



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-00919

Appearances

For Government: Christopher Morin, Esquire, Department Counsel
For Applicant: *Pro se*

10/23/2014

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding drug involvement. Eligibility for a security clearance and access to classified information is granted.

Statement of the Case

On September 30, 2013, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).¹ On April 30, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility – Division A (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline H (Drug Involvement), and detailed reasons why the DOD adjudicators were

¹ GE 1 ((SF 86), dated September 30, 2013).

unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

It is unclear when Applicant received the SOR. In a sworn statement, dated May 19, 2014, Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing “unless a hearing is deemed necessary.”² It remains unclear why the matter was assigned as a hearing, as there is no evidence of a hearing being requested by either party. The issue was not raised as an unresolved procedural matter by either party during the hearing, and no objections to the nature of the process were made.³ Department Counsel indicated the Government was prepared to proceed on August 20, 2014. The case was assigned to me on August 21, 2014. A Notice of Hearing was issued on August 27, 2014, and I convened the hearing, as scheduled, on September 18, 2014.

During the hearing, two Government exhibits (GE 1 and GE 2) and two Applicant exhibits (AE 1 and AE 2) were admitted into evidence without objection. Applicant testified. The transcript of the hearing (Tr.) was received on September 29, 2014. I kept the record open to enable Applicant to supplement it. Applicant took advantage of that opportunity. He submitted six documents which were marked as AE C through AE H and admitted into evidence as without objection. The record closed on September 25, 2014.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the factual allegations in the SOR under drug involvement (¶¶ 1.a. through 1.i.). Applicant’s admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 25-year-old employee of a defense contractor. He has been serving as a software engineer with his current employer since September 2013.⁴ He never served in the U.S. military,⁵ and never held a security clearance.⁶ A June 2007 high school graduate, Applicant received his bachelor’s degree (*cum laude*) in May 2011 and his master’s degree in July 2013.⁷ He has never been married.⁸

² Applicant’s Answer to the SOR, dated May 19, 2014.

³ Transcript (Tr.) at 11.

⁴ GE 1, *supra* note 1, at 13.

⁵ GE 1, *supra* note 1, at 18.

⁶ GE 1, *supra* note 1, at 39. Applicant’s application for a security clearance with another government agency resulted in the processing for that clearance being suspended in March 2012.

⁷ Tr. at 36; GE 1, *supra* note 1, at 12; AE A (Official Academic Transcript, dated September 17, 2014).

Drug Involvement

Applicant was a polysubstance experimenter and abuser whose substances of choice were several illegal drugs, including marijuana, Psilocybin mushrooms, cocaine, and lysergic acid diethylamide (LSD), as well as two prescription drugs, including liquid codeine and Adderall. His use of drugs never resulted in a positive drug test or incidents involving the police or judicial authorities, and he never sought or received treatment for his drug use.⁹ The sole sources for the information developed regarding Applicant's drug involvement are his self-reported responses to inquiries in his SF 86, in his U.S. Office of Personnel Management (OPM) interviews, in his responses to the SOR, and during the hearing.

(SOR ¶¶ 1.a. and 1.b.): Applicant was initially exposed to marijuana during the summer following his high school graduation in 2007 when he was 18 years old. Over the period continuing until October 2012, he generally attended parties and small gatherings with friends and teammates where marijuana was freely provided. Applicant smoked marijuana in cigarettes or pipes more than 75 times, but less than 100 occasions during that five-year period, with most of that use occurring during the first three years.¹⁰ On five or six of those occasions during 2012, he contributed or reimbursed friends for the cost of the marijuana used, but never actually approached any drug dealers to purchase it.¹¹ Applicant's motivation for using marijuana was essentially to fit in because 90 percent of his college teammates used drugs and alcohol.¹² He acknowledged it was wrong, and it was not the way he was raised, but he simply made poor decisions when he was influenced by his peers.¹³ During 2011 and 2012, Applicant started to understand that he did not want to continue using marijuana, and he no longer felt any enticement to use marijuana again.¹⁴ He has abstained from using marijuana since October 2012.¹⁵

(SOR ¶ 1.c. and 1.d.): On one occasion in October 2009, while on a camping trip with his roommates, Applicant was offered Psilocybin mushrooms. Since his roommates were going to use them, out of curiosity, and with no reason not to do so, he accepted their offer. Applicant paid his roommate for 1/16th of an ounce of the substance, and he

⁸ GE 1, *supra* note 1, at 20.

⁹ GE 2 (Personal Subject Interview, dated November 26, 2013), at 3.

¹⁰ Tr. at 25, 37.

¹¹ GE 2, *supra* note 9, at 2; GE 2 (Investigator's Note, dated February 10, 2014); Tr. at 25-27.

¹² Tr. at 25.

¹³ Tr. at 26.

¹⁴ Tr. at 26; GE 1, *supra* note 1, at 34.

¹⁵ Tr. at 24.

ingested it.¹⁶ He has not subsequently used Psilocybin mushrooms and does not intend to ever use them again.¹⁷

(SOR ¶ 1.e.): On one occasion during the period August to October 2010, while at a party with friends, one of Applicant's roommates offered him a very small amount of cocaine. Applicant initially rejected the offer, but when he was told he did not have to ingest it and could simply dab it on his gums, he, out of curiosity changed his mind and accepted the substance.¹⁸ It was furnished to him without cost.¹⁹ He rubbed the substance on his gums, but because so little of the substance was used, he did not feel any effect from it.²⁰ Applicant regretted trying the cocaine and vowed to never use it again.²¹

(SOR ¶¶ 1.f. and 1.g.): On three occasions during the period March 2012 to May 2013, Applicant experimented with LSD, or what he referred to as "acid." The initial incident occurred during his 2012 spring break while with teammates on a "bonding" trip following a tournament. One of his teammates furnished the substance to all of the other members, and everyone, but one person, tried it. Applicant reimbursed his teammate for two "hits" of the substance, both of which he swallowed.²² The second incident occurred later that summer while at a party with friends when a "hit" of the substance was furnished without cost. Applicant swallowed the substance, but there was no resulting effect.²³ The last occasion occurred shortly before graduation while he was with roommates and friends celebrating a friend's discharge from the Army. One of Applicant's friends furnished the substance for free to those who wanted it, and once again, Applicant swallowed a "hit."²⁴ Applicant has not used LSD since that last occasion in May 2013 and declared that he has no interest in using LSD ever again. He explained his experimentation with LSD was something he did with friends from school purely to have fun.²⁵

(SOR ¶ 1.h.): On one occasion in about October 2010, as Applicant's roommate was recovering from flu-like symptoms, Applicant and his roommate consumed the

¹⁶ GE 2, *supra* note 9, at 2; GE 1, *supra* note 1, at 35; Tr. at 27-28.

¹⁷ GE 1, *supra* note 1, at 35.

¹⁸ GE 1, *supra* note 1, at 35; GE 2, *supra* note 9, at 2; Tr. at 28-29.

¹⁹ GE 2, *supra* note 9, at 2.

²⁰ Tr. at 28.

²¹ GE 1, *supra* note 1, at 35.

²² GE 1, *supra* note 1, at 36; GE 2, *supra* note 9, at 2; Tr. at 29.

²³ GE 1, *supra* note 1, at 36; GE 2, *supra* note 9, at 2; Tr. at 30.

²⁴ GE 1, *supra* note 1, at 36; GE 2, *supra* note 9, at 2; Tr. at 30.

²⁵ GE 1, *supra* note 1, at 36.

unused portion of his roommate's prescribed liquid codeine, essentially to experience "high-like" effects.²⁶ Applicant did not pay for the portion that he consumed.²⁷

(SOR ¶ 1.i.): On three occasions between May 2009 and May 2013, Applicant swallowed one-half of an Adderall pill to enhance his focus and better enable him to study for tests and work on school projects.²⁸ He was of the impression that Adderall was considered a "magic study drug," but that was simply an illusion.²⁹ Applicant did not pay for the pills that he used.³⁰

