



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



In the matter of:)
)
) ISCR Case No. 20-01765
)
Applicant for Security Clearance)

Appearances

For Government: Jeffrey Kent, Esq., Department Counsel
For Applicant: *Pro se*

11/30/2022

Decision

PRICE, Eric C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H (drug involvement and substance misuse), and Guideline E (personal conduct). Eligibility for access to classified information is denied.

Statement of the Case

On October 30, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, personal conduct and Guideline H, drug involvement and substance misuse. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); 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.

On November 18, 2020, Applicant responded to the SOR, and requested a hearing before an administrative judge. The case was assigned to me on March 2, 2022. On March 8, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing scheduling the hearing via video teleconference. I convened the hearing as scheduled on April 5, 2022. Department Counsel offered six exhibits marked as Government Exhibit (GE) 1 through 6. The Government's exhibit list and pre-hearing disclosure letter are marked as Hearing Exhibit (HE) I and II. Applicant testified and offered two exhibits marked as Applicant Exhibit (AE) A and B. There were no objections, and all exhibits were admitted in evidence. DOHA received the hearing transcript (Tr.) on April 13, 2022.

Findings of Fact

Applicant is 37 years old. He earned a bachelor's degree in computer engineering, and master's degrees in electrical engineering and business administration in 2007, 2009 and 2017, respectively. He married and had one child in 2018. He was employed by a federal contractor from June 2009 until early 2021, and has worked for his current employer since March 2021. He was granted a Secret clearance in September 2009 and a Top Secret clearance in 2010. His security clearance was suspended in January 2016. (GE 1, 2, 4, 5, 6; Tr. 12-13, 23-36)

Under Guideline H, the SOR alleges that Applicant used: marijuana from 2003 to about February 2013, mushrooms from August 2003 to 2012, ecstasy between 2007 and 2009, and cocaine to about 2013; that he purchased cocaine, was cited for THC possession, and, after being granted access to classified information in September 2009, used marijuana, mushrooms, and cocaine (SOR ¶¶ 2.a – 2.g). Under Guideline E, the SOR cross-alleges the drug involvement, and that he falsified material facts about that drug involvement on security clearance applications (SCA) executed in 2009, 2010, and 2014 (SOR ¶¶ 1.a – 1.f). Applicant admitted all SOR allegations. (SOR Response; Tr. 15-17) In his response to the SOR Applicant explained:

The offenses . . . occurred a minimum of 7 years ago. . . . were not habitual and do not indicate dependency were isolated to that period of time and associated with a more adolescent and immature period in my life. . . . usually occurred with college friends [and those] interactions and [special] events have been eliminated . . . and are no longer a part of my life style. In the 7 years since, I have married and had a child which has further changed my priorities . . . social behavior [and] interactions with [that] social circle[.]

[With respect to the Guideline H allegations he] provided a signed statement of intent to abstain from drug involvement and substance misuse. [With respect to the Guideline E allegations] I have full[y] cooperated, was open, was honest, and voluntarily provided all information that outlined the offense. Again, these offenses were not discovered but communicated once I understood the importance, severity, and consequences of my behavior.

In August 2009 and February 2010, Applicant submitted SCAs wherein he disclosed that he had used THC, 5-10 times, from approximately January 2004 to December 2006. He denied any other illegal use of drugs in the past seven years. In his 2010 SCA, he also denied using controlled substances while possessing a security clearance. In his November 2014 SCA, Applicant denied illegally using controlled substances in the previous seven years or while possessing a security clearance. He reported that in February 2013, he was denied or not granted access by an agency because “[p]assing a polygraph was required for access [and] I did not pass the polygraph.” (GE 1 at 61-65, GE 2, GE 3)

During a July 2017 interview with a government investigator, Applicant reported that he had failed a polygraph examination in February 2013 because he had not fully disclosed his substance misuse. He said that he had illegally used controlled substances until about February 2013 and had not recognized the seriousness of his substance misuse until the polygraph examination. He admitted that he used marijuana 3-4 times per year from 2003 to 2009 and 1-2 times per year from 2009 until about February 2013. He also admitted that he used cocaine on six different days from about 2007 to 2013, usually at New Year’s Eve gatherings with friends, and that he sometimes contributed money to purchase the cocaine. He said that he used ecstasy once in college, and used mushrooms three times from about 2007 to 2012. He stated that he used marijuana because he did not want to feel left out when his friends smoked, and that he used cocaine because his friends were doing it and it seemed like fun. His responses to Interrogatories and testimony were consistent with his disclosures to the background investigator. (GE 4 at 2-3, 10, 13-19; Tr. 32-35, 44-46)

Applicant stated that he has not illegally used controlled substances since the February 2013 polygraph. He said that he has only seen his college friends at special occasions like weddings since 2013, has not participated in drug use with them, declined any drugs offered, and that they have not offered him drugs since he told them drug usage was incompatible with his career. (GE 4 at 16; Tr. 39) He testified that he met his wife in 2012, that she disapproved of his drug use, and that he has been a different person since meeting her, moving in together, getting married, and having a child. He has not received drug treatment or counseling. (GE 4; Tr. 32-44)

Applicant also admitted that he deliberately falsified his 2009, 2010, and 2014 SCAs regarding his drug involvement. He said that he falsified information about his drug use in his 2014 SCA because he had previously denied recent drug involvement including drug use while he had a security clearance, and because he did not believe that derogatory information that he had disclosed during the polygraph examination would be shared with a different agency. He asserted that his acceptance of responsibility, lifestyle changes, good character, desire to support the Defense community, experience, and the passage of time supported granting him a security clearance. (GE 4; Tr. 27-54)

Applicant’s supervisor of 3.5 years, who participated in his selection for a management position after his security clearance was suspended in 2016 praised Applicant’s technical and organizational skills, leadership ability, and commitment to

product quality. He also characterized him as “extremely reliable,” “completely trustworthy, loyal to the United States, an asset to the defense community, [who] can be completely trusted with sensitive information,” and recommended that he be granted a security clearance. (AE A). Applicant’s wife, a medical doctor, noted that when they began dating in 2012, he was socially active with friends, that he became much less socially active after they began living together in 2014, and that by 2018, when they married and had a daughter, his outside social activity was rare. She said that she did not condone his past drug activities and had no indications those activities continued during their relationship. She also attested to his dedication to work and more mature social behaviors. (AE B)

Policies

Eligibility for a security clearance is predicated upon the applicant 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 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 EO 10865 § 7.

“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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” 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). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988); see AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern relating to the guideline for drug involvement 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.

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 drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant admitted that he illegally used controlled substances from 2003 until about February 2013 including after he was granted a security clearance, and that he purchased cocaine as alleged in SOR ¶¶ 2.a through 2.g. AG ¶¶ 25(a) and 25(c) apply.

AG ¶ 25(f) does not apply. SOR ¶ 2.g alleges that Applicant used "marijuana, mushrooms, and cocaine *after being granted access to classified information* [in] about 2009," not "*while granted access to classified information*," as stated in AG ¶ 25(f) (emphasis added). As such, it does not explicitly allege the conduct identified in AG ¶ 25(f). Applicant admitted the conduct alleged in SOR ¶ 2.g, and the record evidence establishes that he used: marijuana from about 2003 to about February 2013, mushrooms from about 2003 to about 2012, and cocaine up to New Years' Eve 2013; that he was granted a Secret clearance in September 2009, granted a Top Secret clearance in 2010, and that his security clearance was suspended in January 2016. However, the record does not establish that his use of controlled substances after he was granted a Secret clearance in September 2009 occurred while he was granted access to classified information. Eligibility for access to classified information and the granting of access to classified information are not synonymous concepts. They are separate determinations. The issuance of a security clearance is a determination that an individual is eligible for access to classified national security information up to a certain level. Security clearance eligibility alone does not grant an individual access to classified materials. In order to gain access to specific classified materials, an individual must have not only eligibility (i.e., a security clearance), but also must have signed a nondisclosure agreement and have a "need to know." See ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022).

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.

AG ¶ 26(a) and ¶ 26(b) apply to SOR ¶¶ 2.a through 2.f. Applicant's use of ecstasy and citation for possession of marijuana were infrequent, happened many years ago, and are unlikely to recur. I find his corroborated claims that he has not illegally used controlled substances since February 2013 credible, and that his substance misuse happened long ago and is unlikely to recur. He provided a signed statement of intent to abstain from illegal drug use, has largely disassociated from his drug-using friends, and has established a pattern of abstinence. SOR ¶¶ 2.a through 2.f are concluded for Applicant.

AG ¶ 26(a) and ¶ 26(b) do not apply to SOR ¶ 2.g. Applicant illegally used marijuana and cocaine on multiple occasions for more than three years after submitting his 2009 SCA, and after he was granted a Secret security clearance. He also used mushrooms on at least one occasion during the same timeframe, and continued to illegally use controlled substances after submitting his 2010 SCA, and after being granted a Top Secret clearance. "An applicant who uses [controlled substances] 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")). The circumstances of Applicant's illegal use of controlled substances while holding a security clearance reflect poor judgment and raise questions as to his trustworthiness. See, e.g., ISCR Case No. 11-03909 at 2-3 (App. Bd. Aug. 30, 2012). I find Applicant's evidence insufficient to resolve concerns about his current reliability, trustworthiness, and good judgment.

Guideline E: Personal Conduct

AG ¶ 15 articulates the security concern for personal conduct:

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:

AG ¶ 16 lists conditions that could raise a security concern and may be disqualifying in this case including:

(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

(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 admitted, and the record reflects, that he deliberately omitted, concealed, or falsified relevant facts in three personnel security questionnaires used to determine his national security eligibility. AG ¶ 16(a) is established.

SOR ¶ 1.a cross-alleges the conduct alleged in SOR ¶ 2. Guideline H is the most appropriate guideline for Applicant's substance misuse alleged in SOR ¶¶ 2.a through 2.f; however, his continued illegal use of controlled substances after being granted access to classified information alleged in SOR ¶ 2.g is equally a security concern under Guideline E, and could have, if known, damaged his personal, professional, or community standing, and created a vulnerability to exploitation, manipulation, or duress. AG ¶ 16(e) is established.

Four mitigating conditions under AG ¶ 17 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;

(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.

AG ¶¶ 17(a) and 17(c) do not apply. Applicant's conduct was serious, frequent and occurred over a period of many years. He misused controlled substances for approximately six years before submitting his 2009 SCA, but deliberately falsified information about the scope of his drug use in that SCA and again in his 2010 SCA. He continued to illegally use marijuana, cocaine and mushrooms after his 2009 and 2010 SCA submissions, and after he was granted a security clearance. Although he claims that he first recognized the seriousness of his drug involvement in February 2013, he chose to deliberately falsify material information about his drug involvement again in his 2014 SCA, and did not disclose the extent of his illegal drug use and deliberate falsifications until his July 2017 background interview. His conduct, and explanation that he provided false responses in his 2014 SCA to be consistent with prior false responses, and because he believed DoD would be unaware of derogatory information from the polygraph continue to cast doubt on his reliability, trustworthiness, and judgment.

AG ¶ 17(d) does not apply because Applicant did not obtain counselling and the evidence is insufficient to support a conclusion that his deceptive behavior is unlikely to recur.

AG ¶ 17(e) applies to the conduct alleged in SOR ¶ 1.a, because his disclosures about his substance misuse since 2017, have reduced or eliminated his vulnerability to exploitation, manipulation, and duress. SOR ¶ 1.a is concluded for Applicant.

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 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 considered Applicant's age, work record, commitment to family, letters of support, and that he has had no drug involvement since February 2013. I considered his history of illegal drug use including after he was granted access to classified information, and his deliberate pattern of deception. I also considered that he deliberately did not disclose his drug use in his 2014 SCA, because he thought DoD security officials were unaware of his derogatory 2013 disclosures. His conduct raises questions about his judgment, reliability, and trustworthiness.

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 under Guidelines E and H.

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 E:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b – 1.f:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a – 2.f:	For Applicant
Subparagraph 2.g:	Against Applicant

Conclusion

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

Eric C. Price
Administrative Judge