



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 23-00175

Appearances

For Government: Andrew Henderson, Esquire, Department Counsel

For Applicant: *Pro se*

12/14/2023

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted his initial Electronic Questionnaires for Investigations Processing (e-QIP) on March 17, 2022. (Government Exhibit 1.) On June 7, 2023, the Defense Counterintelligence and Security Agency Central Adjudication Services issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines 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) shortly thereafter, and requested an administrative decision without a hearing. On June 28, 2023, pursuant to Additional Procedural Guidance, ¶ E3.1.8, of the Directive, Department Counsel converted this case to one requiring a hearing before an administrative judge. Department Counsel was prepared to proceed on June 28, 2023. The case was assigned to me on June 29, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on July 7, 2023. I convened the hearing as scheduled on August 23, 2023. The Government offered Government Exhibits 1 through 4, which were admitted without objection. Applicant testified on his own behalf. He elected not to present any documentation. DOHA received the transcript of the hearing (Tr.) on September 1, 2023.

Findings of Fact

Applicant is a 38-year-old process engineer with a defense contractor. He has worked for them since November 2019. He is married, but has been separated from his wife for nine or ten years. He has one child with his wife. He has received a bachelor of science degree. He is seeking to obtain a security clearance in connection with his work with the DoD. This is his first application for a security clearance. (Government Exhibit 1 at Sections 12, 13A, 17, and 18.)

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 five allegations under this paragraph with explanations.

1.a. Applicant started using marijuana in approximately January 2003. From 2003 through 2010 his use was daily. From approximately 2010 to April 2019 his use was weekly. From April to November 2019 Applicant's use was daily. As stated, Applicant began working for his present employer in November 2019. From November 2019 through 2021 his use was weekly. His use was sporadic after that. (Government Exhibit 2 at 14.)

Applicant has given various dates for his last use of marijuana. In his March 17, 2022 e-QIP, Government Exhibit 1 at Section 23, he stated his last use was in January 2022. During a May 23, 2022 interview with a government investigator Applicant stated that he had last used marijuana earlier in May 2022. (Government Exhibit 2 at 14.) In his responses to DOHA interrogatories he stated his marijuana use had ended in March 2022. (Government Exhibit 2 at 20.) His testimony was very vague about the extent of his marijuana use. He was very unsure about when it ended, stating it was possibly late 2021 or early 2022. (Tr. 25-28, 36-39.)

Applicant's basic explanation for continuing to use marijuana after being employed by a defense contractor was that he did not know that he could not use it. He also testified that he did not intend to use illegal drugs in the future. (Government Exhibit 2 at 14-15; Tr. 27-28, 36.)

1.b. The evidence shows that Applicant used hallucinogenic mushrooms from approximately 2005 through January 2021. He has made several contradictory statements about his mushroom use. In his Answer he stated, "This [end] date [January 2021] was approximated. More likely it had not been during employment." In his March 17, 2022 e-QIP, Government Exhibit 1 at Section 23, he stated his last use was in January 2021 and that he had used it 2 to 3 times a year before that. During a May 23, 2022 interview with a government investigator Applicant stated that he had last used mushrooms in January 2021. (Government Exhibit 2 at 14.) In his responses to DOHA interrogatories he stated that his mushroom use was from 2006 to January 2021. (Government Exhibit 2 at 20.) His testimony was very vague about the extent of his mushroom use. He was very unsure about when it ended, stating it was possibly late 2019, but could also be 2021. (Tr. 28-31.)

1.c. Applicant admitted using cocaine one time in approximately August 2019. This was before he started his current employment. (Government Exhibit 1 at Section 23, Exhibit 2 at 11-12, 20; Tr. 31-33.)

1.d. Applicant admitted using LSD one time in approximately August 2019. This was before he started his current employment. (Government Exhibit 1 at Section 23, Exhibit 2 at 11-12, 20; Tr. 31-33.)

1.e. Applicant admitted that he had been charged with Possession of Cannabis in approximately July 2009. The case resulted in his paying a fine and serving probation for a period of time. He continued to use marijuana for more than ten years after this arrest. (Government Exhibit 2 at 9-10; Tr. 33-35.)

Paragraph 2 (Guideline E – Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct that shows poor judgment, untrustworthiness or unreliability.

2.a. The Government alleges in this subparagraph that the Applicant's drug use history, as set forth under Paragraph 1, above, is also cognizable under Guideline E. Applicant did not admit or deny this allegation. His silence is viewed as a denial.

2.b. Applicant admitted this allegation, which concerns his wife's immigration status, with an explanation.

Applicant's wife is from the Philippines, but has lived in the United States since approximately 2001-2002. They were married in 2008, and informally separated in 2013. She lives in a different state from him. He is unsure of her immigration status, but does not believe she is a citizen of the United States. The couple have no plans to divorce. (Government Exhibit 2 at 22-23.)

The SOR states that Applicant has remained married to his spouse to assist her in qualifying for U.S. citizenship through the naturalization process. In his Answer he stated, "We remain married. No reason not to be. Not for sole purpose of citizenship. Also co-parenting child and family ties. No rule says I have to divorce someone I was with 10 years."

Applicant testified that he does not know his wife's current immigration status. The most he would say is that she might "technically be considered in the country illegally." Once again, his testimony was very vague as to his wife's citizenship status and despite questioning by Department Counsel and myself did not clarify it. (Tr. 15-25.)

It is noted that neither side presented any direct evidence as to Applicant's wife's current immigration status. In addition, no evidence was presented by either side indicating why Applicant and his wife remaining married during the pendency of any naturalization issue would be legally significant.

Policies

When evaluating an applicant's national security eligibility for a security clearance, 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 marijuana, often on a daily basis, from 2003 through at least January 2022. He was arrested for a marijuana-related possession offense in 2009. He used mushrooms on a regular basis from 2005 through January 2021. He used cocaine and LSD a single time each in August 2019. Both of 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.

None of the stated Mitigating Conditions apply to the facts of this case. Applicant has an extensive history of using illegal drugs, particularly marijuana and mushrooms. As stated, he was often unwilling or unable to state with any particularity when he stopped using drugs, except that it was several years after starting work with his current employer. Paragraph 1 is found against Applicant.

Paragraph 2 (Guideline E – Personal Conduct)

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. Three are potentially applicable 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;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself 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 or regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(2) any disruptive, violent, or other inappropriate behavior; and

(3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

The following mitigating conditions under AG ¶ 17 are possibly applicable to Applicant's 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.

2.a. As stated under Paragraph 1, above, Applicant's drug use was frequent, and continued after he was employed. None of the Mitigating Conditions apply to his conduct in using illegal drugs. Subparagraph 2.a is found against Applicant.

2.b. Applicant remains married to his wife, even though they have been separated for ten years. The government alleges that he remains married to her to assist in her naturalization process. However, neither side presented any evidence about her current immigration status, or how her marital status affects it. As Applicant said, there is no rule stating he has to get divorced. As the allegation and evidence stands, I find that there is insufficient evidence that Applicant is remaining married to his spouse for a nefarious or illegal purpose. Accordingly, this allegation fails to raise security concerns. Subparagraph 2.b is found for Applicant.

As stated, subparagraph 2.a was found against Applicant. Accordingly, Paragraph 2 is found against Applicant.

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 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 not mitigated the security concerns raised by his extensive drug use, which continued after he gained employment in the defense industry. Continuation or recurrence of similar conduct is likely. Overall, the record evidence does create 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 2.a through 2.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a:	Against Applicant
Subparagraph 2.b:	For 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