



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 21-00825
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

05/06/2022

Decision

HARVEY, Mark, Administrative Judge:

The statement of reasons (SOR) alleges and Applicant admitted that he possessed and used marijuana and lysergic acid diethylamide (LSD) after he was granted an interim secret clearance. Security concerns arising under Guideline H (drug involvement and substance misuse) are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On April 7, 2020, Applicant completed and signed a Questionnaires for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1). On November 1, 2021, the Defense Counterintelligence and Security Agency, Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; 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. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to

determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline H. (HE 2) On November 8, 2021, Applicant provided a response to the SOR and requested a hearing. (HE 3) On February 16, 2022, Department Counsel was ready to proceed.

On February 23, 2022, the case was assigned to me. On March 4, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for March 17, 2022. (HE 1) The hearing was held as scheduled.

Department Counsel offered 5 exhibits into evidence; Applicant offered 24 exhibits into evidence; there were no objections; and all proffered exhibits were admitted into evidence. (Transcript (Tr.) 17-20; GE 1-GE 5; Applicant Exhibit (AE) 1-24) On March 28, 2022, DOHA received a transcript of the hearing.

Applicant diligently, timely, and professionally responded to all inquiries from the CAF and others during the security clearance process. (Tr. 26-31; AE 6-AE 10; AE 13-AE 17) He endeavored to expedite the security clearance process. (*Id.*)

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

In Applicant's SOR response, he denied the SOR allegations in ¶¶ 1.a and 1.b. (HE 3) He also provided mitigating information. He made some partial admissions in his SOR response. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 34-year-old industrial engineer who has worked for the same defense contractor since 2013. (Tr. 6-8; GE 1) In 2006, he graduated from high school, and in 2012, he received a bachelor's degree. (Tr. 6) His bachelor's degree was in industrial and systems engineering. (Tr. 6) The trend in his grades has been towards improved grades. (Tr. 33-34; AE 18) His grades in graduate school have been excellent. (Tr. 34; AE 19; AE 20) He is in the process of earning a master's degree in engineering technical management. (Tr. 6) He has never served in the military. (Tr. 7) In 2019, he married, and he does not have any children. (Tr. 7) There is no evidence of security violations, employee discipline, arrests, or alcohol abuse.

Drug Involvement and Substance Misuse

SOR ¶ 1.a alleges Applicant used marijuana with varying frequency from about 2010 to at least June 2021. His marijuana use continued after he received access to classified information in April 2020.

SOR ¶ 1.b alleges Applicant used LSD with varying frequency from about 2016 until at least February 2021. His LSD use continued after he received access to classified information in April 2020.

Applicant's first and second marijuana use occurred when he was in college. (Tr. 41-42) When his employer hired him in 2013, he received a drug screen, which he passed. (Tr. 31, 43) As part of in-processing at his employment, he probably received a briefing or written materials about not using illegal drugs. (Tr. 43) He said the company requests that employees not use illegal drugs. (Tr. 44) Over one six-year period, he received three random drug screens or tests, and he did not test positive on any of them. (Tr. 44) During a subsequent period, he used marijuana once or twice a month on weekends and during off-duty hours. (Tr. 45)

Applicant's employer's policy specifically prohibits any use of marijuana regardless of state laws that authorize its use. (GE 5 at 5) The drug policy also prohibits possession of any illegal or controlled substance. (*Id.*) Applicant denied that he intentionally violated his employer's policy prohibiting use of illegal drugs. (Tr. 47) He was only vaguely aware that his employer prohibited illegal drug use; however, he was aware that possession of marijuana and LSD violated federal law. (Tr. 48) There is currently marijuana in his residence; however, he said it was his spouse's marijuana. (Tr. 55)

Applicant did not disclose his possession and use of any illegal drugs on his April 7, 2020 SCA. (GE 1) On May 7, 2020, an Office of Personnel Management (OPM) investigator interviewed Applicant, and he said that from 2010 to May 1, 2020, he used marijuana on average every two or three months. (GE 2) He received the marijuana from friends, acquaintances, and his spouse. (*Id.*) From 2016 to present, he used LSD four times with his most recent LSD use occurring in mid-April 2020. (*Id.*) His spouse provided the LSD to him. (*Id.*) He explained that his failure to disclose his illegal drug use on his SCA occurred because he hurried through the SCA and had difficulty completing it because of computer problems. (*Id.*)

Applicant said the most reliable information about the extent of his marijuana use was during his OPM interview. (Tr. 45; GE 2) His most recent marijuana use was "before June of 2021." (Tr. 45, 55) He could not provide the specific date he most recently used marijuana. (Tr. 60)

Applicant first used LSD in 2016, and during his lifetime, he used LSD a total five times. (Tr. 48) His most recent LSD use was on February 13, 2021. (Tr. 48, 51; GE 2 at 8) On February 13, 2021, he used LSD that his spouse provided to him as a "bonding experience." He did not use LSD with the intention of violating his employer's rules or federal law. (Tr. 52, 54)

Applicant has never purchased marijuana. (Tr. 60) His spouse occasionally purchases marijuana. (Tr. 46) His spouse uses marijuana. He associates with her, and she is involved in use of illegal drugs. (Tr. 53) He told his wife not to give him illegal drugs in the future. (Tr. 54) He does not intend to use illegal drugs in the future because possession of a security clearance and career opportunities are "far more important" than his desire to continue to use illegal drugs. (Tr. 49)

The Defense Information System for Security (DISS) indicates Applicant received an interim secret clearance on April 14, 2020. (GE 3) In August 2020, Applicant signed a

non-disclosure agreement in connection with his access to classified information, and at that time, Applicant learned he had an interim security clearance. (Tr. 56-57; GE 4) However, he did not actually receive access to any classified information because the information he needed to access was top secret, and the interim clearance was insufficient for him to have access to top secret information. (Tr. 56-58) Applicant has not received any drug-related counseling or therapy. (Tr. 55)

Character Evidence

Applicant's character evidence supports approval of his access to classified information. He received positive performance evaluations, which indicate he is an outstanding employee who has made important contributions to the success of his employer. (Tr. 20-25; AE 1-AE 5) He is an intelligent, talented, professional, and diligent high performer who is an innovative problem solver. His credit report does not contain any negative financial information. (Tr. 32; AE 11) His credit score is 761. (Tr. 33; AE 12) From 2013 to 2017, he paid about \$27,000 in student loans. (Tr. 33) He cares for his mother, who was injured in a fall in 2021. (Tr. 37; AE 23) The general sense of his letters of recommendation is that he is trustworthy, diligent, professional, responsible, reliable, and intelligent. (Tr. 34-37; AE 21; AE 22) He has outstanding communication skills, judgment, and leadership. (*Id.*)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only 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 for a security clearance 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 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 possible risk the 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. 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. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence 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 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 and Substance Misuse

AG ¶ 24 provides the security concern arising from drug involvement and substance misuse stating:

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.

AG ¶ 25 provides conditions that could raise a security concern and may be disqualifying in this case: “(a) any substance misuse (see above definition); “(c) illegal possession of a controlled substance. . . .”; and “(f) any illegal drug use while granted access to classified information or holding a sensitive position.” The record establishes AG ¶¶ 25(a), 25(c), and 25(f). Additional information is contained in the mitigation section, *infra*.

AG ¶ 26 lists four conditions that could mitigate security concerns:

(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) 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;

(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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant’s responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. “Any doubt concerning personnel being considered for access

to classified information will be resolved in favor of the national security.”
Directive, Enclosure 2, [App. A] ¶ 2(b).

None of the mitigating conditions fully apply; however, Applicant provided some important mitigating information. He has an outstanding employment record. He presented substantial good character evidence. He promised not to use illegal drugs in the future. He voluntarily disclosed his marijuana and LSD possession and use during the security clearance process.

The evidence against mitigation is more persuasive at this time. In ISCR Case No. 16-03460 at 4 (App. Bd. May 24, 2018), the applicant had a history of marijuana use, and the Appeal Board said:

A clearance adjudication is aimed at determining if an applicant has the requisite judgment and reliability to abide by rules designed to protect classified information. . . . [Security concerns arise if] there is doubt as to whether he [or she] will follow the regulatory requirements for handling classified information, which might, in the event, appear burdensome. Access to national secrets entails a fiduciary duty to the U.S. A person who enters into such a fiduciary relationship is charged with abiding by legal and regulatory guidance regardless of whether he or she believes that guidance to be wise.

Possession of a Schedule I controlled substance is a federal criminal offense. Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana and LSD are Schedule I controlled substances. See Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

The Director of National Intelligence (DNI) Memorandum ES 2014-00674, “Adherence to Federal Laws Prohibiting Marijuana Use,” October 25, 2014, states:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines An individual’s disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual’s judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

See ISCR Case No. ISCR Case No. 20-01772 (App. Bd. Sept. 14, 2021) (noting continued relevance of October 15, 2014 DNI Memorandum in the application of Guideline H for marijuana cases).

Applicant's failures to disclose his marijuana and LSD possession and use on his SCA were not alleged in the SOR. I find that Applicant unintentionally failed to disclose his illegal drug involvement on his SCA.

Applicant used marijuana and LSD after he completed his SCA and had his OPM interview. "An applicant who uses marijuana after having been placed on notice of its security significance, such as using after having completed a clearance application, may be lacking in the qualities expected of those with access to national secrets." ISCR Case No. 17-03191 at 3 (App. Bd. Mar. 26, 2019) (citing ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019) ("An applicant's misuse of drugs after having been placed on notice of the incompatibility of drug abuse with clearance eligibility raises questions about his or her judgment and reliability"))).

Applicant possessed and used marijuana in 2021 and LSD on February 13, 2021. He did not describe any drug-abuse counseling or treatment. At his hearing, he indicated he does not plan or intend to use illegal drugs in the future; however, I have lingering concerns about his future marijuana and LSD possession and use, particularly because his spouse continues to be involved with marijuana. Guideline H security concerns are not mitigated at this time.

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), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline H are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 34-year-old industrial engineer who has worked for the same defense contractor since 2013. In 2012, he received a bachelor's degree in industrial and systems engineering. His grades in graduate school have been excellent. He is in the process of earning a master's degree in engineering technical management. There is no evidence of security violations, employee discipline, arrests, or alcohol abuse.

Applicant received positive performance evaluations, which indicate he is an outstanding employee who has made important contributions to the success of his employer. He is an intelligent, talented, professional, and diligent high performer who is an innovative problem solver. His credit report does not contain any negative financial information, and his credit score is 761. He cares for his mother, who was injured in a fall in 2021. The general sense of Applicant's letters of recommendation are that he is diligent, professional, trustworthy, responsible, reliable, and intelligent. He has outstanding communication skills, judgment, and leadership. His character evidence provides important support for his future access to classified information.

Applicant's first description to security officials of his history of involvement with illegal drugs was to an OPM investigator. He did not test positive on a urinalysis test, and he does not have any drug-related arrests. An honest and candid self-report of drug abuse is an important indication that, if granted security clearance eligibility, the individual would disclose any threats to national security, even if the disclosure involves an issue that might damage his or her own career or personal reputation. However, the mitigating weight of Applicant's disclosures is undermined by his subsequent marijuana and LSD use after his OPM interview, and after he was notified that he was granted access to classified information in August 2020.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. *See Dorfmont*, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person.

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 and 1.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge