



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



In the matter of:)	
)	
)	ADP Case No. 23-02910
)	
Applicant for Public Trust Position)	

Appearances

For Government: William Miller, Esq., Department Counsel
For Applicant: *Pro se*

11/04/2024

Decision

BENSON, Pamela C., Administrative Judge:

Applicant did not mitigate the Guideline H (drug involvement and substance misuse) trustworthiness concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On March 12, 2022, the Defense Counterintelligence and Security Agency (DCSA) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline H. The DCSA acted under the Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines implemented by the DOD on June 8, 2017. Applicant responded to the SOR on May 20, 2024, and requested a decision based on the written record in lieu of a hearing.

The Government’s written case was submitted on June 11, 2024. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the trustworthiness concerns. Applicant received the FORM on June 20, 2024.

He did not respond. The Government exhibits (Items) included in the FORM are admitted into evidence without objection.

Findings of Fact

Applicant is 43 years old. He earned a bachelor's degree in 2006. As of the date of his SOR response, he was unmarried and had no children. He is being sponsored by a defense contractor for a position of trust with the federal government. (Item 3)

Drug Involvement and Substance Misuse

The SOR alleges that Applicant used and cultivated hallucinogenic mushrooms, and he intends to use and cultivate hallucinogenic mushrooms in the future. He also was arrested on a drug-related charge in March 2004. Applicant admitted all five SOR allegations in his response to the SOR, however, he clarified that he no longer intends to use or cultivate hallucinogenic mushrooms in the future. He disclosed that he is soon to be married and is "going to try to live a more cautious and legal lifestyle for the sake of my family." (Items 1, 2)

Applicant listed on his April 2023 Electronic Questionnaires for Investigations Processing (e-QIP) that he had used hallucinogenic mushrooms between May 1999 and June 2022, on approximately five occasions over the last four years. (SOR ¶ 1.a) He used these mushrooms with his friends. He also admitted that he had used hallucinogenic mushrooms previously when he was in his 20s. He listed, "I will likely do this again in the future because I enjoy doing it occasionally." During his June 2023 background interview with an authorized DOD investigator, Applicant repeated his intention that he expected to use hallucinogenic mushrooms in the future. He acknowledged that he knew hallucinogenic mushrooms was considered an illegal drug under current laws. (SOR ¶ 1.c) (Items 3, 4)

Applicant also disclosed on his April 2023 e-QIP that he had cultivated hallucinogenic mushrooms between approximately February 2020 and October 2021. (SOR ¶ 1.b) He and his friends wanted to use hallucinogenic mushrooms and Applicant thought it would be an interesting project to grow the mushrooms himself. He told the investigator during his June 2023 background interview that he intended to cultivate hallucinogenic mushrooms in the future. (SOR ¶ 1.d) (Items 3, 4)

SOR ¶ 1.e alleges that Applicant was arrested in about March 2004, and he was convicted of felony possession of marijuana with intent to distribute. As a result, he was incarcerated for approximately two weeks and placed on 15 months of probation. Applicant also disclosed this arrest on his April 2023 e-QIP. He listed that he was required to participate in an outpatient drug counseling program, and he had this arrest and conviction expunged from his criminal record. (Items 3, 4)

Policies

This case is adjudicated under 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 public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. 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 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.

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 applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable trustworthiness decision.

A person who seeks access to sensitive 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline H: Drug Involvement and Substance Misuse

The trustworthiness concern for drug involvement is set out 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.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant has a recent history of using and cultivating hallucinogenic mushrooms. He has twice indicated to the DOD his intent to use and cultivate hallucinogenic mushrooms in the future, despite that it is an illegal drug under current laws. AG ¶¶ 25(a), 25(c), and 25(g) are applicable.

Conditions that could mitigate the drug involvement trustworthiness concerns are provided under AG ¶ 26. The following are potentially 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.

Applicant bears the burden of production and persuasion in mitigation. The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *[Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)], *supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b). (ISCR Case No. 10-04641 at 4 (App. Bd. Sep. 24, 2013))

Applicant was fully aware that using and cultivating hallucinogenic mushrooms violates the laws and DOD policies for contractors requiring a position of trust. Despite that knowledge, he disclosed on his April 2023 e-QIP and during his June 2023 background interview that he intended to use and cultivate hallucinogenic mushrooms in the future. It was only after he received the March 2024 SOR that Applicant stated he changed his mind, and he was "**going to try** (emphasis added) to live a more cautious and legal lifestyle." The timing of his change of heart and the phrasing of his future intentions are not convincing or compelling under the circumstances.

Given the frequency and span of Applicant's hallucinogenic mushrooms use and cultivation, his past drug conviction, which demonstrates he has not learned from past mistakes, and his repeated and recent statements of intent to use and cultivate hallucinogenic mushrooms in the future, it is too soon to conclude that Applicant has established a pattern of abstinence and changed environment. Applicant has not mitigated the drug involvement and substance misuse trustworthiness concerns.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position 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 public trust position 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guideline H in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a public trust position. I conclude Applicant did not mitigate the drug involvement and substance misuse trustworthiness concerns.

Formal Findings

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

Paragraph 1, Guideline H:	Against Applicant
---------------------------	-------------------

Subparagraphs 1.a-1.e:	Against Applicant
------------------------	-------------------

Conclusion

It is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Pamela C. Benson
Administrative Judge