



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



In the matter of:)
)
) ISCR Case No. 21-00853
)
Applicant for Security Clearance)

Appearances

For Government: Rhett E. Petcher, Esq., Department Counsel
For Applicant: *Pro se*

08/03/2022

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the security concerns under Guidelines E (personal conduct) and H (drug involvement and substance misuse). Eligibility for access to classified information is denied.

Statement of the Case

On August 18, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E and H. Applicant responded to the SOR on August 30, 2021, and requested a hearing before an administrative judge. The case was assigned to me on April 12, 2022.

The hearing was convened as scheduled on May 23, 2022. Government Exhibits (GE) 1 and 3 through 5 were admitted in evidence without objection. The objection to GE 2 was sustained. Applicant testified and submitted Applicant Exhibits (AE) A and B, which were admitted without objection. The record was held open for Applicant to submit additional documentary evidence. He submitted documents that I have marked

AE C through G (the exhibits consist of an email and attached documents) and admitted without objection.

Findings of Fact

Applicant is a 35-year-old employee of a defense contractor. He has worked for his current employer since May 2019. He has a bachelor's degree that he earned 2016, and he is attending graduate school in pursuit of a master's degree. He married in 2010 and divorced in 2013. He has no children. (Transcript (Tr.) at 44; GE 1)

Applicant served in the U.S. military from August 2010 until he was separated with a general under honorable conditions discharge in March 2013. He lived on base in Germany from April 2011 until he and his then wife decided to move off base in April 2012. In October 2012, his then wife reported to the military that as she was moving out of their residence, she discovered two pipes that she suspected were used to smoke marijuana. She told the investigators that Applicant had a history of marijuana use before joining the military. Military investigators seized the pipes. A field test of both pipes tested positive for tetrahydrocannabinol (THC), the active ingredient in marijuana. Applicant provided a urine sample, which tested negative for controlled substances. (Applicant's response to SOR; GE 1, 5)

Applicant requested an attorney, and was not interviewed by the investigators. His supervisor (E-6) reported that Applicant told him that the pipes were his from before he joined the military. An officer (O-4) that Applicant worked for reported that he overheard the conversation in which Applicant admitted that the "bong" was his from before the military. Both the E-6 and the O-4, as well as other military members, wrote glowing letters of recommendation for Applicant to remain in the military. (GE 5; AE G)

Applicant did not admit any illegal drug use on the Questionnaire for National Security Positions (SF 86) and Record of Military Processing he submitted before joining the military. He was discharged with a general under honorable conditions discharge in March 2013 for Defective Enlistments: Fraudulent Entry. (Tr. at 21-23; Applicant's response to SOR; GE 5)

Applicant denied ever using any illegal drugs before leaving the military. He testified that the pipes belonged to his sister who used marijuana, and that they must have gotten mixed in with his household goods when he joined the military. He stated that his ex-wife was upset at him because of their imminent divorce. She told him that she found the pipes in a storage container or a box, and she thought he planted them there to get her in trouble. He testified that she wanted to retract her statement, but she was fearful of the legal repercussions of doing so. (Tr. at 17-23, 44-48)

Applicant's mother wrote a statement in February 2013 in which she wrote that she met with Applicant's wife in February 2013:

When we met, we discussed the divorce, how she was hurt by it, and how it contributed to her making the statements that she did. She explained to

me that she was very sorry that she ever did it, but doesn't want to come forward to retract her statement for fear of possible legal ramifications. From what I understand, she said she spoke with her friend's father who is a lawyer and advised her about the consequences of making a false statement and subsequently taking it back. (AE F)

Applicant's ex-wife wrote an email to Applicant's military defense counsel in February 2013, in which she posed the following question:

I just wanted to ask you what the legality of a statement retraction would be, and whether it would be considered perjury to make a statement in a word document retracting a previous statement to police. Also what would the possible consequences be to that? (AE E)

The E-6 also wrote a statement in February 2013 in which he attempted to clarify his statement from October 2012:

I left out of the statement how I was uncertain of how [Applicant] had worded that drugs had been found with residue and possibly fingerprints on them. I feel my statements may have been taken as a point of fact rather than as hearsay (sic) from the previous days. (AE F)

Applicant's sister wrote a statement to his military defense counsel in February 2013 with the following: "The pipes that were found in [Applicant's] possession were my property which had gotten mixed up in his storage boxes during his transition to Germany and since he is located so far away, it would have been difficult for me to retrieve it." She also wrote a letter in May 2022 in which she wrote that she had "never known [her] brother to be involved in any type of drug use before joining the military." (Tr. at 34-35; AE A, C, F)