Applicant acknowledged that this period of his behavior in his life was immature and his reckless behavior reflects poorly on his character.³¹ He has disassociated himself from the friends and former teammates who were involved in drug use.³² His girlfriend is not a drug user, and he rarely goes to bars or concerts.³³ After he graduated and started looking for employment, Applicant realized he needed to grow up and mature, so he made a decision to quit using drugs. He does not intend to ever use illegal drugs again³⁴ and would be willing to undergo a monthly drug test for the rest of his life, if necessary.³⁵ On September 9, 2014, Applicant submitted a written statement, as follows: "I hereby state my intention to never abuse any drug in the future. If at any time I violate this statement, I agree to automatic revocation of any held security clearance."³⁶

Aside from his professional and social activities, Applicant is an active member of his church, and he has been voluntarily involved in community service with a children's organization.³⁷

Character References

Applicant's college team coach, now a corporate manager, noted that Applicant displayed leadership and practiced honesty during their five years together, and that he

²⁶ GE 1, *supra* note 1, at 37; GE 2, *supra* note 9, at 2; Tr. at 31, 38.

²⁷ GE 2, *supra* note 9, at 2.

²⁸ GE 1, *supra* note 1, at 37; GE 2, *supra* note 9, at 2; Tr. at 31, 38.

²⁹ Tr. at 38-39.

³⁰ GE 2, *supra* note 9, at 2.

³¹ Applicant's Answer to the SOR, *supra* note 2.

³² Applicant's Answer to the SOR, *supra* note 2.

³³ Tr. at 35-36.

³⁴ GE 2, *supra* note 9, at 3.

³⁵ Tr. at 35.

³⁶ AE B (Statement, dated September 9, 2014).

³⁷ Tr. at 39-40.

completely trusts Applicant's judgment, decision-making, and reliability.³⁸ Applicant's girlfriend, a nurse's aide studying to be a registered nurse, has been in a close relationship with Applicant since October 2013. She considers him to be trustworthy, reliable, honest, and gentle, and she is confident that he is committed to avoiding future drug use.³⁹ One former colleague, who served as Applicant's functional lead and eventually his direct supervisor, trusts Applicant implicitly and supports his application for a security clearance.⁴⁰ Two current colleagues, one of who serves as Applicant's work-team leader, have characterized Applicant as very professional in behavior and appearance, as well as honest, reliable, and dependable.⁴¹ A former fellow research student and current friend considers Applicant to be professional, very respectful of privacy, and trustworthy.⁴²

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."⁴³ As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."⁴⁴

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 useful in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. The entire process is a conscientious scrutiny of a number of variables

³⁸ AE F (Character Reference, dated September 25, 2014).

³⁹ AE H (Character Reference, dated September 22, 2014).

⁴⁰ AE E (Character Reference, dated September 22, 2014).

⁴¹ AE C (Character Reference, dated September 22, 2014); AE D (Character Reference, dated September 22, 2014).

⁴² AE G (Character Reference, dated September 24, 2014).

⁴³ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

⁴⁴ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”⁴⁵ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.⁴⁶

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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 information. Furthermore, “security clearance determinations should err, if they must, on the side of denials.”⁴⁷

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”⁴⁸ Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

⁴⁵ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

⁴⁶ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

⁴⁷ *Egan*, 484 U.S. at 531

⁴⁸ See Exec. Or. 10865 § 7.

Analysis

Guideline H, Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 25(a), *any drug abuse (see above definition)*, is potentially disqualifying. Similarly, under AG ¶ 25(c), *illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*, may raise security concerns. Applicant was a polysubstance experimenter and abuser whose substances of choice were several illegal drugs, including marijuana, Psilocybin mushrooms, cocaine, and lysergic acid diethylamide (LSD), as well as two prescription drugs, including liquid codeine and Adderall. He contributed to, or purchased outright, some of the substances used. AG ¶¶ 25(a) and 25(c) have been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement. Under AG ¶ 26(a), the disqualifying conditions may be mitigated where *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*. Under AG ¶ 26(b), drug involvement concerns may also be mitigated where there is *a demonstrated intent not to abuse any drugs in the future, such as:*

(1) *disassociation from drug-using associates and contacts;*

(2) *changing or avoiding the environment where drugs were used;*

(3) an appropriate period of abstinence;

(4) a signed statement of intent with automatic revocation of clearance for any violation.

AG ¶¶ 26(a) and 26(b) apply. Applicant's experimentation and use of drugs took place in a university setting, surrounded by teammates and college friends. His one-time experimentation with Psilocybin mushrooms, cocaine, and liquid codeine, as well as his three-time experimentation with LSD and Adderall all ceased before he graduated from college in May 2013. The Psilocybin mushroom incident occurred in October 2009. The liquid codeine incident and the cocaine incident both occurred in October 2010. The last experimentation with LSD and use of Adderall both ceased in May 2013. In addition, Applicant's more frequent use of marijuana ceased in October 2012. His motivation was generally to fit in with his peers and because of curiosity. His use of Adderall was to enhance his focus and to better enable him to study for tests and work on school projects. Applicant's use of drugs never resulted in a positive drug test or incidents involving the police or judicial authorities, and he never sought or received treatment for his drug use. Despite his drug involvement, there is substantial reason to recognize Applicant's honesty and integrity. As noted above, the sole sources for the information developed regarding Applicant's drug involvement are his self-reported responses to inquiries in his SF 86, in his OPM interviews, in his responses to the SOR, and during the hearing. Without his honesty, the issue might never have been uncovered.

Applicant realized he needed to grow up and mature, so he made a decision to quit using drugs. He has demonstrated an intention not to abuse any drugs in the future. For example, he has disassociated himself from his former drug-using and drug-supplying associates and contacts; he has changed and avoided the college environment where the drugs were used; he has been completely drug-free and abstinent since May 2013, nearly 18 months ago; and he has signed a statement of intent with automatic revocation of clearance for any future violation. In addition, he would be willing to undergo a monthly drug test for the rest of his life, if necessary. Applicant's new outlook regarding substance abuse and his period of sustained abstinence from any of the drugs reflect Applicant's substantial efforts to demonstrate an intention not to abuse any drugs in the future. Applicant's drug involvement is unlikely to continue or recur, and no longer casts doubt on Applicant's reliability, trustworthiness, or good judgment.

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 the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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 security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline H in my analysis below.

There is substantial evidence supporting the security concerns. Applicant was a polysubstance experimenter and abuser of various drugs and substances. His most recent use of any such drug or substance occurred in May 2013.

The mitigating evidence under the whole-person concept is more substantial. His experimentation or use of the various drugs and substances took place while Applicant was a student and his motivation was generally to fit in with his peers and because of curiosity. His use of Adderall was to enhance his focus and to better enable him to study for tests and work on school projects. He was merely 25 years old during the hearing. Applicant's use of drugs never resulted in a positive drug test or incidents involving the police or judicial authorities, and he never sought or received treatment for his drug use. There is substantial reason to recognize Applicant's honesty and integrity, for the sole sources for the information developed regarding his drug involvement are his self-reports. Without his honesty, the issue might never have been uncovered.

Applicant's lengthy periods of drug abstinence are viewed favorably, and he should be encouraged to continue. Applicant has established a pattern of abstinence that enables me to conclude that his substance use and abuse problems have been put behind him and will not recur.

I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.⁴⁹ Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. This decision should serve as a warning that his failure to continue his abstinence from drugs will adversely affect his future eligibility for a security clearance.⁵⁰ After weighing the disqualifying and mitigating conditions, and all

⁴⁹ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

⁵⁰ While this decision should serve as a warning to Applicant, the decision, including the warning, should not be interpreted as being contingent on future monitoring of Applicant's drug abstinence. The Defense Office of Hearings and Appeals (DOHA) has no authority to attach conditions to an applicant's security clearance. See, e.g., ISCR Case No. 06-26686 at 2 (App. Bd. Mar. 21, 2008); ISCR Case No. 04-04302 at 5 (App. Bd. Jun. 30, 2005); ISCR Case No. 03-17410 at 4 (App. Bd. Apr. 12, 2005); ISCR Case No. 99-0109 at 2 (App. Bd. Mar. 1, 2000).

the facts and circumstances, in the context of the whole person, I conclude he has mitigated the drug involvement security concerns. (See AG ¶¶ 2(a)(1) - 2(a)(9).)

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated and overcome the Government's case. For the reasons stated, I conclude he is eligible for access to classified information.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

ROBERT ROBINSON GALES
Administrative Judge