



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



In the matter of:)
)
 [NAME REDACTED]) ISCR Case No. 15-04568
)
 Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

01/04/2018

Decision

BORGSTROM, Eric H., Administrative Judge:

Applicant did not mitigate the security concerns about his illegal drug use. Eligibility for access to classified information is denied.

Statement of the Case

On December 4, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement) and Guideline E (personal conduct).¹ Applicant responded to the SOR on February 18, 2016, and he elected a decision on the written record in lieu of a hearing. On July 18, 2016, Department Counsel submitted her file of relevant material (FORM) and provided a complete copy to Applicant. Applicant received the FORM on July 27, 2016. He was afforded an opportunity to respond within 30 days of its receipt, to file objections, and to submit material to refute, extenuate, or mitigate the security concerns. Applicant did not respond to the FORM. The case was assigned to me on June 2, 2017.

¹ 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 implemented by the DOD on September 1, 2006.

Procedural Issues

On October 16, 2017, I issued an order informing both parties that although the SOR referenced the adjudicative guidelines implemented by the DOD on September 1, 2006, I would be applying the revised adjudicative guidelines (AG) effective as of June 8, 2017, pursuant to Security Executive Agent Directive 4 (SEAD 4). I also permitted the parties to supplement the record with additional evidence and argument. Neither party submitted any further documents.²

In the FORM, Department Counsel references FORM Items 1-6.³ FORM Items 4 and 5 are unauthenticated summaries of interviews with government investigators conducted on September 19, 2012 and February 8, 2008, respectively. Department Counsel advised Applicant that he could object to FORM Items 4 and 5 and they would not be admitted, or that he could make corrections, additions, deletions, and update the documents to make them accurate. Applicant was informed that his failure to respond to the FORM or to raise any objections may constitute waiver, and the evidence would be considered by me. Applicant did not respond to the FORM. Given Department Counsel's advisement and Applicant's education, I find his waiver to be knowing and intelligent.⁴ FORM Items 3-6 are admitted into evidence as Government Exhibits (GE) 3-6, without objection.

Findings of Fact

The SOR alleges security concerns based upon Applicant's illegal drug use, including after having been granted a DOD security clearance. In his response to the SOR, Applicant admitted all of the allegations. After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact:

Applicant is 42 years old. He earned a bachelor's degree in May 2001. He was married in June 2005, and they have two children – ages 6 and 9. Since June 2004, he has been employed as an analyst for a DOD contractor. He was granted a DOD secret clearance in September 2005 and a DOD top secret clearance in February 2008.⁵

Between about September 1993 and October 1994, Applicant used marijuana approximately 26 times and used psilocybin mushrooms once. After he was charged with possession of marijuana in October 1994, he abstained from illegal drug use for about 14

² Hearing Exhibit I includes my order and the revised AG.

³ FORM Items 1 and 2 are the SOR and Applicant's answer, which are pleadings and are included in the administrative record.

⁴ See ISCR Case No. 15-05252 at 3 (App. Bd. Apr. 13, 2016) (Applicant's waiver of the authentication element must be knowing and intelligent.). See ISCR Case No. 12-10810 at 2 (App. Bd. Jul. 12, 2016) ("Although *pro se* applicants are not expected to act like lawyers, they are expected to take timely and reasonable steps to protect their rights under the Directive.")

⁵ GE 3; GE 6.

years. He then used marijuana approximately four times between 2008 and July 2009 and used psilocybin mushrooms once.⁶

Applicant was interviewed by U.S. government investigators in February 2008 and September 2012 as part of the security clearance process. During his February 2008 security interview, Applicant stated that he had no future intent to use illegal drugs. During his September 2012 security interview, Applicant admitted that his spouse is unaware of his illegal drug use after 1994. There is no evidence that his employer is aware of any of Applicant's illegal drug use, including while possessing a clearance. Applicant attributed his drug relapse in 2008 to peer pressure.⁷

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.

⁶ GE 3-5.

⁷ GE 4; GE 5.

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 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); and

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant admitted using marijuana and psilocybin mushrooms on several occasions between September 1993 and July 2009. His illegal drug use occurred on several occasions after having been granted a DOD top secret clearance. The Government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a) and 25(f).

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 26. 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; 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) provided 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) (“happened so long ago”) 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.”⁸

Despite abstaining from illegal drugs for 14 years, graduating from college, getting married, having a child, and expressing his intent to remain drug-free, Applicant relapsed within months of having been granted a DOD top secret clearance. On several occasions, Applicant used illegal drugs while possessing a security clearance. Applicant has not provided evidence of changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. AG ¶ 26(a) does not apply.

Applicant attributed his 2008 relapse to peer pressure, and there is no evidence to support a conclusion that Applicant is no longer susceptible to such pressure. He has not provided evidence sufficient to demonstrate his disassociation from drug-using associates, changed circumstances, or a signed statement of intent to abstain from all drug involvement. Given his drug relapse after 14 years, Applicant has not demonstrated that he has overcome his problem. AG ¶ 26(b) does not apply.

Applicant’s repeated illegal drug use while possessing a DOD security clearance is a serious security concern. He has not provided documentary evidence as to his changed circumstances, good judgment, and rehabilitation. He did not mitigate the drug involvement and substance misuse security concerns.

⁸ ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Guideline E, Personal Conduct

The 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. . . .

The guideline notes several conditions that could raise security concerns under AG ¶ 16. The following disqualifying conditions are potentially applicable in this case:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of . . . (3) a pattern of dishonesty or rule violations; 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.

The SOR cross-alleges Applicant's illegal drug use, including after having been granted a DOD clearance, as a personal conduct security concern. Applicant's marijuana use violated state and federal laws and violated DOD policies governing cleared personnel. Applicant has not disclosed his more recent drug use to his spouse, and there is no evidence that he has disclosed any of his drug use to his employer. AG ¶¶ 16(d)(3) and 16(e)(1) apply.

The following mitigating conditions under AG ¶ 17 are potentially relevant:

(c) the offense is so minor, or such 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

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant's repeated illegal drug use while possessing a clearance is a serious breach of the DOD's trust and demonstrates poor judgment. Applicant attributed his illegal

drug use to peer pressure, and he has provided no evidence to support a conclusion that those circumstances are unlikely to recur. AG ¶ 17(c) does not apply.

During his September 2012 interview, Applicant acknowledged that neither his wife nor his employer is aware of his drug use since 1994. There is no evidence that he has disclosed his illegal drug use while possessing a clearance to his employer, a DOD contractor, or that he has taken any steps to reduce his vulnerability to exploitation. AG ¶ 17(e) does not apply. Applicant did not mitigate the personal conduct security concerns.

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's drug relapse while possessing a DOD security clearance casts doubt on his judgment and ability to adhere to rules and regulations. There is no evidence that these circumstances are unlikely to recur and that he has taken steps to overcome this drug problem and his vulnerability to exploitation. I conclude Applicant did not mitigate the drug involvement 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:	AGAINST APPLICANT
Subparagraphs 1.a.-1.b.:	Against Applicant

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraph 2.a.:

Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance.⁹ Eligibility for access to classified information is denied.

Eric H. Borgstrom
Administrative Judge

⁹ See SEAD 4, Appendix A, ¶¶ 1(d) and 2(c).