



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



In the matter of:)
)
 ---) ISCR Case No. 19-01204
)
 Applicant for Security Clearance)

Appearances

For Government: Benjamin Dorsey, Esquire, Department Counsel
For Applicant: *Pro se*

09/26/2019

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 June 23, 2016, and again on August 31, 2017, Applicant applied for a security clearance and submitted Electronic Questionnaires for Investigations Processing (e-QIP) versions of a Security Clearance Application. On June 24, 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* (AG) (December 10, 2016) 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 a notarized statement, dated July 19, 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 August 16, 2019, and he was afforded an opportunity, within a period of 30 days, 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 August 26, 2019. His response was due on September 25, 2019. Applicant timely submitted one document in response to the FORM, and it was admitted without objection. The case was assigned to me on September 16, 2019.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the factual allegations pertaining to drug involvement and substance misuse (SOR ¶¶ 1.a. through 1.f.); as well as all of the factual allegations pertaining to personal conduct (SOR ¶¶ 2.a. through 2.c.). Applicant's admissions and accompanying comments 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 27-year-old employee of a defense contractor. He has been serving as an engineer/consultant with his current employer since June 2016. A 2011 high school graduate, Applicant received a bachelor's degree in 2015. He has never served with the U.S. military. He was granted a secret clearance in 2016, and he is currently being sponsored for a top secret clearance. Applicant has never been married, and he has no children.

Drug Involvement and Substance Misuse

Applicant was a recreational substance abuser whose primary substance of choice was marijuana, but he also used cocaine, and a prescribed anxiety medication (the prescription was for someone other than himself). In addition, although not alleged in the SOR, Applicant also used mushrooms and an unspecified prescription painkiller. He commenced what he called "semi-regular use" of marijuana in July 2011, and he continued using it periodically (anywhere from once or twice a month to 10 to 15 times per month) with friends in the evenings after school or on weekends while consuming alcohol in a party setting, or simply hanging out with friends at their home. He generally smoked marijuana from a bowl. Applicant's motivation for using marijuana was to be social and have fun, to relieve stress, and to relax himself, but he later realized that it reduced his motivation levels and affected his performance. He intentionally sought out

parties where marijuana was being used. When his friends did not have any marijuana for him, Applicant purchased marijuana for his personal use every other month from about September 2012 until about June 2015. Applicant contends that he reduced his use of marijuana in December 2015, and he last used marijuana in April 2017. (Item 3, at 27-29; Item 5, at 6-9) During a portion of the period of Applicant's marijuana use, he held a secret clearance (December 2016 – April 2017). (Item 1; Answer to the SOR)

In March 2015, while at a college fraternity event, Applicant was offered some cocaine by a friend, and while in the friend's car, Applicant snorted the cocaine. Applicant acknowledged that he attended the event intentionally with the knowledge that he would experiment with cocaine. In March 2017, before attending a concert with friends, Applicant and some friends were in his home consuming alcohol to the point of intoxication. In addition, Applicant and at least one of his friends used cocaine. Applicant had not initially intended to use cocaine that evening, but because he had used drugs with the same person previously, he knowingly and voluntarily participated in the conduct. (Item 3, at 28; Item 5, at 8) The most recent use of cocaine occurred while Applicant held a security clearance. (Item 1; Answer to the SOR)

In December 2016, prior to taking a flight, because he was experiencing anxiety about flying, Applicant knowingly and voluntarily took two pills of the prescription medication Klonopin – used to treat seizures, panic disorder, and anxiety – that he received from his girlfriend. The prescription was not for Applicant. (Item 5 at 9) Applicant's use of Klonopin occurred while he held a security clearance. (Answer to the SOR)

Applicant has never received counseling or treatment as a result of his illegal use of drugs or controlled substances. (Item 3, at 31) He acknowledged that his wrongful use of the above described substances occurred during a period of his life when he was essentially immature and reckless. He claims he eventually matured and stopped using any illegal substances after April 2017, and that he has avoided his former drug-using friends. (Item 5; Answer to the SOR)

Personal Conduct

On June 23, 2016, when Applicant completed his first e-QIP, he responded to certain questions pertaining to his illegal use of drugs or drug activity found in Section 23 – Illegal Use of Drugs or Drug Activity. The most significant questions, and the ones alleged in the SOR, were essentially as follows: In the last seven (7) years: "have you illegally used any drugs or controlled substances?"; "have you been involved in the illegal purchase, manufacture, cultivation, trafficking, production, transfer, shipping, receiving, handling or sale of any drug or controlled substance?"; and "have you intentionally engaged in the misuse of prescription drugs, regardless of whether or not the drugs were prescribed for you or someone else?" Applicant answered "no" to each of the questions. (Item 4, at 25) He omitted and concealed his subsequently admitted use of marijuana and cocaine. He certified that his responses to those two questions were "true, complete, and correct" to the best of his knowledge and belief, but, because of his omission and concealment, the responses to those questions were, in fact, false. As for the response

to the prescription-related question, since the e-QIP was completed in June 2016, and the alleged misuse of the prescription did not occur until December 2016, the e-QIP response was not false, despite Applicant's erroneous admission.

To his credit, when applying for a top secret clearance, Applicant completed his most recent e-QIP in August 2017, and he acknowledged his past drug involvement and substance misuse. (Item 3, at 27-30)

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 “semi-regular” marijuana user between July 2011 and April 2017; a two-time user of cocaine in March 2015 and March 2017; and a one-time user of a prescription medication that was not prescribed for him in December 2016. During the period September 2012 and June 2015, he purchased marijuana on numerous occasions every other month. He held a security clearance from December 2016 until the present day. 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.

AG ¶ 26(a) and 26(b) minimally apply. Applicant's "semi-regular" use of marijuana occurred from July 2011 until April 2017, and 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. His two incidents of cocaine use took place in 2015 and 2017. The one misuse of the prescription medication took place in December 2016. It is highly significant that the use or misuse of the three substances either occurred or continued occurring after Applicant was granted a security clearance in December 2016. While Applicant now finely acknowledges his drug involvement and substance misuse, he has only stated that he is abstinent and that he has ended his relationships with his drug-using friends. There is no documentation, including character statements that might support his positions. Also, although he claims to have no intention of future drug involvement and substance misuse, he has not submitted a formal statement acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

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 April 2017, while Applicant was in possession of a security clearance. Given his cavalier attitude towards laws, rules, and regulations, Applicant's use of marijuana, cocaine, and a prescription medication that was not prescribed for him while holding a security clearance, 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 June 2016, 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 allegations. As noted above, Applicant did not controvert the falsification allegations. In his Answer to the SOR, Applicant admitted failing to disclose his illegal drug use in his 2016 e-QIP. He explained that he was worried that any potential red flags would put his job offer in jeopardy, so he "made the mistake of not completely disclosing his history of controlled substances during the time frame in question." In stating the above, Applicant was still not fully candid, for it was not his failure to completely disclose his history of drug use, but his absolute and complete denial that he had such a history. He did not claim that he misinterpreted the questions, or that he forgot his drug involvement and substance misuse. In other words, he intentionally concealed his substance misuse and falsified his responses. As to the deliberate falsifications on the 2016 e-QIP regarding his drug activity, pertaining to SOR ¶¶ 2.a. and 2.b., AG ¶ 16(a) has been established. For the reasons stated above, AG ¶ 16(a), pertaining to SOR ¶ 2.c., has not been established. Because of the way the SOR was drafted, the drug involvement and substance misuse

were not separately alleged under personal conduct, and AG ¶ 16(c) has not 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 false responses to the e-QIP inquiry occurred in June 2016. It took over an additional year, but Applicant finally acknowledged his history of drug involvement and substance misuse when he completed his August 2017 e-QIP. However, before those e-QIP admissions, he made no efforts to correct the omissions, concealments, or falsifications associated with his 2016 e-QIP. Applicant's attitude towards laws, rules, and regulations while initially seeking, and subsequently holding, a security clearance, lasted over a year. Despite his claimed new maturity, 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. (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))

There is some evidence mitigating Applicant's conduct. Applicant is a 27-year-old employee of a defense contractor. He has been serving as an engineer/consultant with his current employer since June 2016. A 2011 high school graduate, Applicant received a bachelor's degree in 2015. He was granted a security clearance in December 2016. He has reportedly abstained from any drug involvement and substance misuse since April 2017. Applicant finally disclosed his history of drug involvement and substance misuse when he completed his most recent e-QIP in August 2017, when he was being sponsored by his employer for a top secret clearance.

The disqualifying evidence under the whole-person concept is more substantial. Applicant admittedly was a "semi-regular" marijuana user between July 2011 and April 2017; a two-time user of cocaine in March 2015 and March 2017; and a one-time user of a prescription medication that was not prescribed for him in December 2016. During the period September 2012 and June 2015, he purchased marijuana on numerous occasions every other month. He held a security clearance from December 2016 until the present day. Applicant admitted failing to disclose his illegal drug use in his 2016 e-QIP. He explained that he was worried that any potential red flags would put his job offer in jeopardy, so he intentionally concealed his substance misuse and falsified his responses. Applicant finally acknowledged his history of drug involvement and substance misuse when he completed his August 2017 e-QIP, but before those e-QIP admissions, he made no efforts to correct the omissions, concealments, or falsifications associated with his 2016 e-QIP. Applicant's attitude towards laws, rules, and regulations, is unacceptable, especially for one who was an applicant for a security clearance, and was still using illegal substances when he completed the first e-QIP, and then was granted a security clearance.

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

ROBERT ROBINSON GALES
Administrative Judge