



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



In the matter of:)	
)	
)	ISCR Case No. 11-14352
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

August 6, 2013

Decision

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on July 10, 2007. On February 27, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and E for Applicant. 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 (AG), effective within the Department of Defense after September 1, 2006.

Applicant acknowledged receipt of the SOR on March 14, 2013. He answered the SOR in writing on April 10, 2013, and requested a hearing before an Administrative Judge. DOHA received the request on April 15, 2013, and I received the case assignment on May 13, 2013. DOHA issued a notice of hearing on May 15, 2013, and I convened the hearing as scheduled on June 12, 2013. The Government offered Exhibits (GXs) 1 through 5, which were received without objection. Applicant testified

on his own behalf and submitted Exhibits (AppXs) A through F, which were received without objection. DOHA received the transcript of the hearing (TR) on June 20, 2013. The record closed on June 12, 2013. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Motion to Amend SOR

Department Counsel moved to amend Subparagraph 1.c. of the SOR by inserting the word "hallucinogenic." (TR at page 12 line 21 to page 13 line 18.) The allegation now reads, "You used hallucinogenic mushrooms 2~3 times from approximately November 2007 to February 2009." There being no objection, the allegation was so amended.

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of Sections 802 and 812 of the Controlled Substance Act. (21 U.S.C. Sections 802 and 812.) The request was granted. The statutes Sections were not admitted into evidence, but were included in the record. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in Subparagraphs 1.a., 1.b., 1.c., and 2.a. of the SOR, with explanations. He denied the factual allegations in Subparagraphs 1.d. and 2.b. as it relates to Subparagraph 1.d. of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Guideline H - Drug Involvement

1.a. Applicant used marijuana 2~3 times from about August of 2005 to June of 2007. (TR at page 26 line 9 to page 27 line 8, and GX 5 at page 1.)

1.b.~1.d. Applicant was granted a Secret security clearance in November of 2007. (GX 3 at page 50.) He used cocaine 2~3 times, and he also used hallucinogenic mushrooms 2~3 times, from about November 2007 to February 2009. (TR at page 33 line 5 to page 35 line 13, at page 46 line 16 to page 47 line 16, GX 2, and GX 5 at page 1.) Applicant, claiming to be immature at the time, knowingly use these illegal substances while holding a security clearance. (TR at page 27 line 9 to page 32 line 25, and at page 53 lines 13~20.) Born in May of 1987, he was nearly 22 years of age when he last used these drugs. (GX 1 at page 6.)

On June 10, 2013, Applicant signed a statement of intent “not to use any controlled substance in the future,” and acknowledged “that any future use of any controlled substance will result in automatic revocation of . . . [his] security clearance.” (AppX D.)

Guideline E - Personal Conduct

2.a. and 2.b. Applicant answered, “No,” to “Section 24: Your Use of Illegal Drugs and Drug Activity,” Subparagraph a., on his July 10, 2007, e-QIP, thereby denying any use of “marijuana” in the last 7 years.” (GX 1 at page 33.) As noted above under Subparagraph 1.a., he used marijuana 2~3 times during this time frame. Applicant admittedly falsified his e-QIP because he was afraid of losing his job. (TR at page 27 line 17 to page 32 line 25, and at page 52 lines 7~20.)

More than four years later, on August 17, 2011, Applicant filed an Incident Report admitting to his past drug involvement. (TR at page 35 line 14 to page 36 line 12, and GX 2.)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). 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.

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 over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG Paragraph 2(c), 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.

The protection of the national security is the paramount consideration. Paragraph 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph 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 as to obtaining a favorable security 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 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.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H - Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in Paragraph 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.

The guideline also notes several conditions that could raise security concerns. Under Subparagraph 25(a), “*any drug abuse*” may be disqualifying. In addition, “*any illegal drug use after being granted a security clearance*” under Subparagraph 25(g) may be disqualifying. Here, Applicant used, albeit only on 2~3 occasions each, marijuana, cocaine, and hallucinogenic mushrooms. His cocaine and hallucinogenic mushrooms use occurred after being granted a security clearance.

These are countered, however, by the mitigating conditions found in Subparagraphs 26(a) and 26(b)(4). Applicant’s “*behavior happened so long ago, was so infrequent . . . that it is unlikely to recur*” Furthermore, he has shown “*a demonstrated intent not to abuse any drugs in the future, such as: a signed statement of intent with automatic revocation of clearance for any violation.*” The Applicant was last involved with any illegal substance more than four years ago. He has also signed a letter of intent not to abuse any drugs in the future. I find his statement of intent to be credible and sincere.

Guideline E - Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in Paragraph 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 information.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 16(a), "*deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . or similar form*" Here, Applicant falsified his answer to Sections 24a on his July 2007 e-QIP. He used marijuana prior to executing this document. I can find no countervailing Mitigating Condition that is applicable here. Although Applicant did self report his past drug involvement, this was more than four years after he executed his e-QIP; and as such, clearly not a "prompt" effort "to correct the omission," as required by mitigating condition 17(a).

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. Under AG Subparagraph 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.

The Administrative Judge should also consider the nine adjudicative process factors listed at AG Subparagraph 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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. The Applicant has the unqualified support of his spouse who abhors use of illegal drugs (AppX A at page 1), and of his supervisor (AppX A at page 2). However, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. He was clearly less than candid with the Government as to his past drug abuse. For this reason, I

conclude Applicant has not mitigated the security concerns arising from his Personal Conduct.

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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 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 national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Richard A. Cefola
Administrative Judge