



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



In the matter of:)	
)	
)	ISCR Case No. 23-01101
)	
Applicant for Security Clearance)	

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

03/18/2024

Decision

Dorsey, Benjamin R., Administrative Judge:

Applicant mitigated the drug involvement and substance misuse security concerns. He did not mitigate the criminal conduct and personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On July 19, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement and substance misuse, Guideline J, criminal conduct, and Guideline E, personal conduct. On August 10, 2023, Applicant responded to the SOR (SOR Response) and requested a decision based on the written record in lieu of a hearing.

On October 19, 2023, the Government provided a complete copy of the file of relevant material (FORM) to Applicant, who was given 30 days to file objections and submit material to refute, extenuate, or mitigate the security concerns. In its FORM the Government withdrew one of the allegations under Guideline E (SOR ¶ 3.a). Applicant received the FORM on October 25, 2023, but he did not respond to it. The case was assigned to me on January 30, 2024. On February 5, 2024, the Government moved to

reopen the record to provide additional documentary evidence. Over Applicant's objection, in the interest of compiling a more fulsome record, and for good cause shown, I reopened the record until February 13, 2024, to allow either party to submit additional documentary evidence. The Government timely provided a document that I marked for identification purposes as Item 10, consisting of a summary of Applicant's October 4, 2022, and October 5, 2022, personal subject interviews. Applicant did not provide any documents, and he did not object to the entry of Item 10 into the record. The Government exhibits included in the FORM (Items 1-10) are therefore admitted in evidence without objection.

Findings of Fact

Applicant is a 27-year-old employee of a defense contractor for whom he has worked since December 2021. He received a high school diploma in June 2015. He was married from March 2017 until his divorce in June 2021. He has no children. He served on active duty with the U.S. Navy from October 2016 until March 2021, when he was administratively separated for misconduct with a general discharge under honorable conditions (Items 4-7, 10)

From about June 2019 until about December 2019, while he was on active duty with the Navy, Applicant used, purchased, possessed, and distributed lysergic acid diethylamide (LSD). At all times relevant to this investigation, LSD has been a controlled substance and its possession (and therefore its use) and distribution have been illegal. While there is evidence that he was granted security clearance eligibility, there is insufficient evidence to demonstrate that he had access to classified or sensitive information while he was involved with an illegal drug. (Response to SOR; Items 4, 6-10)

During this time, while he was a sailor with the U.S. Navy, Applicant purchased LSD via social media and provided it to other sailors. In early 2020, the U.S. Naval Criminal Investigative Service (NCIS) began an investigation into Applicant and his possible illegal activities. The NCIS investigation included interviews with Applicant and several individuals that obtained LSD from him. During the investigation, Applicant admitted the aforementioned illegal conduct involving LSD, telling investigators that he began using LSD in the summer of 2019 because he was depressed by his lack of command recognition, his pending divorce, and the passing of some of his friends. He also admitted to NCIS investigators that he acted as a "middleman" for other servicemembers by purchasing four to five doses of LSD from someone via social media on six or seven occasions and then distributing it to fellow sailors. An NCIS search of the text messages on Applicant's cellular phone led to interviews with some of these other sailors. One of these sailors acknowledged that Applicant had provided him with the LSD. (Items 4, 6-10)

After NCIS concluded its investigation, Applicant was charged with violating Article 112a (wrongful possession, manufacture, or distribution of a controlled substance) of the Uniform Code of Military Justice (UCMJ). After a Captain's Mast, Applicant was found guilty of violating Article 112a by a preponderance of the evidence.

His commanding officer awarded him a reduction in rank, restriction and extra duty for 45 days, and forfeiture of one-half of his pay for two months. Applicant was advised of his appeal rights, but he affirmatively waived them. The Navy administratively separated Applicant for misconduct, as referenced above. During the Navy administrative separation process, he was afforded the right to consult with counsel and submit a written statement for consideration, but he affirmatively waived those rights. (SOR Response; Items 4, 6-10)

Despite admitting his 2019 illegal drug involvement to NCIS investigators, Applicant certified in his February 2022 Electronic Questionnaires for Investigations Processing (e-QIP) that he had not illegally used any drugs or controlled substances in the last seven years. He also certified that he had not been involved in the illegal purchase, manufacture, cultivation, trafficking, production, transfer, shipping, receiving, handling or sale of any drug or controlled substance. Instead, as an optional comment, he wrote that he had been "... accused of using a controlled substance because of a group text message, but I did not fail a drug test for a controlled substance." (Items 4, 6, 7)

During an October 2022 security interview with an authorized DOD investigator, Applicant again minimized the full extent of his 2019 illegal drug involvement. He claimed that he tried to purchase LSD but was unsuccessful in doing so. He also claimed that he briefly possessed LSD that a friend of his purchased, but he threw it away without using it. He claimed that he never used or sold LSD. Initially, he told the DOD investigator that he had not told NCIS investigators that he used LSD. (SOR Response; Items 4, 6, 7, 10)

The following day, in an October 5, 2022 affidavit, Applicant swore that he tried to purchase LSD but was unsuccessful. He reiterated that he never used LSD and only possessed it in his home briefly before throwing it away. He also changed his story from the day before and told the DOD investigator that he *did* tell NCIS investigators that he used LSD, because he thought he could easily disprove his use through a clean drug test. He maintained that he did not tell NCIS investigators that he purchased LSD. (Items 4, 6-10)

I find that Applicant is being untruthful about the full scope of his drug involvement because of the following: he changed his narrative during the security clearance process about what he admitted to NCIS investigators; if he had not used LSD, he lied to NCIS investigators about his use; his alleged basis for telling NCIS investigators that he used LSD when he had not defies logic; a witness corroborated portions of his LSD involvement that he now denies; and the un rebutted presumption that the NCIS officials and his commanding officer were acting in good faith in carrying out their duties when they investigated his drug involvement and found him guilty of the broader drug misconduct, including its use, respectively. (Response to SOR; Items 4, 6-10)

During his security interviews and in his affidavit, Applicant claimed he did not hire a lawyer for assistance or appeal his punishment because the "yeoman" led him to

believe that it would not be worth it to do either. He claimed that he has learned better coping mechanisms for depression such as treatment through Veterans Affairs (VA) and meditation. He stated that he follows the VA's treatment advice and takes recommended medication. Without providing documentary corroboration, he alleged that he had negative results from a March 2021 urinalysis drug test and an October or November 2021 hair follicle drug test. Despite the over two years that passed after his alleged LSD use, he claimed that any such use in 2019 would have been revealed by the hair follicle test. (SOR Response; Items 6-10)

In his SOR Response, Applicant denied the allegations in the SOR except for the lone Guideline J allegation relating to him receiving non-judicial punishment for violation of Article 112a of the UCMJ, which he admitted. His admission is incorporated in my findings of fact. He provided narrative statements in his SOR Response in relation to the Guideline E SOR allegations. He largely reiterated what he told the DOD investigator on the second day of his security interview and what he wrote in his sworn affidavit, as I noted above. He admitted he made a mistake by briefly possessing LSD and having had an intent to use it, on which he ultimately did not act. (SOR Response; Items 6-10)

Applicant claimed he contemplated using LSD because he was depressed and has since been able to manage his depression. He misses the military, enjoys his job, and claimed he has never let his personal life affect his professional life. He claimed he told the DOD investigator the truth to the best of his knowledge and has passed multiple drug tests. (SOR Response; Items 6-10)

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);

(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.

Applicant illegally used, possessed, and distributed LSD with varying frequency in 2019. AG ¶ 25(a) and AG ¶ 25(c) are established. While there is evidence that Applicant had security clearance eligibility while he was involved with LSD, there is no evidence that he was granted access to classified information or holding a sensitive position. SOR ¶ 1.c is not established and I find in Applicant's favor with respect to that allegation.

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;

(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.

It has been about four and one-half years since Applicant was involved with illegal drugs or controlled substances. The circumstances surrounding his LSD involvement were to alleviate symptoms of depression because his career was not going well and because he was going through a divorce. He now enjoys his job, is years removed from his divorce, and is receiving appropriate treatment from the VA. His LSD involvement only occurred over a relatively short period. Given this period of abstinence, and because the circumstances that led to his LSD use are no longer present, I find that his period of abstinence since December 2019 is sufficient to show that it is unlikely to recur. AG ¶ 26(a) applies. AG ¶ 26(b) does not apply because

Applicant has not acknowledged the full extent of his drug involvement and substance misuse.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

There is substantial evidence that, in 2019, Applicant used, possessed, and distributed an illegal drug. After an NCIS investigation where he admitted this criminal behavior to NCIS investigators, his commanding officer found that he committed these acts and violated Article 112a of the UCMJ by a preponderance of the evidence. The above referenced disqualifying condition is established, thereby shifting the burden to Applicant to provide evidence in mitigation.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

As it has been about four and one-half years since Applicant was involved with illegal drugs, it would appear that a significant amount of time has passed since he engaged in criminal behavior. However, as I found that he was being untruthful about the full scope of his illegal drug involvement, he lied about a material fact relevant to a security clearance adjudication. Falsifying material information in a security clearance

adjudication is a criminal offense under 18 U.S.C.A. § 1001. Therefore, Applicant has continued to engage in criminal behavior, undercutting his efforts at mitigation under AG ¶ 32(a) and AG ¶ 32(d), which require the passage of time without recurrence of criminal acts. Given the recency of his criminal activity, AG ¶ 32(a) and AG ¶ 32(d) do not apply. AG ¶ 32(c) does not apply because there is reliable evidence of his illegal drug involvement in the form of credible allegations from the NCIS investigation and the Captain's Mast findings. None of the Guideline J mitigating conditions apply.

Guideline E, Personal Conduct

The security concern for personal conduct 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 guideline notes several conditions that could raise security concerns under AG ¶ 16. The following are potentially applicable 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other government official.

Applicant deliberately omitted the full extent of his illegal drug involvement on his e-QIP. In October 2022, he lied to a DOD-authorized investigator, and he lied in a sworn affidavit. Both of the above disqualifying conditions are applicable.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. The following mitigating conditions potentially apply in Applicant's 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; 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.

Applicant did not correct his omission or concealment of his illegal LSD involvement prior to being confronted with the facts. Instead, he continues to misrepresent the full extent of this involvement. AG ¶ 17(a) does not apply.

Deliberately omitting required information and lying to DOD investigators is not minor. Instead, these actions strike at the heart of the security clearance process, which relies on candid and honest reporting. Applicant engaged in this deceitful and misleading activity multiple times and continues to do so. Therefore, he has not shown that his behavior was infrequent, happened under unique circumstances, or is unlikely to recur. AG ¶ 17(c) does not apply.

Applicant has not acknowledged his dishonest behavior. Moreover, for the reasons I provided in my analysis of AG ¶ 17(c), I cannot find his behavior is unlikely to recur. AG ¶ 17(d) does not apply. None of the Guideline E mitigating conditions are applicable.

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, J, and E in my whole-person analysis. I have also considered Applicant's military service.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude he mitigated the drug involvement and substance misuse security concerns. He did not mitigate the criminal conduct 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 H:	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Withdrawn
Subparagraphs 3.b-3.d:	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.

Benjamin R. Dorsey
Administrative Judge