



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [REDACTED]) ISCR Case No. 20-00428
)
 Applicant for Security Clearance)

Appearances

For Government: A.H. Henderson Esq., Department Counsel
For Applicant: *Pro se*
02/17/2021

Decision

MARINE, Gina L., Administrative Judge:

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

Statement of the Case

Applicant submitted his security clearance application (SCA) on April 4, 2017. On May 21, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. The CAF 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 (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on a date not reflected in the record, and requested a decision based on the written record in lieu of a hearing. On October 28, 2020, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including pleadings and evidentiary documents identified as Items 1 through 6. He was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government’s evidence. He received the FORM on November 13, 2020, and did not respond. Item 1 contains the

pleadings in the case. Items 2 through 6 are admitted into evidence. The case was assigned to me on January 7, 2021.

Evidentiary Matter

Items 4 and 5 contain the policies of Applicant's current employer that relate to employee drug use. In the absence of an objection by Applicant, I admitted both Items because they are relevant to the issue of Applicant's drug use. However, each Item bore a date that was outside of the alleged period of Applicant's drug use and, thus, were accorded less weight. The SOR alleged that Applicant's drug use ended in "approximately late summer of 2017." Item 4 is a copy of a code of conduct dated January 2020. Item 5 is a copy of the procedures related to a drug and alcohol free workplace program dated April 2018. No evidence was proffered to establish that similar policies were in place between May 2012 and late summer 2017.

Findings of Fact

Applicant, age 40, has never married nor had children. He earned a high school diploma in 1999, a bachelor's degree in 2003, and a master's degree in 2005. He has been employed as a software engineer by three different defense contractors from 2005 through present. He has worked for his current employer since September 2017. He has maintained a DOD security clearance since 2006. (Items 2, 3)

Applicant used and purchased psilocybin mushrooms approximately two to three times per year from May 2012 through late summer of 2017. He estimated that he used them no more than a dozen times during that period. His use occurred while in social settings, such as parties and music or other festivals. He usually purchased one bag of mushrooms during a festival that he attended from "various people" at the festival. He spent approximately \$30 per bag, which typically consisted of four "small" mushrooms. He generally used at least half of the mushrooms at the festival, and then saved any leftover mushrooms for use at a later time. The SOR did not allege facts about his mushroom purchases so I will consider them only to evaluate mitigation and the whole person concept. (SOR Answer; Item 2 at 24-25; Item 3 at 4, 11)

Applicant reported his mushroom use on his April 2017 SCA. He further discussed it during his August 2018 security clearance interview (SI), in his March 2020 response to interrogatories (ROI), and in his SOR answer. He attributed his first use of mushrooms to being depressed over a breakup. He continued to use them because it was "kind of fun." He explained that he never "consciously decided" to stop using mushrooms, but "they just hold so little influence in my life I don't actively seek them." When using mushrooms, he feels euphoric and sees colors and shapes differently. He has never been diagnosed as drug dependent. (Item 3 at 5, 6, 11).

Applicant gave varied responses about his future intent with respect to using mushrooms. In his SCA, he stated that he had no intent to use them in the future because "they are difficult for me to acquire." During his SI, Applicant stated that it was "possible" that he might use mushrooms in the future. He described his mushroom use as

“manageable and controlled.” He stated that he did not believe that his mushroom use was a habit or “bad for him.” He admitted that it was “not good judgment” to use illegal drugs while holding a security clearance. However, when asked if a person that demonstrates poor judgment should hold a security clearance, he responded that there are “levels of poor judgment.” He then explained that he used mushrooms in a “controlled environment” without harming himself or negatively impacting anyone else. He denied having knowledge of his current employer’s drug-use policy. In his ROI, Applicant answered “No” to whether he had intentions of using mushrooms in the future. (Item 2 at 25; Item 3 at 8, 12)

In his SOR answer, Applicant denied ever having stated that he “intend[ed] to continue to use mushrooms in the future,” as alleged in SOR ¶ 1.c. However, he admitted “I can’t promise I’ll never use [mushrooms] again.” He acknowledged that “ADDICTION is bad, regardless of whether the addiction is something legal or illegal.” However, he denied having an “addiction problem” given that the frequency of his mushroom use was “at the most frequent” only three times in a year. Applicant asserted that he has proven himself “very trustworthy” and “loyal” to the defense of the United States because he was so forthcoming about his mushroom use (which he referred to as an “indiscretion”). (Item 1)

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.” (*Egan* 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.” (EO 10865 § 2).

Eligibility for a security clearance is predicated upon the applicant 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.” (EO 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. (*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. (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. (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; 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, 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 facts and circumstances of Applicant’s use of psilocybin mushrooms establish the following disqualifying conditions (DC) under this guideline:

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

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

AG ¶ 25 (g): expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Neither of the following potentially applicable mitigating conditions under this guideline are established:

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; and

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.

Applicant used and purchased psilocybin mushrooms several times per year over a five-year period, during which time he possessed a security clearance. While he was candid about it during the security clearance process, Applicant minimized his conduct and never fully acknowledged how serious a lapse in judgment it was. He provided conflicting statements about his future intent. He failed to accept responsibility for the fact that he not only used and purchased an illegal drug, but also violated his security clearance obligations.

Inexplicably, Applicant believed that the circumstances of his mushroom use did not rise to the level of poor judgment that would preclude him from eligibility for a security clearance. The fact his mushroom use occurred during a relatively short phase of his life and ended more than three years ago weighs in his favor. However, he failed to meet his burden to establish mitigation sufficient to overcome the significance of his use while in possession of a security clearance and his failure to clearly and convincingly commit to abstinence. I am unable to conclude that Applicant's illegal drug involvement is unlikely to recur and have doubts about his current reliability, trustworthiness, and good judgment.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole

person. In evaluating the relevance of an individual's conduct, 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 Guideline H in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the security concerns raised by his illegal drug use. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

Formal findings 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.c:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge