



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 16-03387
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert Blazewick, Esq., Department Counsel
For Applicant: *Pro se*

01/31/2018

Decision

HESS, Stephanie C., Administrative Judge:

Applicant's illegal drug use while holding a security clearance and his intentional falsifications during his background investigation remain concerns. Applicant has failed to mitigate the Guideline H (Drug Involvement and Substance Misuse) and the Guideline E (Personal Conduct) security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on February 9, 2015. On March 3, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The DOD CAF acted under Executive Order (Ex. Or.)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) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on March 22, 2017, and requested a decision on the record without a hearing. Department Counsel submitted the Government's written case

on May 30, 2017. On May 31, 2017, a complete copy of the file of relevant material (FORM,) which included Government Exhibits (GX) 1 through 8, 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 June 5, 2017, and his Response was received by the Defense Office of Hearings and Appeals (DOHA) within the allotted 30 days and admitted without objection. The case was assigned to me on October 1, 2017.

The SOR was issued under the AG implemented on September 1, 2006. The DOD implemented the amended AG on June 8, 2017, while this decision was pending. This decision will be decided based on the amended AG effective June 8, 2017.

Findings of Fact

The SOR alleges under Guideline H that Applicant used cocaine at least twice between 2011 and 2013; used marijuana on numerous occasions between 1995 and 2010; used ecstasy and psilocybin mushrooms in 2002; and, used cocaine and marijuana after having been granted a security clearance in 2008. Applicant admits each of these allegations. The SOR alleges under Guideline E that Applicant intentionally falsified his July 2000 e-QIP by failing to list his use of ecstasy and psilocybin mushrooms; that he falsified his February 2015 e-QIP by failing to list his second cocaine use; and, that he falsified his November 2015 responses to interrogatories by failing to disclose his ecstasy and psilocybin use, and by failing to report a second use of cocaine in 2013. Applicant admits each of these allegations. Applicant's admissions are incorporated in my findings of fact.

Applicant is a 36-year-old service technician employed by a defense contractor since September 2006. He was first granted a security clearance in October 2008. He has worked for his current employer for over 10 years. He and his cohabitant have resided together since approximately November 2004, and they have two children, ages nine and eight. Applicant graduated high school in 1999, and received a technical certificate in 2001. (GX 1.)

Applicant has been repeatedly asked about his illegal drug use during background investigations beginning in 2008. He has failed to give consistent responses regarding his use of illegal drugs. Specifically, Applicant has repeatedly failed to fully disclose the nature and extent of his illegal drug use in a candid and forthcoming manner. Applicant has given the following conflicting accounts of his use of illegal drugs:

On his first e-QIP in July 2008, he listed his illegal drug use as use of marijuana between September 1997 and April 1999, "socially in high school and a few times after." (GX 5.)

During his August 2008 PSI, Applicant stated that during the same timeframe he "used marijuana at least 50 times on the weekends." (GX 6.)

Applicant interviewed with another government agency, and was given a polygraph examination, at some point in 2013. As a result of the information disclosed during the polygraph examination about Applicant's illegal drug use, Applicant was denied access to classified information.

During his April 2015 PSI, Applicant stated that he used marijuana one time in the last seven years in September 2010. He explained in great detail the circumstances of his once-in-his-life February 2013 use of cocaine, and made multiple references throughout the interview to this one-time use. Applicant stated that because of his disclosure of his one-time use of cocaine and 2013 during his polygraph examination, his access to classified information was denied.

In his November 2015 responses to interrogatories, when asked to list all illegal drugs he had ever used, Applicant listed that he used marijuana in the late 1990s socially, once in 2010, and cocaine once in 2013.

In his January 2017 response to interrogatories, Applicant listed that he used marijuana from 1995 until 2000 "occasionally." He listed a one-time use of angel dust in 1998, and a one-time use of Ecstasy and hallucinogenic mushrooms in 2002. He also listed two uses of cocaine between 2012 and 2013. He elaborated that the first cocaine use was while watching National Football League (NFL) playoff games, and the second use was approximately one month later, while watching football with the same people.

In his March 2017 Answer, he stated that he used marijuana between 1995 and 1999 "socially", and once in 2010. He further stated that he used cocaine twice at the beginning of 2013, and not during 2011 or 2012. His description of the circumstances under which he used cocaine twice was verbatim to his January 2017 description.

Applicant's failure to fully and candidly disclose the nature and extent of his illegal drug use as required gave rise to the intentional falsification allegations in the SOR under Guideline E. In his Answer, Applicant admitted each of the Guideline E allegations, but qualified each admission. He stated that he did not list his 2002 Ecstasy and psilocybin mushrooms on his 2008 e-QIP because of "the insignificance of use" and because he had not thought about the dates of use. He explained that his failure to list his second cocaine use on his 2015 e-QIP was because he "did not take the proper time to fill out and update [his] e-QIP information." In response to the allegation that he intentionally failed to disclose his use of ecstasy and psilocybin mushrooms, and his second cocaine use, on his November 2015 responses to interrogatories, Applicant stated, "I admit, I did not respond in the manner I should have."

Additionally, Applicant has justified his use of illegal drugs while holding a clearance, minimized the security significance of such actions, and falsified material facts concerning his drug use during all stages of his background investigations.

In his Response, Applicant asserts that, despite his admissions to the Guideline E allegations, his conduct was excusable. For example, Applicant cites AG ¶ 17(b):

the refusal or failure to cooperate, omission, or concealment was because are significantly contribute to by advice of . . . A person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

He then argues the applicability of this mitigating condition by stating:

During my original 2008 interview after disclosing my experience with drugs, I cannot recall verbatim what was said but I was made to feel like what occurred wasn't that significant and I probably didn't need to put in the form because it happened in high school. I don't recall the exact date but I was told by an interviewer (female) that I was not required to discuss anything which had been discussed with a previous interviewer. I will admit I haven't taken the proper time to update my e-QIP application but since all these proceedings have begun, I have cooperated, responded and replied and have provided all that has been asked of me fully and truthfully.

In his Response, Applicant also argues that the mitigating conditions set forth in AG ¶ 17(c): the offense is minor, so much time has passed, behavior is unlikely to recur and does not cast doubt on Applicant's current security trustworthiness; AG ¶ 17(d): Applicant has acknowledged his behavior and participated in counseling or taken other positive steps to prevent such future behavior; and, AG ¶ 17(e): Applicant has taken positive steps to reduce vulnerability to exportation manipulation or duress, are applicable. Applicant states that it is been four years since his last drug use and he has gone to counseling; he emphasizes that he "was not arrested . . . suspected of . . . or disciplined for" his illegal drug use; and, that he has "done everything that has been asked of" him.

In his Answer, Applicant states that his 2010 marijuana use was with a friend, with whom he no longer associates, who had just returned from his second or third combat deployment. Applicant further states that his two uses of cocaine in 2013 occurred when he was experiencing extreme difficulties in his relationship with his cohabitant and he was "not himself." He and his cohabitant have since attended relationship counseling.

Additionally, March 21, 2017, approximately four years after his last admitted use of illegal drugs, Applicant voluntarily enrolled in a six-week state-certified alcohol and drug treatment program. At intake, Applicant underwent several assessments which, according to his discharge report, "indicated a low probability of substance abuse/dependence disorder." During the program, he submitted to a random drug screening, which was negative. He successfully completed the program in May 2017, and his discharge report recommends no further treatment. Applicant also submitted a notarized statement of intent of no future illegal drug use, and acknowledged that any such illegal drug use would result in the revocation of his security clearance. Applicant

states that he no longer associates with people who use illegal drugs. He emphasizes that his illegal drug use happened many years ago, and that he has made mistakes. (Response; Answer.)

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant’s meeting the criteria contained in the AG. 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.” See 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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; see AG ¶ 2(b).

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 . . . 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.

Applicant’s admissions, corroborated by the record evidence, establish the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse; and

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position.

The following mitigating conditions may also apply:

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 a 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, and

AG ¶ 26(d): satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Illegal involvement with a controlled substance(s) after being granted a security clearance raises heightened concerns about a person's judgment, reliability and trustworthiness, and requires a judge to closely scrutinize any claim of reform and rehabilitation. See ISCR Case No. 16-02005 at 3 (App. Bd. June 2, 2017) ("an applicant's use of illegal drugs after having completed a security clearance application raises substantial questions about his or her judgment, reliability, and willingness to comply with laws, rules, and regulations.")

The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006). The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006).

Applicant's most recent use of cocaine was at some point in 2013. Although it has been nearly five years since Applicant's last use of illegal drugs, time is not the only relevant factor when evaluating an applicant's eligibility for access to classified information. In this instance, Applicant's repeated failures to be candid and forthcoming about his use of illegal drugs underscore concerns about his judgment, reliability, willingness to comply with laws rules and regulations, and overall trustworthiness. Applicant has held a security clearance since 2008. He used marijuana in 2010 while holding a clearance, and justifies his actions by stating that he used marijuana with a friend who had recently returned from his second or third combat deployment. He claims that he was experiencing stress due to his personal life, which resulted in his acting out of character and using cocaine on two separate occasions. While Applicant acknowledges his use of illegal drugs, he does not accept responsibility for his actions.

Applicant voluntarily enrolled in a drug and alcohol treatment program on March 21, 2017, the day before he filed his Answer to the SOR. His intake assessments indicated a low probability that he had a substance abuse/dependence disorder. He successfully completed the program in May 2017, and no further treatment was recommended at that time. However, Applicant had not used any illegal drugs in over four years when he self-enrolled in this treatment program, and participation in the program was not prescribed. I have considered AG ¶ 26(d), and while it partially applies, it does not fully mitigate the concern. None of the other mitigating conditions applies.

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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

The following disqualifying conditions apply:

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;

AG ¶ 16(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 official government representative;

The following mitigating conditions are potentially applicable:

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; and

AG ¶ 17(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.

While Applicant argues that his Guideline E conduct is mitigated by time, stating that he last used any illegal drugs over four years ago, the concern under this guideline is not the illegal drug use, but his lack of candor and honesty. Throughout the multiple stages of Applicant's background investigations, he has failed to be forthcoming about the nature and extent of his illegal drug use. Further, he continues to justify his recent illegal drug use, minimize the security significance of such actions, and admit that he was

intentionally untruthful. None of the mitigating conditions apply to Applicant's dishonest conduct.

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. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but I have also considered the following:

Applicant has worked for his defense-contractor current employer for over 10 years. While there is no evidence that Applicant has used illegal drugs in the last five years, his use while holding a security clearance, in light of his age and experience with the security process, combined with his continued justification of his conduct and minimization of its security significance leave me with considerable doubts about his security worthiness.

After weighing the disqualifying and mitigating conditions under Guidelines 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 illegal drug use, including while holding a security clearance, and his failure to disclose issues as required. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

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

I conclude that it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Stephanie C. Hess
Administrative Judge