



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 21-02724

Appearances

For Government:
Jeff Nagel, Esquire, Department Counsel

For Applicant:
Pro se

March 31, 2023

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted his most recent Electronic Questionnaire for Investigations Processing (e-QIP) on July 11, 2020. (Government Exhibit 1.) On April 1, 2022, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines J (Criminal Conduct), G (Alcohol Consumption), H (Drug Involvement and Substance Misuse), and E (Personal Conduct). 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 26, 2022, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on June 23, 2022. The case was assigned to me on June 29, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on July 6, 2022. The case was heard on August 18, 2022. DOHA received the transcript (Tr.) of the hearing on August 29, 2022.

The Government offered Government Exhibits 1 through 7, which were admitted without objection. Applicant testified on his own behalf, called one witness, and submitted Applicant Exhibit A, which was also admitted without objection. Applicant requested the record remain open until September 9, 2022, for the submission of additional evidence. No further evidence was submitted by Applicant.

Findings of Fact

Applicant is 33 years old and single. He received a bachelor's degree and is currently studying for his master's. Applicant has been employed by a defense contractor as an engineer since September 2020 and seeks to obtain national security eligibility and a security clearance in connection with his current employment. He had worked for another defense contractor from 2013 to 2020. (Government Exhibit 1 at Sections 12, 13A, and 17.)

Paragraph 1 (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 admitted both allegations under this guideline.

1.a. Applicant was arrested on December 28, 2016, and charged with Felony Assault with a Deadly Weapon. Applicant stated that he was extremely intoxicated that night and does not really remember the event. However, Applicant admitted he hit another person in the head with a glass during a bar fight. The glass broke, the other person was injured, and Applicant was arrested. Applicant subsequently pled guilty in May 2017 to the Assault with a Deadly Weapon charge. He was sentenced to five years of supervised probation, two days in jail, and 30 days community labor. (Government Exhibit 1 at Section 22, Exhibit 4 at pages 10-11.)

Applicant's probation terms included the following, as described by Applicant:

Do not use or possess any narcotics, dangerous or restricted drugs or associated paraphernalia, except with a valid prescription and stay away from places where users or sellers congregate. Do not associate with drug users or sellers unless attending a drug treatment program. . . Abstain from the use of alcoholic beverages, including beer and wine, and stay out of places where they are the chief items of sale. . . You [Applicant] are specifically ordered not to use or possess any quantity of marijuana, even with an otherwise valid prescription or recommendation. (Government Exhibit 1 at Section 22.)

Applicant's probation ended in May 2022. (Tr. 49.) He repeatedly violated the above terms of his probation as described below.

1.b. Applicant used illegal drugs and alcohol on a frequent basis from May 2017 through June 2019 while he was on probation for the offense set forth in 1.a, above. He knew his conduct was in violation of his probation. Applicant admitted that he did not tell the probation department at any time that he was violating his probation. He stated that he discussed telling the probation department about his drug and alcohol use once he stopped using all drugs and alcohol after June 2019. He was advised by relatives that he should not do so, since admitting to a probation violation may require him to go to jail or prison. Applicant agreed not to tell probation personnel about his conduct. Applicant stated that his probation officer never asked Applicant if he used drugs or alcohol during his mandatory monthly interviews. (Government Exhibit 4 at 24-25; Tr. 52-54.)

Paragraph 2 (Guideline G, Alcohol Consumption)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he consumes intoxicants to excess. Applicant admitted both allegations under this guideline.

2.a. Refer to that information set forth under subparagraph 1.a, above.

2.b. Applicant used alcohol from May 2017 through December 2018. He stated that from about the middle of 2018 until September 2018 he consumed alcohol frequently and excessively. During that time, as set forth under paragraph 1, above, Applicant was on probation and required to abstain from any use of alcohol. Applicant was interviewed by a Government investigator on March 2, 2021. The investigator's Report of Investigation (ROI) stated, "He [Applicant] decided to keep drinking alcohol during the time he was on probation because he had already violated his probation at that time." (Government Exhibit 1 at Section 24; Exhibit 4 at pages 12, 22-23; Tr. 54-55.)

Paragraph 3 (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 preliminary matter, Applicant held a security clearance from approximately January 2015 through March 2017. According to Applicant his clearance was revoked due to the criminal charges set forth in paragraph 1, above. (Government Exhibit 1 at Section 25.)

3.a. Applicant used marijuana on various occasions from approximately February 2003 until July 2019. As stated, between January 2015 and March 2017 Applicant was granted access to classified information. He used marijuana daily from June to December 2018. Applicant stopped use for several months until he last used marijuana with an ex-girlfriend in July 2019. (Government Exhibit 4 at pages 8-19.)

3.b. Applicant used cocaine on various occasions from May 2010 to December 2018. As stated, between January 2015 and March 2017 Applicant was granted access to classified information. He used cocaine weekly during 2017. He used cocaine daily during 2018 until his last use around New Year's 2018/19. (Government Exhibit 4 at pages 19-20.)

3.c. Applicant used cocaine at work while employed by a defense contractor in 2018. He stated in his Answer, "I used at an unclassified site with no classified information present, nor any secure rooms or locations present at the facility." (Government Exhibit 4 at pages 19-20.)

3.d. Applicant used Ecstasy one time in June 2010 and a second time in July 2018. It is further alleged that Applicant's 2018 use of Ecstasy occurred while he was granted access to classified information. The record is unclear as to whether he actually had access in July 2018. He stated in his Answer that his clearance was under reinvestigation at that time, and he may have had an interim clearance. However, Government Exhibit 5, a DISS/CATS Incident Report, stated Applicant's "Eligibility Level" was "none." The document also stated, under "Eligibility Determination," "'No Determination Made' made on 2019-02-11 by DoD CAF." (Internal punctuation added for clarity.) (Government Exhibit 4 at pages 20, 24; Tr. 51-52.) Given the state of the evidence this allegation is found for Applicant.

3.e. Applicant used hallucinogenic mushrooms one time in about November 2018. It is further alleged that Applicant's 2018 use of hallucinogenic mushrooms occurred while he was granted access to classified information. The record is unclear as to whether he actually had access in July 2018. He stated in his Answer that his clearance was under reinvestigation at that time, and he may have had an interim clearance. However,

Government Exhibit 5, a DISS/CATS Incident Report, stated Applicant's "Eligibility Level" was "none." The document also stated, under "Eligibility Determination," "'No Determination Made' made on 2019-02-11 by DoD CAF." (Internal punctuation added for clarity.) (Government Exhibit 4 at pages 20-21, 24; Tr. 51-52.) Given the state of the evidence this allegation is found for Applicant.

3.f. Applicant admitted that he used marijuana, cocaine, Ecstasy and Hallucinogenic Mushrooms between at least May 2017 and July 2019 as set forth above. During that period, he was prohibited from using any illegal drugs under the terms of his probation. He stated in his Answer that his use, including daily use of cocaine and marijuana, was because, "I was under extreme depression and anxiety due to the circumstances that arose from my arrest in December 2016 as stated in subparagraph 1.a." (Answer; Government Exhibit 4 at pages 18-21; Tr. 49.)

With regard to his drug use, as well as his alcohol use, Applicant stated that he made a conscious decision at the end of 2018 to stop using all the substances in order to live a better, healthier life. He also stated that his decision was the result of a religious awakening in his life. Applicant testified that his management is aware of his past. However, no additional information was forwarded by Applicant from his current employers setting forth the extent of their knowledge. (Government Exhibit 4 at 18; Tr. 42-48, 54-55.)

Paragraph 4 (Guideline E, Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has falsified material facts during the clearance screening process. In addition, it is alleged that Applicant engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Applicant admitted both allegations under this paragraph with explanations.

4.a. The Government alleges in this subparagraph that all of the information set forth under paragraphs 1, 2, and 3, above, is also cognizable under this guideline.

4.b. Applicant submitted an e-QIP on January 11, 2018. (Government Exhibit 2.) Section 23 concerned Illegal Use of Drugs and Drug Activity. Applicant was specifically asked, "In the last (7) seven years, have you illegally used any drugs or controlled substances?" Applicant answered, "Yes." He disclosed marijuana use between 2003 and 2013, cocaine use in 2010, and Ecstasy use in 2010. These were false answers to relevant questions about Applicant's drug involvement. In his Answer, Applicant explained this conduct:

Note that while I falsified information at this time, I was using alcohol and drugs and was not applying my best judgment. The substance abuse did create my conduct to be questionable and this is what caused me to falsify

information. Another reason was my fear of admission of substance abuse could be reported to my probation officer and this would cause me to serve my suspended sentence.

Applicant was forthcoming on a 2020 questionnaire and in subsequent interviews with Government investigators. (Government Exhibit 1 at Section 23; Government Exhibit 4 at pages 18-21, 25; Tr. 50.)

Mitigation

The pastor of Applicant's church testified on his behalf. The witness has known Applicant for three years. He testified at length about what the witness views as Applicant's personal growth in the past three years. The witness had knowledge of the allegations in the SOR. He stated that Applicant has been open with him about his conduct and about his battle with alcohol and drugs. Applicant provides substantial financial support to the church. The witness believes Applicant to be trustworthy. (Applicant Exhibit A; Tr. 17-40.)

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 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 three 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;

(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; and

(d) violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant was arrested in 2016 and convicted in 2017 for the offense of Assault with a Deadly Weapon. He served five years formal, supervised probation that ended in May 2022. During almost the entirety of his probation time Applicant was violating his probation by drinking alcohol and using illegal drugs. All three disqualifying conditions apply to his conduct.

The guideline includes four conditions in AG ¶ 32 that could mitigate the security concerns arising from Applicant's alleged 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.

Applicant's arrest for a serious offense occurred in 2016. The problem is his five years of formal, supervised probation only ended in May 2022, and he was violating his probation almost daily the entire time. Adding to those concerns is the fact that Applicant knowingly deceived the probation department by not reporting his infractions. He stated that the probation officers never asked him in five years of monthly contact if he was using alcohol or drugs. Even assuming that to be true, the responsibility was his to maintain the terms of his probation, not for them to ferret it out. There is a paucity of evidence from which to find that Applicant has met either of the mitigating conditions with regard to his history of criminal conduct. Paragraph 1 is found against Applicant.

Paragraph 2 (Guideline G, Alcohol Consumption)

The security concerns relating to the guideline for alcohol consumption are set out in AG ¶ 21, which states:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

AG ¶ 22 describes two conditions that could raise security concerns and may be disqualifying in this case:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder; and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

Applicant had a serious, alcohol-related arrest in 2016 while he was binge drinking. He also was using alcohol excessively until December 2018. The above disqualifying conditions apply to this case.

The guideline includes two conditions in AG ¶ 23 that could mitigate the security concerns arising from Applicant's alcohol consumption:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment; and

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Applicant admitted that he had a serious alcohol problem up to December 2018. At that time, he decided to change his life and stop drinking. This was partially due to a profound religious experience that has helped him achieve and maintain sobriety. However, once again, his conduct must also be examined in the context of his repeated probation violations. Under the particular circumstances of this case the mitigating evidence is insufficient to justify a finding in Applicant's behalf. Paragraph 2 is found against Applicant.

Paragraph 3 (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
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant used marijuana and cocaine on a frequent basis until 2018. His use of the drugs was daily in 2018. Applicant used illegal drugs at his place of employment during 2018. His drug use also occurred while he was on probation, and while he held his previous security clearance, as set forth at length above. 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; 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.

Applicant used marijuana and cocaine on a frequent basis for about eight years. He ended cocaine use in December 2018, marijuana use in June 2019. Applicant stopped using drugs because he wished to change his life and because of the profound religious experience that occurred about the same time. However, it has to be realized that Applicant's drug use also occurred during the time he was on probation for the Assault with a Deadly Weapon conviction. In addition, he failed to notify probation of his violations. Under the particular circumstances of this case, his actions continue to cast doubt on his current reliability, trustworthiness, and good judgment. Paragraph 3 as a whole is found against Applicant.

Paragraph 4 (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 two conditions that could raise security concerns and may be disqualifying in this case:

(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; and

(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.

Applicant falsified his 2018 security clearance questionnaire in answering questions about his drug use history. In addition, he has a criminal conviction, long-term alcohol and drug issues, and repeatedly violated the terms of his probation. The above disqualifying conditions have application in this case.

The guideline includes four conditions in AG ¶ 17 that could mitigate the security concerns arising from Applicant's alleged falsification and adverse conduct:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(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.

Applicant admitted falsifying his 2018 e-QIP out of fear that his repeated violation of the terms of his probation would be reported to authorities. That fear controlled a lot of Applicant's activities. His conduct deprived the state of knowing the true extent of his ability to fulfill the terms of his probation. This fear of discovery and his conduct in not telling the state about his conduct continued until the end of his probation in May 2022, just three months before the hearing in this case. Insufficient mitigation is shown. Paragraph 4 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. While there is some evidence Applicant has changed many things in his life for the better, he has obvious issues being accountable for his own adverse conduct. He has not mitigated the concerns regarding his criminal conduct, alcohol abuse, substance misuse, and personal conduct. He has not minimized the potential for pressure, coercion, or duress. He has also not shown that there is little likelihood of recurrence at this time. 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 J:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant
Paragraph 3: Guideline H:	AGAINST APPLICANT
Subparagraphs 3.a through 3.c:	Against Applicant
Subparagraphs 3.d and 3.e:	For Applicant
Subparagraph 3.f:	Against Applicant
Paragraph 4: Guideline E:	AGAINST APPLICANT
Subparagraphs 4.a and 4.b:	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