



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



In the matter of:)
)
) ISCR Case No. 20-03731
)
Applicant for Security Clearance)

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: *Pro se*

March 9, 2022

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline H (drug involvement and substance misuse). Eligibility for access to classified information is denied.

Statement of the Case

On May 21, 2020, Applicant submitted a Questionnaire for National Security Positions (SF-86). On February 2, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudication Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H. The SOR detailed reasons why the CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On March 16, 2021, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated April 16, 2021, was provided to him by letter dated April 22, 2021. Department Counsel attached as evidence to the FORM Items 1 through 4.

Applicant was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. He timely submitted additional evidence that I marked as Item 5. I received Items 1 through 5 into evidence. On July 16, 2021, the case was assigned to me.

Findings of Fact

Background Information¹

Applicant is a 29-year-old contract employee employed by a defense contractor since May 2020. He is a first-time applicant for a security clearance. It is unclear from the record what level of access Applicant is currently seeking.

Applicant graduated from high school in May 2011. He was awarded a bachelor's degree in May 2015. He has never married and has no dependents. Applicant has not served in the Armed Forces.

Drug Involvement and Substance Misuse

SOR ¶ 1.a alleges that Applicant used marijuana with varying frequency from about October 2008 to about April 2020; SOR ¶ 1.b alleges that he used cocaine with varying frequency from about March 2016 to about December 2019; SOR ¶ 1.c alleges that he used hallucinogenic mushrooms with varying frequency from about March 2013 to about August 2016; SOR ¶ 1.d alleges that he used prescription medication Adderall, not prescribed to him, with varying frequency from about May 2013 to about May 2015; and SOR ¶ 1.e alleges that he used LSD in about April 2013. He admitted all of these allegations in his SOR Answer without explanation. (Items 1, 2)

These allegations came to light when Applicant self-admitted his past drug use on his May 21, 2020 SF-86 (Item 3). On June 15, 2020, he was subsequently interviewed by an Office of Personnel Management (OPM) investigator. During that interview, Applicant provided further details regarding his past drug use. (Item 4) In his FORM response, he elaborated even further on his past drug use. (Item 5)

A summary of Applicant's explanations follows:

Marijuana – Applicant used marijuana all throughout high school from 2008 to 2011, “a handful of times, always with a group of peers, and always at a private home.” He smoked marijuana because of peer pressure. (Items 4, 5) Applicant continued his marijuana use during college from 2011 to 2015, “a few times a week” and stopped during the summer months because he had a job as a lifeguard and was drug tested. Applicant smoked marijuana during college, “as an escape from the stress of school.” (Items 4, 5) He did not smoke marijuana from 2016 to 2017 when he was employed as

¹ The limited background information regarding Applicant was derived from the FORM and was the most current information available.

an English teacher in Thailand (Items 4,5) From 2017 to 2020, Applicant smoked marijuana “recreationally to help relieve him from stress from work and being unemployed.” He stopped using marijuana in April 2020. (Items 4, 5) Applicant stated, “Although I have a history of using marijuana through a 12 year period, the amount of time using marijuana during that time is miniscule and my dedication to not using it can be seen in my drug tests that I never failed.” (Item 5)

Cocaine – Applicant used cocaine “a total of four times . . . three times in 2016 and one lone time in 2019.” He stated a friend “convinced [him] to try it” in 2016 and the second and third cocaine uses were “under the same circumstances.” The last time Applicant used cocaine, in 2019, occurred when a friend “talked [Applicant] into using it.” (Items 4, 5)

Hallucinogenic mushrooms – Applicant used hallucinogenic mushrooms “twice.” The first time was in March 2013 when he was with a group of friends, and one of his friends “pressured him into using it.” His second use of mushrooms occurred in Thailand in August 2016. Another friend “talked him into . . . order[ing] a happy milkshake that had hallucinogenic mushrooms in it.” (Items 4, 5)

Prescription Adderall – Applicant used Adderall while in college “approximately five times to help him focus on studying for school work” from May 2013 to May 2015. He stated he used Adderall so he “could study and focus a tad more than normal.” (Items 4, 5)

LSD – Applicant used LSD one time “in about” April 2013. A friend “convinced” him to try LSD. (Items 4, 5)

Applicant stated that he never tested positive for drugs, does not currently associate with anyone he used drugs with in the past, and does not intend to use drugs in the future. He has not sought professional counseling regarding his past drug use. (Items 4, 5) I note that Applicant’s last drug use occurred in April 2020, one month before he completed his SF-86 in May 2020, claiming that “he wanted control of his life and that he had no intention of future use.” (Item 4) Applicant did not submit a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is a grounds for revocation of national security eligibility.

Applicant stated that he is “a loving friend, a reliable & trustworthy coworker, and a human who complies with other laws and regulations.” He added that he is a dedicated, reliable and trustworthy employee and would like to have a clearance to become a more effective employee and enhance his position within his company. Applicant stated that his mistakes from the past are no reflection of who he is today. (Item 5)

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 clearance favorable 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

Drug Involvement and Substance Misuse

AG ¶ 24 describes the security concern about drug involvement and substance misuse:

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.

AG ¶ 25 provides one condition that could raise a security concern and may be disqualifying in this case:

(a) any substance misuse (see above definition).

The Applicant admitted and the record established this disqualifying condition. Consideration of mitigating conditions is required.

AG ¶ 26 lists two conditions that could mitigate security concerns in this case:

(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.

I have considered all of the mitigating conditions under drug involvement and substance misuse and especially considered AG ¶¶ 26(a) and 26(b).

Concerning AG ¶ 26(a), 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 record within the parameters set by the Directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. 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.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis, the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.”) (citation format corrections added).

Applicant's most recent marijuana use occurred in April 2020, one month before he submitted his SF-86 in May 2020, and ten months before his SOR was issued in February 2021. Applicant asserts that he has turned his life around, that he no longer wants to use drugs, and will not use drugs in the future. Among the problems here is the recency of his drug use. Additionally, his written assertions that he is drug-free and has no intention of using drugs in the future lack corroboration. While Applicant receives credit for self-reporting his past drug use, that alone is insufficient to mitigate his 12-year history of self-admitted intermittent use of a variety of drugs. Also problematic, is Applicant's susceptibility to peer pressure to use drugs, which he acknowledged was a common theme in his past drug use.

Accordingly, mitigation credit under AG ¶ 26(a) is not warranted at this time. Applicant is able to receive partial credit for acknowledging his drug involvement and substance misuse under AG ¶ 26(b) for disassociation with drug-using associates and contacts and changing or avoiding the environment where drugs were used under subsections (1) and (2). However, the overall circumstances do not warrant full mitigation of security concerns under Guideline H.

In summary, apart from partial application of AG ¶ 26(b), no other mitigating conditions fully apply. In addition to evaluating the facts and applying the appropriate adjudicative factors under Guideline H, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Applicant is gainfully employed and is presumed to be a mature, responsible citizen. Nonetheless, without other information suggesting his long-standing drug involvement and substance misuse problems are being or have been addressed, doubts remain about his suitability for access to classified information. Protection of the national interest is the principal focus of these adjudications. Accordingly, those doubts must be resolved against Applicant.

Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the drug involvement and substance misuse security concerns. By failing to provide such information, and in relying on an explanation lacking sufficient detail to fully establish mitigation, drug involvement and substance misuse considerations security concerns remain.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a – 1.e:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. National security eligibility is denied.

ROBERT TUIDER
Administrative Judge