Applicant smoked marijuana in about September 2013 after leaving the military. He continued to periodically smoke marijuana through November 2019. (Tr. at 16, 18-19, 23-24, 30-31, 38-39; Applicant's response to SOR; GE 1)

Applicant used marijuana, cocaine, and MDMA (3,4-methylenedioxy-methamphetamine), all controlled substances, at a four-day music festival in August 2018. He also drank heavily. The police were notified at about 5:42 a.m. that an individual was attempting to give cocaine to at least one female. Applicant was pointed out as the individual. When the police approached him, he was extremely intoxicated and less than completely cooperative. Cocaine was discovered on him. He was arrested and charged with possession/use of a dangerous drug; possession/use of drug paraphernalia; and resist arrest-passive resistance. He received a deferred adjudication in which he was required to complete 25 hours of community service and a weekend of counseling, which included drug and alcohol counseling. (Tr. at 17, 25-29, 39; Applicant's response to SOR; GE 1, 3, 4)

Applicant submitted a Questionnaire for National Security Positions (SF 86) in May 2020. He reported his use of marijuana, cocaine, and MDMA, and his 2018 arrest. (GE 1)

There is no evidence of any illegal drug use after November 2019. Applicant stated that he does not intend to use illegal drugs in the future. He has dissociated himself from the acquaintances he used cocaine and MDMA with at the music festival. He provided a signed statement of intent in which he swore to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility. (Tr. at 16, 24, 31-32, 41-42; Applicant's response to SOR; AE C, D)

Applicant submitted documents and letters attesting to his outstanding performance of military duties, excellent job performance, and strong moral character. Some of the letters were written in support of his remaining in the military; and others are more recent. He is praised for his honesty, trustworthiness, work ethic, persistence, competence, dedication, professionalism, and integrity. Several of the authors of the recent letters recommend him for a security clearance. (AE A, B, G)

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 Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is set out in AG ¶ 24:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition); and

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

Applicant possessed and used marijuana from 2013 through November 2019. He possessed and used cocaine and MDMA at a music festival in 2018. The above disqualifying conditions are applicable.

SOR ¶ 1.e alleges that Applicant was discharged from the military “for fraudulent enlistment based on drug paraphernalia found at [his] residence and testimony stating [he] had a history of drug use [he] failed to disclose upon entry into the armed services.” I conclude that the SOR alleges both his preservice drug use and his possession of drug paraphernalia.

Applicant denied using any illegal drugs before he was discharged from the military. There is some evidence supporting Applicant’s position, most notably his sister’s statement that the pipes belonged to her, his ex-wife’s pondering whether to recant her statement, and his negative drug test. After considering all the evidence, I find by substantial evidence¹ that the pipes belonged to Applicant. My finding is primarily based on the reports by the E-6, who had a discussion with Applicant, and the O-4, who overheard the discussion. I also note that Applicant smoked marijuana in about September 2013, or about six months after his discharge. AG ¶ 25(c) is applicable as it relates to SOR ¶ 1.e.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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

¹ Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” See, e.g., ISCR Case No. 17-04166 at 3 (App. Bd. Mar. 21, 2019) (citing Directive ¶ E3.1.32.1). “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “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); ISCR Case No. 04-07187 at 5 (App. Bd. Nov. 17, 2006).

involvement or misuse is grounds for revocation of national security eligibility.

There is no evidence of any illegal drug use after November 2019. There are no bright-line rules for when conduct is recent. All of Applicant's illegal drug use might be mitigated if I had found him credible, but I did not. *Falsus in uno, falsus in omnibus* (false in one thing, false in everything) is not necessarily true, but it is sufficient to cause pause and leave lingering doubts on a close case.

Applicant's conduct continues to cast doubt on his current reliability, trustworthiness, good judgment, and willingness to comply with laws, rules, and regulations. The above mitigating conditions, individually or collectively, are insufficient to alleviate those concerns.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant's history of drug involvement is cross-alleged under Guideline E. His illegal drug use reflects questionable judgment and an unwillingness to comply with rules and regulations. The conduct also created vulnerability to exploitation,

manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable because Applicant's conduct is sufficient for an adverse determination under the drug involvement guideline. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Personal conduct security concerns about Applicant's drug involvement are not mitigated based on the same analysis discussed above under Guideline H. The above mitigating conditions are insufficient to overcome ongoing concerns about Applicant's judgment, reliability, trustworthiness, and honesty.

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 have incorporated my

comments under Guidelines E and H in my whole-person analysis. I also considered Applicant's favorable character evidence.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the security concerns under Guidelines E (personal conduct) and H (drug involvement and substance misuse).

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.e:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge