



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 23-00892
)
 Applicant for Security Clearance)

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: *Pro se*

01/22/2024

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement and Substance Misuse) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an electronic questionnaire for national security positions (e-QIP) (SF 86 format) on September 29, 2022. On June 5, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (CAS) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The CAS acted under Executive Order (Exec. Or.) 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 (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on June 12, 2023, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written case on October 17, 2023. On October 18, 2023, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on October 24, 2023, and submitted a timely response on November 27, 2023. His response was admitted in evidence as Applicant's Exhibit A. The case was assigned to me on January 11, 2024.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations in the SOR. His admissions are incorporated in my findings of fact.

Applicant is a 29-year-old senior avionics integration and test engineer employed by a defense contractor since September 2022. He graduated from high school in May 2012 and received a bachelor's degree in May 2016. He attended post-graduate courses from January 2017 to August 2018 but did not receive a degree. He was employed as an electrical engineer by several federal contractors from October 2017 until he was hired by his current employer.

In October 2017, Applicant submitted an electronic questionnaire for non-sensitive positions (e-QIP) (SF 85 format). He answered "No" to the question, "In the last year, have you used, possessed, supplied, or manufactured illegal drugs?" He did not disclose that he had used lysergic acid diethylamide (LSD) and mushrooms on various occasions between approximately 2013 and the date of his e-QIP and that he had used marijuana from about August 2012 through the date of his e-QIP.

In September 2022, Applicant submitted another e-QIP (SF 86 format), seeking a security clearance. In response to questions about illegal use of drugs or drug activity, he disclosed that he regularly used marijuana in college about once a week between 2012 and September 2016 and that he used marijuana about one to three times a year between 2016 and 2021. He disclosed that he used hallucinogenic substances such as LSD and mushrooms about two times a year while in college and about once a year until 2021. He disclosed that he used Adderall as a study aid in college a few times a year. Finally, he disclosed that he purchased marijuana illegally from 2012 to 2016 and that he purchased it from legal dispensaries from 2016 to 2021.

In Applicant's answer to the SOR, he stated that his previous drug use was infrequent, that he was not dependent on drugs, and that they had no negative effect on his work or personal life. He decided to stop using illegal drugs in September 2021, when he was offered a position that required a security clearance. He stated that he has not used Adderall for seven years. He stated that he did not disclose his drug involvement in his October 2017 e-QIP because he was young, "relatively fresh out of school," and afraid that he would be fired if he disclosed it. He declared that he will not use illegal drugs in

the future. He acknowledged that his falsification was wrong and that he now understands that he needs to be candid and forthright in matters involving national security.

In Applicant's response to the FORM, he pointed out that his last drug use was more than two years ago and that it was his only drug involvement in the last four years. He declared his intent to refrain from further illegal drug use and asked for consideration of his change of behavior and full disclosure of past drug use.

Policies

"[N]o 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 applicants 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 § 2.

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, an administrative judge applies these guidelines 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 and 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 that 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 made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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." *Egan*, 484 U.S. at 531.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The concern under this guideline 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.

Applicant's admissions and the evidence in the FORM establish the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse (see above definition); and

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The following mitigating conditions are potentially applicable:

AG ¶ 26(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;

AG ¶ 26(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.

The first prong of AG ¶ 26(a) focuses on whether the drug involvement was recent. There are no bright line rules for determining when conduct is recent. The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without any evidence of misconduct, then an administrative judge must determine whether that period of time demonstrates changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

AG ¶ 26(a) is not established. Although Applicant has abstained from illegal drug use for a significant period of time, the evidence falls short of demonstrating rehabilitation. He began reducing his illegal drug use in 2017, but he continued occasional use until about two years ago. From the time of his false application in 2017 until September 2021, he continued to use illegal drugs, knowing that it was contrary to federal law and inconsistent with his employer's policies. His drug use was not the result of unusual circumstances. His motivation was his search for a new job, not a change of attitude about drug involvement.

AG ¶ 26(b) is not fully established. Applicant has acknowledged his illegal drug use and has abstained since September 2021. However, he provided no evidence that he has disassociated from his drug-using associates or changed his environment. He has provided a statement of intent to abstain from drug involvement and substance misuse, but his statement does not include an express acknowledgment that any future involvement will be grounds for revocation of national security eligibility. His long period of working under false pretenses undermines the credibility of his current promise to abstain from illegal drug use.

Guideline E, Personal Conduct

SOR ¶ 2.a cross-alleges the Applicant's previous drug involvement alleged in SOR ¶¶ 1.a-1.c. SOR ¶ 2.b alleges his falsification of his October 2017 e-QIP. The security concern under this guideline is set out in AG ¶ 15:

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 disqualifying conditions are relevant:

AG ¶ 16(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

AG ¶ 16(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 . . . : engaging in activities which, if known, could affect the person's personal, professional, or community standing.

When Applicant submitted an e-QIP in 2017, he was not applying for a security clearance, but his questionnaire was used to determine his employment qualifications and trustworthiness. In his response to the SOR, he admitted that he knew he would be fired if he disclosed his drug involvement. His admissions establish AG ¶¶ 16(a) and 16(e).

The following mitigating conditions are potentially relevant:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(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.

AG ¶ 17(a) is not established. Almost five years elapsed before Applicant disclosed his falsification.

AG ¶ 17(c) is not established. Applicant's falsification is not recent. It began in October 2017 and continued until September 2022. It did not happen under unique circumstances. It was not minor. It undermined the integrity of his employer's determination that he was eligible for a sensitive position. It was a felony in violation of 18 U.S.C §1001, punishable by a fine and imprisonment for up to five years.

Whole-Person Concept

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 applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guidelines H and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Because he requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). After weighing the disqualifying and mitigating conditions under Guideline H and E and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his drug involvement and personal conduct.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge