personal Conduct). Applicant answered the SOR on January 7, 2019, and requested a hearing before an administrative judge (Answer). The case was assigned to me on January 30, 2019. Due to Applicant’s counsel’s scheduling conflicts, the hearing could not be scheduled as planned in May 2019. The case was re-assigned to me on October 1, 2019. On October 22, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for November 20, 2019.

At the hearing, Government Exhibits (GE) 1 and 2 and Applicant Exhibits (AE) A and B were admitted without objection, and Applicant testified. The record was held open until December 2, 2019, but Applicant did not submit additional documentation. I received the complete transcript (Tr.) on December 4, 2019, and closed the record.

Findings of Fact

Applicant is almost 34, single, and has no children. He was the valedictorian of his high school class. In 2008, he received a bachelor's degree in philosophy and aerospace engineering. In 2010, he received a master's degree in aerospace engineering. Applicant received prestigious grants to attend both universities, which are among the best in the United States. Since December 2015, he has worked as a research engineer for a defense contractor at a research facility. He applied for his first security clearance in March 2017. (GE 1; Tr. 14-23)

Applicant admitted, with explanation, all of the SOR allegations, including: using and purchasing 3,4-methylenedioxy-mehtaphetamine (MDMA) between January and August 2017; selling one MDMA pill in May 2017; and using marijuana in 2011, 2012, and 2016. He also admitted to falsifying his March 2017 SCA and making false statements during his October 2017 personal subject interview (PSI).

On March 1, 2017, Applicant submitted his SCA, and he disclosed no involvement with illegal drugs. When he completed the SCA, he understood that it was important to tell the truth. He did not disclose his drug use because he was concerned that any disclosure of drug use would prevent him from obtaining government employment, in particular because he is a minority. He also felt pressure to complete the SCA quickly. (Answer; GE 1 at 39-40; Tr. 26-28, 45-48, 51-52)

Applicant was interviewed by a government investigator in October 2017, November 2017, and May 2018. During his first PSI on October 20, 2017, Applicant affirmatively denied any drug use. In doing so, he failed again to disclose his illegal drug involvement, and he also provided false information to the investigator. (GE 1 at 39-40; GE 2 at 2-3, 9)

Applicant testified that he did not appreciate or understand the seriousness of the security clearance process until his initial interview in October 2017. He explained that after the initial interview, he conducted research regarding lying in a SCA and during government interviews. He then realized that drug use and lying in SCAs is a "big deal." (Tr. 28-31)

On November 15, 2017, Applicant called the investigator and requested that the investigator not contact his former girlfriend. She was a listed contact in his SCA, and they had recently ended their relationship. Applicant was concerned about what she would say about him and how it could hurt his chances of obtaining a security clearance. The investigator told Applicant that because his girlfriend was listed as a source in his SCA, interviewing her was not optional. (GE 2 at 11-12, Tr. 53-57, 76)

Two days after his request to the investigator, Applicant called the investigator and confessed to using drugs, failing to disclose his drug use, and asked for a subsequent interview. Several days later, on November 21, 2017, Applicant was re-interviewed by the investigator. He disclosed that he used marijuana once in 2011 and once in 2012. He also consumed edible marijuana in the spring of 2016. All of his marijuana use occurred

at parties. He also disclosed that in early 2017, he purchased MDMA pills from a website because he was interested in neuroscience and the affect MDMA has on the brain. He used MDMA 5 to 10 times, and sold an MDMA pill one time at a party in May 2017. Applicant told the investigator that his drug use was not habitual or detrimental to his life, and that he did not think he had to disclose it. During a subsequent PSI in May 2018, Applicant disclosed that he used MDMA from early 2017 until the summer of 2017. (GE 2 at 13-14, 17-18; Tr. 33-35, 53-57, 68)

In October 2018, Applicant responded to DOHA interrogatories regarding his drug use. He certified the accuracy (with one minor change) of all three of his PSIs. He also completed a worksheet, in which he claimed that he used marijuana only one time, and affirmed that he used MDMA 5 to 10 times in 2017. (GE 2 at 4; Tr. 58)

At the hearing, Applicant initially acknowledged that he used marijuana only one time in 2012, and that he used MDMA only 3 to 4 times in 2017. Additionally, for the first time, he claimed that all of his MDMA use occurred after he completed his SCA in March 2017, and therefore, he did not fail to disclose his MDMA use in his SCA. Upon further questioning, he admitted purchasing 10 MDMA pills, using MDMA 4 times with his former girlfriend and once by himself at a party, and using marijuana a total of three times. Applicant claimed the discrepancy regarding his marijuana use was due to forgetfulness and was unintentional. He asserted that he decided to experiment with MDMA due to his educational background in neuroscience and philosophy. (Tr. 32-36, 49-51, 58, 66)

At the hearing, Applicant maintained that he continued to use MDMA after he completed his SCA, because he wanted to try it, and "it was gone from his mind" that drug use was inconsistent with holding a security clearance. However, he also acknowledged that at the same time he was concerned that if his employer learned he had used drugs his employment would be in jeopardy. As of the hearing, Applicant had not reported his 2016 marijuana use and 2017 MDMA use to his FSO or supervisor, because he was afraid it would negatively impact his ability to get a clearance, maintain his employment, and damage his reputation. Applicant has not been subjected to any urinalyses through his current employment, but his employer does have a policy prohibiting the use of illegal drugs. (Tr. 44, 66-69, 76)

Applicant's supervisor, who submitted a letter of recommendation, has known Applicant for four years in a professional capacity. His letter indicated he is aware that Applicant used drugs approximately when he was in his early teens, but he is unaware that Applicant used drugs since he has known him. Applicant's supervisor recommended him for a clearance. Additionally, Applicant submitted a letter of recommendation from a friend. Both letters of recommendation described Applicant as responsible, reliable, and trustworthy. (AE A; AE B; Tr. 23, 69)

Applicant testified that he has not used MDMA since the summer of 2017, because his curiosity was satisfied, and he does not intend to use illegal drugs in the future. He has friends that continue to use marijuana, but he avoids being around them when they use drugs. While in college, Applicant volunteered as a tutor. Applicant is currently applying to become an Air Force Reserve Officer. (GE 2 at 15, 18; Tr. 38, 41-43)

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 the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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 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 H: Drug Abuse and Substance Misuse

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

Applicant's admissions and the record evidence established the following disqualifying conditions under AG ¶ 25:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The burden shifted to Appellant to prove mitigation of the resulting security concerns. AG ¶ 26 provides conditions that could mitigate security concerns in this case:

- (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.

Appellant's decision to purchase, use, and sell illegal drugs after he completed his SCA cannot be considered a minor lapse in judgment, but rather a pattern of behavior that reflects his unwillingness to follow rules and regulations. Security clearance decisions are not limited to conduct during duty hours. Off-duty conduct, especially where it reflects poor judgment, provides a rational basis for the government to question an appellant's security worthiness. (See, e.g., *Cole v. Young*, 351 U.S. 536, 550 n.13 (1956); *Croft v. Department of Air Force*, 40 M.S.P.R. 320, 321 n.1 (1989)). Applicant's behavior showed a disregard for the law, regulations, and the fiduciary relationship he voluntarily entered into with the government.

Applicant used marijuana once in 2011, 2012, and in 2016. He purchased 10 pills of MDMA in early 2017 and sold one MDMA pill in May 2017. He used MDMA at least five times in 2017. He had an opportunity to make changes to the statements, he made a change, and then reaffirmed the information he provided in the statements. Applicant's hearing testimony regarding his history of drug involvement was inconsistent with the statements he made to the government investigator. His characterization of his use throughout the investigative process minimized his drug involvement and reduced his credibility.

Applicant did not disclose his drug involvement to the government until he became concerned that his former girlfriend would disclose his involvement with drugs during her government interview. He did not report his 2016 marijuana use or his 2017 MDMA involvement to his employer or security officer. He acknowledged that his employer has a policy against illegal drug use, and he was concerned that if his employer knew of his drug use it would affect his employment and reputation.

Applicant continues to associate with individuals who use drugs. All of his drug involvement occurred after he had completed a master's degree in 2010, and the majority of his drug involvement occurred while he was working for his current employer and in his 30s. Therefore, Applicant's assertions that he has stopped using illegal drugs were insufficient to overcome the concerns with respect to his past drug involvement, especially since he was not forthcoming about it throughout the security clearance process. He failed to establish mitigation under AG ¶¶ 26(a) and 26(c).

Guideline E: Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Applicant's false statements regarding his drug involvement in his March 2017 SCA and during his October 2017 PSI, buttressed by the documentary evidence, established the following disqualifying conditions under AG ¶ 16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

AG ¶ 17 describes conditions that could raise a security concern and be mitigating. Two are potentially applicable in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Applicant failed to disclose his history of drug involvement in his March 2017 SCA and during his October 2017 PSI. He failed to avail himself of numerous opportunities to correct his SCA omission.

Applicant made deliberate choices to keep the government and his employer in the dark regarding his behavior, raising the concern that he is unreliable and untrustworthy and calling into question his judgment and willingness to comply with rules and regulations. The totality of the evidence demonstrates that Applicant disclosed his

drug involvement because he was concerned that the government or his employer would learn of his conduct from an independent source. Therefore, his disclosure does not rise to the level of a prompt or good-faith effort to correct his earlier falsifications.

Applicant's statements and testimony regarding his drug involvement are inconsistent and lack credibility. His assertion at the hearing, for the first time, that he only used MDMA after he completed the March 2017 SCA, demonstrates that he continues to be untruthful with the government. This concern has not been mitigated by the passage of time. He failed to establish mitigation under AG ¶¶ 16(a) and 16(c).

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 relevant 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.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines E and H in my whole-person analysis. I also considered Applicant's favorable character evidence, including his letters of recommendation.

Applicant chose to use, purchase, and sell illegal drugs while working for his current employer. Much of his involvement occurred just prior to applying for security clearance or within months of submitting his March 2017 SCA. All of this behavior occurred when he was in his early 30s, after he received degrees from two very prominent U.S. universities. There has not been a sufficient passage of time to overcome the concerns with his drug involvement and falsifications. He did not initially disclose his drug involvement until he became concerned that the government would learn of his behavior from an independent source. Additionally, his hearing testimony was inconsistent and not credible, indicating a continued lack of truthfulness. As of the date of the hearing, his current supervisor and employer are not aware of his drug involvement, which primarily occurred while he has been in his current position.

I conclude Applicant has not met his burden of proof and persuasion. He did not mitigate the drug involvement and personal conduct security concerns or establish his eligibility for a security clearance.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H: AGAINST APPLICANT

Subparagraphs 1.a-1.c: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraphs 1.a-1.c: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security of the United States to grant or continue Applicant's national security eligibility for access to classified information. Eligibility for access to classified information is denied.

CAROLINE E. HEINTZELMAN
Administrative Judge