



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



In the matter of:)
)
 ---) ISCR Case No. 19-00402
)
 Applicant for Security Clearance)

Appearances

For Government: Adrienne M. Driskill, Esquire, Department Counsel
For Applicant: *Pro se*

08/08/2019

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding drug involvement and substance misuse, and personal conduct. Eligibility for a security clearance is denied.

Statement of the Case

On April 5, 2010, and again on May 1, 2018, Applicant applied for a security clearance and submitted Electronic Questionnaires for Investigations Processing (e-QIP) versions of a Security Clearance Application. On March 6, 2019, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order (Exec. Or.) 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 Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016) (AG) for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position, effective June 8, 2017.

The SOR alleged security concerns under Guidelines H (Drug Involvement and Substance Misuse), and E (Personal Conduct), and detailed reasons why the DOD adjudicators were 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.

In separate notarized statements, dated March 22, 2019, and May 3, 2019, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by the Defense Office of Hearings and Appeals (DOHA) on June 5, 2019, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on June 11, 2019. His response was due on July 11, 2019. Applicant timely submitted one document in response to the FORM, and it was admitted without objection. The case was assigned to me on August 7, 2019.

Findings of Fact

In his Answer to the SOR, Applicant admitted both of the factual allegations pertaining to drug involvement and substance misuse of the SOR (SOR ¶¶ 1.a. and 1.b.); as well as the two factual allegations pertaining to personal conduct (SOR ¶¶ 2.a. and 2.b.). 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 66-year-old employee of a defense contractor. He has been serving as a senior cyber security specialist with his current employer since February 2011. He previously served as a software engineer with two different defense contractors from May 1993 until February 2002, and from November 2008 until January 2011. A 1970 high school graduate, Applicant received a bachelor's degree in 1974, and although he subsequently earned additional college credits, he has not received any other advanced degrees. He has never served with the U.S. military. He was initially granted a secret clearance in August 1979, and that clearance was periodically renewed. Applicant was married in 1980 and divorced in 1984. He remarried in 2001 and divorced in 2002 or 2003. He has been residing with a cohabitant in a "civil marriage, legally recognized civil union, or legally recognized domestic partnership" since 2018. He has no children.

Drug Involvement and Substance Misuse

Applicant was a recreational substance abuser whose substance of choice was marijuana. His initial period of such drug involvement and substance misuse commenced in about June 1979 – a few months before he was granted a security clearance – and continued until about June 1981, well into the period in which he held the security clearance. He acknowledged that he smoked marijuana on approximately 25 occasions.

Although he was in his mid-to-late 20s at the time, Applicant referred to his behavior as “youthful indiscretion” with “perhaps a little too much appetite for adventure.” The record is silent regarding how he obtained the marijuana, or if he paid for it. Applicant does not remember with whom he smoked the marijuana or where he smoked it. He acknowledged that he never received drug counseling or treatment, and he denied that his marijuana use caused him any financial, criminal, or security issues. There is no indication that Applicant ever informed his employer that he was using marijuana during the period of his use, and he has acknowledged that no one was aware of it. (Item 3, at 5-6; Item 1)

In December 2017, Applicant attended a funeral for a “beloved old friend” with old friends that he had known since college, but whose names he could not reveal. As a “special one-time event,” Applicant participated in what he referred to as a “ceremonial partaking,” during which he smoked marijuana. (Item 3, at 5; Item 1) He acknowledged that he never received drug counseling or treatment, and he denied that his marijuana use caused him any financial, criminal, or security issues. Applicant did not inform his employer that he had used marijuana in December 2017.

Applicant contended that he outgrew his marijuana-using behavior “a long time ago,” and that, with the exception of the ceremonial partaking in 2017, he has had no desire or intention to use any controlled substance in the future. He is willing to submit to testing to prove that he will no longer use any controlled substances. (AE 1)

Personal Conduct

On April 5, 2010, when Applicant completed his e-QIP, he responded to certain questions pertaining to his illegal use of drugs or drug activity found in Section 23. The most significant question, and the one alleged in the SOR, was essentially as follows: “Have you ever illegally used a controlled substance while possessing a security clearance. . . ?” Applicant answered “no” to the question. (Item 4, at 45) He omitted and concealed his subsequently admitted use of marijuana that started before he received his security clearance and continued until June 1981. He certified that his response to that question was “true, complete, and correct” to the best of his knowledge and belief, but, because of his omission and concealment, the response to that question was, in fact, false.

Applicant did not controvert the falsification allegation. In his Answer to the SOR, Applicant submitted two responses to the allegation. He admitted deliberately failing to disclose his illegal drug use in his e-QIP. In another section of his Answer, he acknowledged that he answered the question untruthfully, and he could not understand why he did so. His response “bothers [Applicant] personally and [he has] sincere regrets.” (Item 1) He did not claim that he misinterpreted the question, or that he forgot his drug involvement and substance misuse.

To his credit, when Applicant completed his most recent e-QIP in May 2018, he acknowledged both his earlier marijuana use as well as his December 2017 marijuana use. However, it appears that he sought to minimize both activities by claiming the initial

marijuana use occurred many decades ago, and the most recent use was merely for “ceremonial purposes.” (Item 2, at 47-48)

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.” (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)) 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 eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” (Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.)

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.” “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).)

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

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 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." (*Egan*, 484 U.S. at 531)

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." (See Exec. Or. 10865 § 7) 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 or 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.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Abuse 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.

Furthermore, on October 25, 2014, the Director of National Intelligence (DNI) issued Memorandum ES 2014-00674, *Adherence to Federal Laws Prohibiting Marijuana Use*, which states:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines (Reference H and I). An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains

adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

The guideline notes several conditions under AG ¶ 25 that could raise security concerns 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
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant admittedly was a recreational substance abuser between June 1979 and June 1981. Although he did not use marijuana for nearly four decades thereafter, in December 2017, he once again succumbed to smoking marijuana as part of what he described as a “ceremonial partaking.” He held a security clearance from August 1979 until the present day. While the record is silent regarding the purchase or possession of marijuana, Applicant obviously possessed the marijuana before and while using it. AG ¶¶ 25(a), 25(c), and 25(f) have been established.

The guideline also includes examples of conditions under AG ¶ 26 that could mitigate security concerns arising from Drug Involvement and Substance Misuse:

- (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.

Neither condition applies. Applicant's initial recreational use of marijuana from June 1979 until June 1981 occurred when he was in his mid-to-late 20s, and all but the

first two months took place while he was in possession of a security clearance. As such, there was nothing infrequent about his marijuana use, and there is no evidence to indicate that it happened under such circumstances that it was unlikely to recur. If that would have been his last use of marijuana, his security clearance might not now be under review. While that period of marijuana use was followed by nearly four decades of abstinence, Applicant returned to his old ways in December 2017 by smoking marijuana with old friends while attending a funeral. Applicant sought to minimize both activities by claiming the initial marijuana use occurred many decades ago, and the most recent use was merely for “ceremonial purposes.”

A person should not be held forever accountable for misconduct from the past, but in this instance, the most recent drug involvement and substance misuse, was in December 2017. Given his cavalier attitude towards laws, rules, and regulations, Applicant’s “ceremonial” use of marijuana, while still holding a security clearance, after nearly four decades of abstinence, despite knowing that such use was prohibited by both the Government and his employer, continues to cast doubt on his current reliability, trustworthiness, and good judgment.

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 following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline also includes examples of conditions that could raise security concerns under AG ¶ 16:

(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.

My discussions related to Applicant's drug involvement and substance misuse are adopted herein. At the time Applicant completed his initial e-QIP in April 2010, he concealed any references to his history of drug involvement and substance misuse. Applicant's comments provide sufficient evidence to examine if his submissions were deliberate falsifications, as alleged in the SOR, or merely inaccurate answers that were the result of oversight or misunderstanding of the true facts on his part. Proof of incorrect answers, standing alone, does not establish or prove an applicant's intent or state of mind when the falsification or omission occurred. As an administrative judge, I must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning Applicant's intent or state of mind at the time the alleged falsifications or omissions occurred.

I have considered the entire record, including Applicant's admission of the SOR allegation. As noted above, Applicant did not controvert the falsification allegation. In his Answer to the SOR, Applicant submitted two responses to the allegation. He admitted failing to disclose his illegal drug use in his e-QIP. In another section of his Answer, he acknowledged that he answered the question untruthfully, and he could not understand why he did so. His response "bothers [Applicant] personally and [he has] sincere regrets." He did not claim that he misinterpreted the question, or that he forgot his drug involvement and substance misuse. In addition, aside from his lack of candor with respect to the 2010 e-QIP, there is Applicant's history of drug involvement and substance misuse, and his personal conduct. As to the deliberate falsification on the e-QIP regarding his drug activity, AG ¶¶ 16(a) has been established. As to the drug involvement and substance misuse, and Applicant's personal conduct allegation associated with his 2017 marijuana use, AG ¶ 16(c) has been established.

The guideline also includes examples of conditions under AG ¶ 17 that could mitigate security concerns arising from personal conduct. They include:

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

(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.

Neither of the conditions apply. Applicant's history of drug involvement and substance misuse initially took place from June 1979 and lasted until June 1981; and then reappeared in December 2017. His false response to the e-QIP inquiry occurred in April 2010. It took eight years, but Applicant finally acknowledged his history of drug involvement and substance misuse when he completed his May 2018 e-QIP. However, before that e-QIP admission, he made no efforts to correct the omission, concealment, or falsification associated with his 2010 e-QIP. Far from being infrequent, Applicant's initial drug involvement and substance misuse was routine during June 1979 until June 1981, and although there were decades of abstinence, he reverted back to what he referred to as ceremonial partaking of marijuana. His attitude towards laws, rules, and regulations, especially while holding a security clearance, has lasted for a lengthy period. Applicant's actions under the circumstances continue to cast doubt on his current reliability, trustworthiness, and 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 SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, 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.¹

There is some evidence mitigating Applicant's conduct. Applicant is a 66-year-old employee of a defense contractor. He has been serving as a senior cyber security specialist with his current employer since February 2011, and before that he served as a software engineer with two different defense contractors from May 1993 until February 2002, and from November 2008 until January 2011. A 1970 high school graduate,

¹ 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).

Applicant received a bachelor's degree in 1974, and subsequently earned additional college credits. He was initially granted a security clearance in August 1979, and that clearance was periodically renewed. He abstained from any drug involvement and substance misuse for nearly four decades after June 1981 until December 2017. Applicant finally disclosed his use of marijuana when he completed his most recent e-QIP in May 2018.

The disqualifying evidence under the whole-person concept is more substantial. Applicant admittedly was a recreational substance abuser between June 1979 and June 1981. Although he did not use marijuana for nearly four decades thereafter, in December 2017, he once again succumbed to smoking marijuana as part of what he described as a "ceremonial partaking." He held a security clearance from August 1979 until the present day. It appears that Applicant sought to minimize the significance of his marijuana use during both periods by claiming the initial marijuana use occurred many decades ago and was the result of youthful indiscretion, and the most recent use was merely for "ceremonial purposes." In April 2010, when Applicant completed his initial e-QIP, he concealed any references to his history of drug involvement and substance misuse. Applicant finally acknowledged his history of drug involvement and substance misuse when he completed his May 2018 e-QIP, but before that e-QIP admission, he made no efforts to correct the omission, concealment, or falsification associated with his 2010 e-QIP. Applicant's attitude towards laws, rules, and regulations, especially while holding a security clearance, has lasted for a lengthy period.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his drug involvement and substance abuse; and personal conduct. See SEAD 4, App. A, ¶¶ 2(d)(1) through AG 2(d)(9).

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. and 1.b.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a. and 2.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 Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ROBERT ROBINSON GALES
Administrative Judge