



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 21-02723

Appearances

For Government:

Tovah Minster, Esquire, Department Counsel

For Applicant:

Pro se

March 31, 2023

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted his initial Electronic Questionnaires for Investigations Processing (e-QIP) on October 21, 2019. (Item 3.) On March 15, 2022, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines H (Drug Involvement and Substance Misuse), E (Personal Conduct), and J (Criminal Conduct). (Item 1.) The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*

(January 2, 1992), as amended (Directive); and the Adjudicative Guidelines effective within the Department of Defense after June 8, 2017.

Applicant answered the SOR in writing (Answer) on April 13, 2022, with explanations and one enclosure identified as Applicant Exhibit A. He requested his case be decided on the written record in lieu of a hearing. (Item 2.) On June 3, 2022, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM), consisting of Items 1 to 4, was provided to Applicant, who received the file on June 8, 2022.

Applicant was given 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant submitted additional information that was received by the Defense Office of Hearings and Appeals (DOHA) on July 11, 2022. The information consisted of a statement from Applicant and two additional documents. Department Counsel had no objection to the admission of the additional information, and it is admitted into evidence collectively as Applicant Exhibit B. The case was assigned to me on August 9, 2022. Based upon a review of the pleadings and exhibits, national security eligibility for access to classified information is denied.

Findings of Fact

Applicant is 34 years old and single. He received a bachelor's degree and a master's degree. Applicant has been employed by a defense contractor as a senior software engineer since March 2019. He seeks to obtain national security eligibility and a security clearance in connection with his current employment. Applicant has not held a security clearance in the past. (Item 3 at Sections 12, 13A, 17, and 25.)

Paragraph 1 (Guideline H, Drug Involvement and Substance Misuse)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has used illegal drugs. Applicant admitted all the allegations under this paragraph with explanations.

As a general statement, Applicant admitted that he had an extensive history of illegal drug abuse when he worked in the restaurant industry before 2014. After he began school in 2014 his drug use continued as further described below. (Item 3 at Section 23; Item 4 at 12-14.)

The allegations will be discussed in chronological order:

1.b. Applicant used and purchased marijuana on various occasions from approximately May 2006 until February 2018. (The SOR allegation that Applicant's marijuana use began in 2003 is based on a typographical error in the Report of

Investigation of an interview of Applicant by a Government investigator dated December 10, 2019.) Applicant's most frequent use of marijuana occurred between 2006 and 2013. During that period, he used marijuana on a daily, weekly, or bi-weekly basis. From 2014 to 2018 Applicant used marijuana infrequently. His last use was at a family wedding in February 2018. (Item 3 at 46-47; Item 4 at 12; Applicant Exhibit B.)

Applicant submitted a notarized statement of intent dated February 4, 2022, as an attachment to his interrogatory responses. Part of that statement says, "I am not able to commit to not associating with individuals who use, because many members of my family use marijuana, and family is very important to me." (Item 4 at 19-20.)

1.j. Applicant was arrested in July 2007 and charged with Operating Under the Influence of Alcohol, Speeding, and Possession of a Class D Substance: Marijuana. He stated that he was put on probation for a year and had to obtain counseling. (Item 3 at 42-43; Item 4 at 11.)

1.f. Applicant purchased and used hallucinogenic mushrooms about four times from about March 2007 to about May 2010. (Item 3 at 47; Item 4 at 13.)

1.g. Applicant purchased and used LSD about four times from about March 2007 to about May 2010. (Item 3 at 47; Item 4 at 13.)

1.c. Applicant used cocaine from about April 2007 to about April 2014. He stated, "During most of my restaurant career I would use cocaine once every few months, but in 2013 when I was at . . . Steakhouse there was a couple months were [sic] I used once a week on 'guys night.' Towards the end of this I realized that cocaine is basically a waste of money and I haven't used it since." (Item 3 at 47-48; Item 4 at 13; Applicant Exhibit B.)

1.i. Applicant was arrested in about October 2009 and charged with Drug Possession of a Class A Substance: Heroin. Applicant stated that the charges were dropped. (Item 3 at 43-44; Item 4 at 11-12.)

1.h. Applicant was arrested in December 2009 after he was involved in an automobile accident. He was charged with Negligent Operation of a Motor Vehicle, Marked Lanes Violation, and Possession of a Class D Substance: Marijuana. He stated that the Possession charge was dropped and he was put on probation for a year. (Item 3 at 44-45; Item 4 at 12.)

Applicant became addicted to prescription painkillers in approximately 2009 due to serious pain in his legs and feet from his work in the restaurant industry. He stated, "I tried to combat this [pain] with Aleve or Ibuprofen, but I eventually started to use stronger prescription medication that wasn't prescribed for me." (Applicant Exhibit B at 2.)

1.e. Applicant used the prescription medication Oxycontin that was not prescribed for him between May 2009 to June 2012. (Item 3 at 50-51; Item 4 at 13.)

1.d. Applicant used the prescription medication Oxymorphone that was not prescribed to him from about May 2011 to November 2012. Applicant used this drug because Oxycontin became more difficult to acquire. (Item 3 at 51; Item 4 at 13.)

1.a. In about May 2012 Applicant began using the prescription drug Suboxone daily as a way to combat his opioid addiction. Applicant did not obtain a prescription for it. Rather, he obtained the Suboxone from his father. His use of Suboxone continued for ten years, until March 2022, just before issuance of the SOR. This was after he submitted his e-QIP in 2019 and responses to DOHA interrogatories in February 2022. (Item 3 at 51; Item 4 at 13-14.)

Applicant enrolled in a Medication Assisted Treatment (MAT) program on March 8, 2022, aimed at persons suffering from Opioid Use Disorder. A Progress Report dated July 7, 2022, states that Applicant had made eight appointments without any absences. The Report describes the program: "MAT is arranged as part of a comprehensive treatment that includes medication with counseling and participation in [a] social support program." (Applicant Exhibits A and B at 3.)

Also attached to Applicant Exhibit B, at 4, is a statement dated July 7, 2022, from a Lead Behavioral Health Technician at the counseling center Applicant attends. The statement says, "He [Applicant] is currently stable and seen monthly by provider [Applicant] is consistent and appears committed to his recovery by reliably participating in MAT services. He would benefit from the continuance of medication."

Applicant stated that he is currently on the drug Buprenorphine, with a proper prescription to help him combat Opioid Use Disorder. He further stated, "So far, my time in the MAT program has proven to be stable and successful, so I will continue this route until this is finally behind me." (Applicant Exhibit B at 2.)

As stated, Applicant submitted a signed statement of intent that said in part, "If issued security clearance, I am willing to abstain from any drug involvement or substance misuse, and I acknowledge that any future involvement or misuse would be considered grounds for revocation of national security eligibility." (Item 4 at 19.)

Paragraph 2 (Guideline E, Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Applicant did not admit or deny the sole allegation under this guideline. His silence is viewed as a denial.

2.a. The Government alleges in this subparagraph that all of the information to which Applicant admitted set forth under paragraph 1, above, is also cognizable under this guideline.

Paragraph 3 (Guideline J, Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal conduct that creates doubt about a person's judgment, reliability, and trustworthiness. Applicant did not admit or deny the sole allegation under this guideline. His silence is viewed as a denial.

3.a. The Government alleges in this subparagraph that all of the information to which Applicant admitted set forth under paragraph 1, above, is also cognizable under this guideline.

The record contains no evidence concerning Applicant's recent job performance, trustworthiness, character in a professional setting, or track record with respect to handling sensitive information and observation of job-related security procedures. I was unable to evaluate his credibility, demeanor, or character in person, since he elected to have his case decided without a hearing.

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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. The entire process is a conscientious scrutiny of applicable guidelines in the context 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, "Any 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 national security eligibility. 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 or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (Guideline H, Drug Involvement and Substance Misuse)

The security concern relating to Drug Involvement and Substance Misuse is set forth 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.

I have examined the disqualifying conditions under AG ¶ 25 and especially considered the following:

- (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.

Applicant used and purchased marijuana, cocaine, LSD, and hallucinogenic mushrooms until 2018. He was addicted to opioids from approximately 2009 through at least March 2022. Applicant did not have a prescription for the opioids he used. The stated disqualifying conditions apply.

The following mitigating conditions under AG ¶ 26 have also been considered:

- (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;
- (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; and
- (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 practitioner.

Applicant has a long-standing drug habit. He used and purchased marijuana, cocaine, LSD, and hallucinogenic mushrooms at various times between 2006 and 2018. He had three drug-related arrests between 2007 and 2009. Beginning in approximately 2009 Applicant got addicted to opioids. This addiction continued into 2022. In March 2022 Applicant began MAT. When the record closed in July 2022 Applicant had been to eight

sessions. As part of MAT, Applicant is now taking a prescription medication that helps fight opioid addiction. Applicant is to be commended for finally attempting to conquer his addiction. However, at this time, it is simply too soon to find that he is finally and firmly recovered from his addiction issues. The weight of his signed statement of intent under AG ¶26(b)(3) is lessened by his statement that he cannot commit to not seeing his family, many of whom use marijuana. I have also considered the fact that his father illegally gave him the Suboxone during some period of his addiction. AG ¶ 26(d) does not apply since there is no evidence in the record to show “satisfactory completion of a prescribed drug treatment program.” Applicant has not met his burden. Paragraph 1 is found against Applicant.

Paragraph 2 (Guideline E, Personal Conduct)

The security concerns relating to the guideline for personal conduct are set out in AG ¶ 15, which states:

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.

AG ¶ 16 describes one condition that could raise security concerns and may be disqualifying in this case:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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.

As stated above, Applicant has an extensive history of drug abuse, including drug-related arrests and purchase of illegal drugs, that ended approximately three months before the record closed. The stated disqualifying condition applies to the facts of this case, transferring the burden to Applicant to mitigate the adverse inferences supported by his admitted conduct.

The guideline includes three conditions in AG ¶ 17 that could mitigate the security concerns arising from Applicant's admitted adverse conduct:

(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;

(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; and

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

For the reasons stated under Paragraph 1, above, I find Applicant has not sufficiently mitigated the security significance of his drug usage and related criminal conduct under this guideline. Paragraph 2 is found against Applicant.

Paragraph 3 (Guideline J, Criminal Conduct)

The security concerns relating to the guideline for criminal conduct are set out in AG ¶ 30, which states:

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 two conditions that could raise security concerns and may be disqualifying in this case:

(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 judgment, 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.

As stated above, Applicant has an extensive history of illegal drug abuse, including drug-related arrests and purchase of illegal drugs, that ended approximately three months

before the record closed. The stated disqualifying conditions apply to the facts of this case, transferring the burden to Applicant to mitigate the adverse inferences of his admitted conduct.

The guideline includes four conditions in AG ¶ 32 that could mitigate the security concerns arising from Applicant's admitted criminal conduct. Two have possible application to the facts of this case:

(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.

For the reasons stated under Paragraph 1, above, I find Applicant has not sufficiently mitigated the security significance of his drug usage and related criminal conduct under this guideline. Paragraph 3 is found against Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for national security eligibility 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 national security 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 pertinent facts and circumstances surrounding this case. Applicant has just started the long road to recovery from opioid addiction, after years of illegal drug use that started in 2006. At this time, he is not eligible for a security clearance. He has not mitigated the concerns regarding his substance misuse, personal conduct, and criminal conduct. The potential for pressure, coercion, or duress still exists. Based on the current state of the record, he has also not shown that there is little likelihood of recurrence. Overall, the record evidence creates substantial doubt as to Applicant's present suitability for national security eligibility and a security clearance.

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 and 1.j:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3: Guideline J:	AGAINST APPLICANT
Subparagraph 3.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 or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge