



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



In the matter of:)	
)	
)	ISCR Case No. 23-00147
)	
Applicant for Security Clearance)	

Appearances

For Government: Dan O’Reilly, Esq., Department Counsel
 For Applicant: *Pro se*
 09/14/2023

Decision

BENSON, Pamela C., Administrative Judge:

Applicant failed to mitigate the drug involvement and substance misuse and personal conduct security concerns. National security eligibility is denied.

Statement of the Case

On February 2, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudications Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H (drug involvement and substance misuse) and E (personal conduct). The CAS acted 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 the adjudicative guidelines implemented by the DOD on June 8, 2017.

On February 12, 2023, Applicant responded to the SOR (Answer). He admitted all of the SOR allegations alleged under Guidelines H and E. (SOR ¶¶ 1.a and 2.a through 2.e.). He requested a determination on the written record, in lieu of a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge.

On March 31, 2023, Department Counsel submitted a file of relevant material (FORM) and provided a complete copy to Applicant. Department Counsel’s FORM

includes Items 1 through 7. DOHA provided notice to Applicant that he had 30 days from the receipt of the FORM to provide objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. Applicant timely submitted two character reference letters, which I labeled as Applicant Exhibit (AE) A and B; there were no objections and all proffered exhibits were admitted into evidence.

Findings of Fact

Applicant is 25 years old. He has never been married and does not have any children. He earned a bachelor's degree in 2019. Based on his most recent security clearance application (SCA) he completed in April 2022, he was currently enrolled in a master's program. Since August 2020, he has worked for a federal contractor as an associate reliability engineer. On November 2, 2020, he was given an indoctrination briefing after he was granted a secret-level DOD security clearance in October 2020. (Item 3, Item 4, Item 6)

Drug Involvement and Substance Misuse and Personal Conduct

The SOR alleges under Guideline H that Applicant has used marijuana from about October 2017 to June 2021. (SOR ¶ 2.a) He has used methylenedioxy-methamphetamine (MDMA, or Ecstasy) from June 2018 to November 2019. (SOR ¶ 2.b) He used cocaine in October 2019. (SOR ¶ 2.c) He used lysergic acid diethylamide (LSD) in May 2020. (SOR ¶ 2.d) Applicant used marijuana in June 2021 while he had access to classified information after his secret-level security clearance was granted in October 2020. (SOR ¶ 2.e) He admitted all of the allegations in his February 2023 Answer. He also stated that most drug uses were experimental in nature and occurred infrequently while he was immature and attending college. He believed his voluntary disclosure of his dishonesty to his federal contractor employer in 2021 should be viewed in his favor. (Item 2)

On July 4, 2020, Applicant completed a SCA, as part of his employment process with a federal contractor. Under Section 23 – illegal drug use or drug activity, he failed to disclose his illegal drug use, as required. (SOR ¶ 1.a.) A background interview was not conducted as part of Applicant's security clearance investigation. As stated above, Applicant started employment with the federal contractor in August 2020, and he was granted a DOD security clearance in October 2020. (Item 4, Item 6)

In about November 2021, Applicant applied for and was offered employment at another facility with his employer. Applicant accepted the job offer, and then he contacted the facility security officer (FSO) at his new employment location and disclosed that he had used illegal drugs that he had not previously disclosed on his July 2020 SCA. Applicant told the FSO that he did not disclose his illegal drug use because he did not want the adverse information to prevent him from obtaining employment with the federal contractor. His last use of marijuana occurred in June 2021 after he had been hired and granted a Secret security clearance. On November 22, 2021, the FSO created an Incident Report in the Defense Information System for Security (DISS), reporting the adverse

information provided by Applicant. The FSO also rescinded Applicant's job offer. (Item 6, Item 7)

Applicant was asked to complete another SCA, which he did in April 2022. He disclosed on this SCA that he had used marijuana approximately 10 times between October 2017 and June 2021. He used MDMA, commonly referred to as Ecstasy, four or five times between June 2018 and November 2019. He used cocaine on one occasion in November 2019, and LSD on one occasion in May 2020. He stated that he had no intent to use illegal drugs in the future. (Item 3)

In September 2022, Applicant participated in a background interview with a DOD authorized investigator. Applicant disclosed that he was working for his employer in a current position that did not require a DOD security clearance. His last use of marijuana was in edible form in June 2021, while he was employed and possessing a Secret security clearance. He understood that marijuana use, in any form, is prohibited by Federal law. He told the investigator that he did not disclose his illegal drug use on his July 2020 SCA because he really wanted the job and did not think his illegal drug use was "a big deal." He reiterated that he does not intend to use illegal drugs again. (Item 5)

Applicant submitted two character reference letters that were provided by two managers with his current employer. One manager stated that Applicant reported to her from August 2020 until June 2022. He displayed sound technical judgment and successfully completed his responsibilities correctly and on schedule. She became aware of the DISS adverse incident report around Thanksgiving 2021. Applicant never exhibited any behavior that would cause her to question his credibility, or his ability to protect classified information. She does not expect he will use illegal substances in the future, and she believed that when he initially completed his SCA in July 2020, he was still immature. She listed that research has shown the pre-frontal cortex of the brain does not complete its growth until the early to mid-20's. This portion of the brain is responsible for reasoning, judgment, planning, and impulse control. The second manager stated that Applicant has been part of the quality engineering team since mid-2022. Applicant has displayed consistent discipline and a high commitment to the team's mission. (AE A, AE B)

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 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 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 potential 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, 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.

The record establishes AG ¶¶ 25(a), 25(c) and 25(f). Applicant has used illegal drugs from about October 2017 to about June 2021. He used marijuana in June 2021 after he had been granted a DOD secret-level security clearance and while holding a sensitive position.

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.

None of the mitigating conditions apply. Applicant has a long history of using illegal drugs, to include marijuana, MDMA, cocaine, and LSD between October 2017 to June 2021. He is aware that marijuana use violates federal law, DOD regulations, and his employer's drug policy. Despite this knowledge, he used marijuana in edible form in June 2021 after he was granted a DOD security clearance.

Although I appreciate Applicant's candid statements and his remorse in his Answer, his long history of using a wide range of illegal drugs is troubling. He told an investigator during his September 2022 background interview that he failed to disclose his illegal drug use on the SCA because he did not think it was "a big deal." His decision to use marijuana in June 2021 also demonstrates that he does not yet possess the requisite traits of reliability, trustworthiness, and good judgment that are necessary for all DOD security clearance holders. His marijuana possession and use are over two years old, but I find that more time is needed for him to mature as well as confirm that he is fully rehabilitated. Applicant failed to mitigate the drug involvement and substance misuse security concerns.

Guideline E: Personal Conduct

AG ¶ 15 describes the security concern about personal conduct 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 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 includes disqualifying one condition that could raise a security concern and may be disqualifying in this case:

(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 admitted that he deliberately failed to disclose his illegal drug use on his July 2020 SCA. AG ¶ 16(a) applies.

AG ¶ 17 provides conditions that could mitigate security concerns as follows:

(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; and

(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.

At the time Applicant completed his July 2020 SCA, he deliberately failed to list his illegal drug use because he wanted to receive an offer of employment from the federal contractor, and he was worried that listing his history of illegal drug use would prevent him from being hired. To his credit, Applicant voluntarily disclosed his deception to the FSO following a job offer in about November 2021. His conduct, however, does not amount to a prompt, good-faith effort to correct his July 2020 concealment of illegal drug use. Over a year had passed since he concealed his illegal drug use, and he used marijuana again in June 2021 while possessing a DOD security clearance. He provided candid information on another SCA he completed in April 2022. His past conduct casts doubt on his reliability, trustworthiness, and overall good judgment. None of the mitigating conditions fully apply. Personal conduct security concerns are not mitigated.

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 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 and the factors in AG ¶ 2(d) in this whole-person analysis.

Applicant has shown that his personal interests come first, even if his preferences violate rules, laws, and regulations. He is aware that federal law prohibits marijuana use, but he continued to use marijuana in June 2021 after he concealed his illegal drug use on his July 2020 SCA and was hired by his employer. I find that his use of marijuana after he had been granted a secret-level DOD security clearance in October 2020 is also very serious. He did not report his deception for over a year, and despite his voluntary disclosure of illegal drug use when offered a new position in November 2021, his conduct

does not support a finding that he made a prompt, good-faith effort to correct his initial deception in July 2020. More time is needed to demonstrate his successful rehabilitation. 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. In light of all the facts and circumstances surrounding this case, I conclude Applicant has not met his burden of proof and persuasion. He failed to mitigate the drug involvement and substance misuse and personal conduct security concerns.

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.:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a - 2.e.:	Against Applicant

Conclusion

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

Pamela C. Benson
Administrative Judge