



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



In the matter of:)
)
) ISCR Case No. 20-03094
)
)
Applicant for Security Clearance)

Appearances

For Government: Andrew Henderson, Esq., Department Counsel
For Applicant: *Pro se*

November 17, 2021

Decision

Lokey Anderson, Darlene D., Administrative Judge:

Statement of the Case

On April 8, 2020, Applicant submitted a security clearance application (e-QIP). (Government Exhibit 1.) On December 18, 2020, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline H, Drug Involvement and Substance Misuse; and Guideline J, Criminal Conduct. 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 (AG) effective within the DoD after June 8, 2017.

Applicant answered the SOR on July 19, 2021, and requested a hearing before an administrative judge. The case was assigned to me on September 21, 2021. The Defense Office of Hearings and Appeals issued a notice of hearing on September 24, 2021, and the hearing was convened as scheduled on October 13, 2021. The Government offered three exhibits, referred to as Government Exhibits 1 through 3, which were admitted without objection. The Applicant offered six exhibits, referred to as

Applicant's Exhibit A through F, which were admitted without objection. Applicant testified on his own behalf. The record remained open until close of business on October 20, 2021, to allow the Applicant to submit additional supporting documentation. Applicant submitting nothing further. DOHA received the transcript of the hearing (Tr.) on October 25, 2021.

Request for Administrative Notice

The Government requested I take administrative notice of seven illegal drugs and controlled substances identified and described in Fact Sheets I through VII, from the Department of Justice, Drug Enforcement Administration. Applicant had no objection. (Tr. p. 17.) Accordingly, Administrative Notice was taken. (Tr. p. 17.)

Findings of Fact

Applicant is 34 years old and unmarried. He has Bachelor's Degree in Chemical Engineering. He is employed by a defense contractor as a Sr. Systems Engineer. He is seeking to obtain a security clearance in connection with his employment.

Applicant has an extensive history of illegal drug involvement and substance misuse, and a drug-related arrest. His illegal drug use includes hallucinogenic drugs LSD, Mushrooms, Ayahuasca, and DMT from about April 2013 to at least March 2020; THC/Tetrahydrocannabinol from April 2013 to at least March 2020; stimulants, MDMA/Ecstasy from April 2013 to at least February 2020; Cocaine or Crack Cocaine from April 2014 to at least October 2019; Nitrous Oxide from May 2013 to at least September 2017; and Ketamine from July 2015 to at least August 2016. He has also purchased THC, MDMA, LSD, and cocaine on various occasions throughout his use.

Applicant began working for his current employer in March 2020. (Government Exhibit 1). He has never applied for a security clearance before, and has no military service. Applicant admits each of the allegations set forth in the SOR. (See, Applicant's Answer to SOR dated July 19, 2021.)

Applicant began using marijuana in 2003, before attending college. (Tr. p. 28.) Applicant attended college from August 2005 to June 2010, and used marijuana and MDMA, (commonly referred to as Ecstasy) while in college. (Tr. p. 27.) At the hearing, when asked, when the last time was that he used marijuana, Applicant stated, "I respectfully decline to answer the question." (Tr. p. 28.) He stated that he first used MDMA or ecstasy in 2004, 2006, or 2007. (Tr. p. 28.) When asked when his most recent use of MDMA or ecstasy occurred, he stated, "I respectfully decline to answer the question." (Tr. p. 28.) Applicant continued to decline to answer any question by Department Counsel about his most recent use of any illegal drug listed in the SOR.

Applicant stated that he first used LSD in 2013. When asked when his most recent use of LSD occurred, he again refused to answer the question. (Tr. p. 29.)

Applicant used mushrooms in about April 2013. When asked when his most recent use of mushrooms occurred, he refused to answer the question. (Tr. p. 29.) Applicant used Ayahuasca and indicated that he first used it in about 2013. When asked when his most recent use of Ayahuasca occurred, he refused to answer the question. (Tr. p. 30.) Applicant also used DMT, which is an active ingredient within Ayahuasca. Applicant stated that it should have occurred the same time he used Ayahuasca. (Tr. p. 30.) Applicant stated that this drug allows a person to access old memories from early life. (Tr. p. 38.) When asked when his most recent use of DMT occurred, he refused to answer the question. (Tr. p. 31.) Applicant also used inhalants such as nitrous oxide. He refused to answer the question concerning his most recent use of inhalants. (Tr. p. 32.) Applicant has also used cocaine or crack, and he refused to indicate when his most recent use occurred. (Tr. p. 32.) Applicant also used Ketamine for the first time in 2015. When asked when his most recent use of Ketamine occurred, Applicant refused to answer the question. (Tr. p. 37.) Applicant stated that Ketamine is often used as a veterinary tranquilizer. (Tr. p. 37.)

Applicant testified that the use of at least some of these substances occurred at music festivals. He stated that it was in 2013 that he started attending music festivals. He stated that he has used illegal drugs at parties. When asked when the last time was that he attended a party, he refused to answer the question. (Tr. p. 33.)

Applicant's responses to the undated interrogatories reflect some dates he started and last used a particular drug. However, none of the information in this form was corroborated because Applicant refused to answer all questions regarding his most recent use of these illegal drugs. (Government Exhibit 2.)

In August 2013, Applicant was arrested and charged with Felony and misdemeanor charges for possession of a controlled substance; possession of a narcotic controlled substance, and possession of marijuana. At the time of his arrest, Applicant had in his possession LSD, MDMA, THC and marijuana. (Government Exhibit 3.) Applicant testified that following the arrest, he continued to use all of the illegal drugs he was arrested for. (Tr. p. 34.) He stated that they just drove through a police check point, heading to a known party, and were illegally searched. Applicant was found in possession of the above-mentioned illegal drugs, and was arrested. Applicant stated that news reports regarding this procedure indicate that the head of the police department in that area was fired following this arrest. (Tr. p. 44.)

Applicant stated that in his opinion the DoD Directive is severely outdated in terms of effectiveness. (Tr. p. 47.) He believes that he is sufficiently trustworthy and reliable to properly protect Government information, regardless of his history. (Tr. p. 47.)

Four letters of recommendation submitted by professional associates, coworkers and friends collectively attest to Applicant's excellent work performance, strong interpersonal and leadership skills, and reliability, and honesty. None of these individuals is aware of the extent of Applicant's illegal drug use. (Applicant's Exhibits A, B, C and D; and Tr. p. 51.)

Applicant submitted a Statement of Intent to abstain from illegal drug involvement and substance misuse dated October 4, 2021, with the understanding that any future involvement or misuse is grounds for revocation of national security eligibility. (Applicant's Exhibit E.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Directive ¶ E3.1.14, requires the Government to present evidence that establishes 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person who applies for access to classified information seeks to enter 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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 relating to the guideline for Drug Involvement and Substance Misuse is set forth at 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 at AG ¶ 25 contains two conditions that could raise a security concern and may be disqualifying:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The guideline at AG ¶ 26 contains conditions that could mitigate security concerns. None of the conditions are 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) 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.

None of the mitigating conditions are applicable. Applicant refused to answer any questions about his most recent illegal drug use. His failure to cooperate in this regard shows immaturity, and an implied attempt to hide information from the government. Thus there is insufficient information in the record to make a proper determination as to his eligibility. It not clear from the evidence whether he continues to use illegal drugs, has reduced his use, increased his use, or has stopped. Applicant has not shown the requisite good judgment, reliability and trustworthiness necessary to be eligible for access to classified information.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person'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 are potentially applicable:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgement, reliability, or trustworthiness; and
- (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.

The guideline at AG ¶ 31 contains conditions that could mitigate security concerns. Neither of the conditions are 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; 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

Applicant's criminal record reflects one arrest in 2013, and several charges for illegal possession of several different controlled substances. Applicant's conduct demonstrates poor judgment, immaturity and a total disregard for the law. His criminal conduct is inexcusable. Applicant has not established that he is sufficiently reliable and trustworthy to access classified information. His extensive illegal drug use, his refusal to answer questions regarding his most recent drug use, and his arrest for possession of controlled substances gives rise to serious concerns about his judgment, reliability and trustworthiness, both because of the nature of the offenses, and the circumstances surrounding the offenses. The before-mentioned disqualifying conditions have been established and are not mitigated.

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 facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and J in my whole-person analysis. Based upon the facts and analysis set forth above, Applicant has failed to provide sufficient evidence to demonstrate that he meets the qualifications for a security clearance.

Overall, the record evidence leaves me with many questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Drug Involvement and Substance Misuse, and Criminal Conduct security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraphs 1.a through 1.k.	Against Applicant
Paragraph 2, Guideline H:	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 national interest to grant Applicant national security eligibility for a security clearance. Eligibility for access to classified information is denied.

Darlene Lokey Anderson
Administrative Judge