



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 20-03723
)
Applicant for Security Clearance)

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: *Pro se*

09/21/2021

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, drug involvement and substance misuse, but disqualifying conditions were not established under Guideline E, personal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On February 15, 2021, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. The DOD acted 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) implemented by the DOD on June 8, 2017.

On March 11, 2021, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM), which was received by Applicant on May 20, 2021. The evidence included in the FORM is identified as Items 3-7 (Items 1-2 include pleadings and transmittal information). Applicant was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He did not file any objections, nor did he submit any documentary evidence. The Government exhibits are admitted into evidence without objection. The case was assigned to me on August 17, 2021.

Findings of Fact

In Applicant's answer, he admitted the Guideline H allegations, but denied the Guideline E allegations. I adopt his admissions as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 32 years old. He is single, never married, and has no children. He holds a master's degree. Applicant started working for his current federal contractor-employer in November 2019 as an engineer. He previously worked for a federal contractor from April 2011 to August 2018. Between August 2018 and November 2019, he worked for a non-federal contractor. He was granted a secret security clearance in 2011 and 2016. (Items 3, 7)

The SOR alleged Applicant used marijuana with varying frequency from approximately 2010 until May 2020; that he used marijuana with varying frequency from approximately June 2011 until May 2020, after he was granted access to classified information; and that he used Ecstasy once in April 2020, after he was granted access to classified information. The SOR also alleged that Applicant falsified his answers when completing his security clearance applications (SCA) in April 2011 and March 2016, when he failed to disclose his marijuana use within the last seven years on those SCAs.

Applicant acknowledged that he used all the illegal substances alleged in the SOR and at times when he held a security clearance. He denied deliberately making any false statements when completing his 2011 and 2016 SCAs. (Items 2, 4 (section II, Drug Use, question 1))

Applicant first used marijuana in 2010. He claims this use was in a country where it was legal at the time of his use. Between 2018 and 2020 he used marijuana by smoking it using a vape pen and eating edibles approximately 25 times. His last use of marijuana was in May 2020. His use was with his roommate, who also provided the marijuana. He claims these uses were all in states that legalized marijuana under state law. He acknowledged knowing marijuana use is illegal under federal law. He used Ecstasy one time in April 2020. He used Ecstasy with his roommate and three other acquaintances. He ingested it by drinking it in a powder form. He stated that he does not intend to use either marijuana or Ecstasy in the future. He did not provide any information on whether

he still has contacts with the roommate and acquaintances he described above. He first held a security clearance in 2011 and more recently has held a clearance since 2016. (Items 2, 4, 7)

Applicant completed a SCA in April 2011. In response to a question asking about his illegal drug use in the past seven years, he answered in the negative. Applicant asserts that his only marijuana use at that point in time was in 2010 while he was visiting a foreign country where such use was legal. He believes his answer to this SCA question was not false because he did not engage in “illegal” drug usage, since it was legal under the laws of the country where he used it. (Items 2, 6)

Applicant completed a second SCA in March 2016. In response to a question asking about his illegal drug use in the past seven years, he answered in the negative. Applicant never really asserted a reason why he answered “no” to this question, other than explaining his use in a foreign country in 2010 and asserting that the question was confusing to him. He also pointed out that in his most recent SCA (July 2020) he listed all of his illegal drug usage. (Items 2, 3, 5)

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 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, these guidelines are applied 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 section E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive section E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that 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 Involvement and Substance Abuse

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.

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

- (a) any substance misuse; and

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

Applicant first used marijuana in approximately 2010 and resumed his use of marijuana in 2018 through May 2020 over 20 more times. He used Ecstasy one time in April 2020. He held a security clearance from 2016, so many of his uses came while holding a security clearance. I find both of the above disqualifying conditions apply.

AG ¶ 26 provides conditions that could mitigate security concerns. Two potentially apply 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.

Applicant's marijuana use was relatively frequent since 2018 and as recent as May 2020. His use of Ecstasy was experimental, but was recent (April 2020) and was done while he held a security clearance. While he denied that he intended to use illegal drugs in the future, he did not provide a signed statement of intent to abstain from all future illegal drug use upon penalty of losing his clearance. Additionally, we have no information as to whether he has distanced himself from his drug-using acquaintances, one of whom was his roommate. Given his recent pattern of use of marijuana and Ecstasy while holding a security clearance, his current reliability, trustworthiness, and good judgment are called into question. AG ¶¶ 26(a) and AG 26(b) do not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security concern:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying condition is potentially applicable:

(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;

Applicant claims his only drug use between 2010 and 2018 was when he used marijuana while visiting a foreign country where such use is legal under the country's laws. The Government's only evidence of Applicant's drug use comes from his own admissions. Therefore, when he denied any illegal drug use between 2011 and 2018, we must give that denial proper weight. The only "illegal" use then that is applicable to the questions contained in both his SCAs from 2011 and 2016 is his use in the foreign country in 2010. Applicant believed this use was legal under the laws of the country where he used it, thus he had no intent to deliberately falsify this information on either SCA. Applicant's full disclosure of his past drug-use history on his 2020 SCA lends credibility to Applicant's statement about his intent when he completed the earlier SCAs. The evidence does not establish a deliberate falsification or omission on either the 2011 or 2016 SCAs.

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(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 guideline 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 considered Applicant's statement of intent of no future use. However, I also considered that he used marijuana on numerous occasions and Ecstasy as recently as 2020, while holding a security clearance.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement and substance misuse, but the disqualifying conduct was not established under Guideline E, personal conduct.

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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a - 2.b:	For Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge