



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



In the matter of:)
)
) ISCR Case No. 22-00985
)
Applicant for Security Clearance)

Appearances

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

01/31/2023

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Guideline H, drug involvement and substance misuse security concerns. He successfully refuted the security concern raised under Guideline E, personal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On July 20, 2022, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. The action was taken 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) effective on June 8, 2017.

Applicant answered the SOR on July 25, 2022, and elected to have his case decided on the written the record in lieu of a hearing. Department Counsel submitted the Government’s file of relevant material (FORM), and Applicant received it on September

6, 2022. He was afforded an opportunity to file objections and submit material in refutation, extenuations or mitigation within 30 days of receipt of the FORM. The Government's evidence is identified as Items 2 through 5 (Item 1 is the SOR). Applicant did not provide a response to the FORM or object to any of the Government's evidence. Items 2 through 5 are admitted in evidence. The case was assigned to me on December 2, 2022.

Findings of Fact

Applicant admitted all the SOR allegations. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 27 years old. He earned a bachelor's degree in 2018. He is not married and has no children. He has been employed by a federal contractor since July 2018. (Item 3)

In June 2016, Applicant was employed as a summer intern for a company that had random drug testing. He was terminated the same month for testing positive for marijuana on a random drug test. He explained that he had used marijuana several weeks prior to starting the job. (Items 3, 5)

In October 2021, Applicant completed a security clearance application (SCA). In it he disclosed that from 2013 to October 2021, he occasionally used marijuana about once every two months on average from 2013 to 2014; once every two weeks while attending college from 2014 to 2018, more frequently during the school year and less frequently during the summer months; and once a month on average from 2020 to 2021. (Item 3) Applicant stated in his SCA the following:

I inten[d] to use THC on occasional frequency in the future provided nothing regarding my employment responsibilities changes. One potential impact to my employment responsibilities would be the successful obtainment of a Federal Security Clearance. In this case, I would refrain from using THC while in possession of the clearance. (Item 3)

Applicant disclosed that he purchased marijuana illegally from people he knew in his hometown and at college about once every two months from 2013 to 2018. It was not legal in his state when he purchased it. (Item 3)

Applicant disclosed on his SCA that he used hallucinogenic drugs five times. He used LSD twice in 2014 and once in 2020 and mushrooms once in 2017 and 2019. He stated he does not intend to use these drugs in the future because it does not appeal to him and the risks of using them are too high. (Item 3)

Additionally, Applicant disclosed that from 2015 to September 2020 he used cocaine eight times. It was provided by someone else and he consumed it through his

nose. He reported that five of his uses were in college, then twice in late 2018 and once in 2020. He reported he does not intend to use cocaine in the future as it was not an appealing drug to him and the risks of using it were too high. (Item 3)

In December 2021, Applicant was interviewed by a government investigator as part of his background investigation. He reported to the investigator that his last use of marijuana was October 2021. He confirmed his previously disclosed cocaine and hallucinogenic drug use and frequency. He confirmed that he continues to have contact with two of his friends with whom he used illegal drugs. He said he changed his mind about using marijuana and other illegal drugs in the future, and he does not intend to use any illegal drugs in the future. He is focused on his future. He explained he used all of these drugs for fun and recreation. (Item 5)

In June 2022, Applicant completed government interrogatories. He was transferred by his employer and moved to a new state in October 2021. Marijuana can be legally obtained in that state. He reported in his interrogatories that his last use of marijuana was November 2021 in the state where he had moved. This contradicts the date that he told the government investigator that his last use was October 2021. He stated he decided to stop using marijuana. (Items 3, 4) He said:

Decided to focus on career including security clearance application.
Decided risk to career, reputation, legal action was not worth it. Additionally decided to focus on physical health as an adult. (Item 4)

Applicant stated he continues to associate with persons who use illegal substances and frequents places where he has reason to believe illegal substances are used or are used in his presence. He stated that this occurs about once every three months at concerts and outdoor parks, but he typically does not find himself in these situations. He reported that when he had been in situations where illegal drugs were present, he removed himself and made it clear he had made a decision not to use illegal drugs. (Item 4)

Applicant stated that he has changed his professional situation and joined a new team at his job, which supports the military, and having a security clearance is desirable. He said he applied for a security clearance in December 2021. His SCA was signed on October 22, 2021. (Items 3, 4)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. 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(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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states 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 as to obtaining 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 as to 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 Misuse

The security concern relating to the guideline 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.

AG ¶ 25 provides conditions that could raise security concerns. The following are potentially applicable:

- (a) any substance misuse;
- (b) testing positive for an illegal drug; and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia.

Applicant tested positive for marijuana during a random drug test administered by his employer in June 2016. Applicant possessed and used marijuana with varying frequency from about 2013 to November 2021. From 2015 to September 2020, he possessed and used cocaine with varying frequency. From 2014 to 2020, he possessed and used LSD and mushrooms with varying frequency. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from drug involvement and substance misuse. The following mitigating conditions under AG ¶ 26 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 to overcome the 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 being 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 used marijuana, cocaine, LSD, and mushrooms while in high school and college from 2013 to 2018. This perhaps can be attributed to a period of experimental and youthful indiscretion. However, he continued to use illegal drugs after he graduated from college in 2018 and was employed by a federal contractor. He initially intended to continue using marijuana unless he was granted a security clearance. Later, during his

background interview (December 2021) and in his June 2022 interrogatories, he changed his mind and declared his intention not to use illegal drugs in the future, so he could focus on his career. Applicant continues to associate with friends with whom he used illegal drugs. After completing his SCA in October 2021, he disclosed in his June 2022 response to interrogatories that he was transferred by his employer to a new state, where marijuana is legal under state law, and he used it in November 2021.

Applicant did not provide a response to the FORM with any additional evidence regarding his drug involvement or commitment to abstinence. Because Applicant chose to have his case decided without a hearing, I was unable to make a credibility determination of Applicant's sincerity and commitment to remain drug free. It is concerning that after being fired by an employer in 2016 for testing positive for marijuana, and being put on notice that marijuana and other illegal drug use is incompatible with certain employment, he continued to use it after being hired by a federal contractor. I also have concerns that after clearly being put on notice about drug use when he completed his SCA in October 2021, he used marijuana in November 2021. I find that Applicant's handwritten disclosures in his interrogatories, which were sworn to in the state where he had recently moved, noting the date and place of his last use, are more credible than the summary of interview from the government investigator. There is insufficient evidence that Applicant's conduct was infrequent, happened under unique circumstances, and is unlikely to recur. Without additional evidence, I find his illegal drugs use casts doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 26(a) and 25(b) do not apply.

Guideline E: Personal Conduct

AG ¶ 15 expresses 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 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. 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 describes conditions that could raise a security concern and may be disqualifying. I find the following potentially applicable:

(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 was fired from his job in 2016, while he was a summer intern, for testing positive for marijuana. The SOR alleges his termination for testing positive for marijuana under the personal conduct guideline. I have previously addressed concerns under the drug involvement and substance misuse guideline regarding his use and termination from his job in 2016. I find that his termination from a job as a 20-year-old summer intern does not rise to the level of making him vulnerable to exploitation, manipulation, or duress or having the potential to affect his personal, professional, or community standing. I find the above disqualifying condition does not apply and in Applicant's favor under this guideline.

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 have incorporated my comments under Guidelines H and E, in my whole-person analysis.

Applicant failed to meet his burden of persuasion. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement and substance misuse. I find the evidence did not support the application of a disqualifying condition under Guideline E, personal conduct, and find in his favor.

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.d:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For 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's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge