



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 ---) ISCR Case No. 19-02598
)
 Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: *Pro se*

01/10/2020

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 January 17, 2019, Applicant applied for a security clearance and submitted a Questionnaire For National Security Positions (SF 86). On October 4, 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 E (Personal Conduct) and H (Drug Involvement and Substance Misuse), 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 October 18, 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 October 31, 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 November 7, 2019. His response was due on December 7, 2019. Applicant did not submit any response to the FORM. The case was assigned to me on January 3, 2020.

Findings of Fact

In his Answer to the SOR, Applicant admitted, without any comments, nearly all of the factual allegations pertaining to personal conduct (SOR ¶¶ 1.b. through 1.e.) and drug involvement and substance misuse (SOR ¶¶ 2.a. and 2.b.). He failed to address the remaining allegation (SOR ¶ 1.a.). 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:

Background

Applicant is a 64-year-old employee of a defense contractor. He has been serving as a driver with his current employer since October 2018. He previously served as a delivery driver with another company from October 2016 until October 2018, and as a warehouse inventory control with a different company from May 2007 until May 2016. He is a 1973 high school graduate. He has never served with the U.S. military. He has never been granted a security clearance. Applicant was married in 1991. He has no biological children.

Drug Involvement and Substance Misuse

Applicant was a recreational substance abuser whose substance of choice was marijuana. He used marijuana, with varying frequency, from about January 1975 until at least September 2018, for a period of over four decades. He reported that he generally used marijuana while alone or when he was at the beach with others who were partying and having a good time. (Item 4 – Subject Contact, dated May 30, 2019, at 12) In May 2016, after being involved in a vehicle incident in which the unsecured battery of his company vehicle fell out of the vehicle as it turned a corner, his on-site supervisor, in compliance with company procedures after a vehicle incident, directed that Applicant be

taken to a medical facility where he was administered a urine test. Applicant was suspended for one week pending the test results. Applicant's test results were positive for marijuana. In compliance with the employer's zero-tolerance drug policy, Applicant was immediately terminated from his employment. (Item 4 – Subject Contact, dated May 23, 2019, at 10; Item 4 – Subject Contact, dated May 30, 2019, at 11-12)

While Applicant received treatment and counseling for alcohol abuse in 2001, he has never received treatment or counseling as a result of his illegal use of drugs or controlled substances. (Item 4 – Enhanced Subject Interview, dated March 6, 2019, at 7) Although his termination took place in May 2016, Applicant admitted that he continued using marijuana for two and a quarter more years. He acknowledged that his wrongful marijuana use caused issues at home with his wife. (Item 4 – Subject Contact, dated May 30, 2019, at 12) He claims that he no longer uses drugs and that he stopped doing so in September 2018. He also claimed that he no longer socializes or works with people who are involved in criminal activity. (Item 4 – Enhanced Subject Interview, dated March 30, 2019, at 7; Item 4 – Subject Contact, dated May 30, 2019, at 12)

Personal Conduct

Applicant has a history of a lack of candor. On January 17, 2019, when Applicant completed his SF 86, he responded to certain questions pertaining to his employment record found in Sections 13A – Employment Activities; 13B – Employment Record; and 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:

(Section 13A): Applicant was asked if he had left a particular employment by mutual agreement following notice of unsatisfactory performance, and he said “yes,” that he had left by mutual agreement following notice of unsatisfactory performance. He claimed the reason for the unsatisfactory performance was personal. Those responses were false, for Applicant had been terminated for a positive urinalysis and violation of the employer's zero tolerance drug policy, not for unsatisfactory performance. (Item 3, at 13-14)

(Section 13C): Applicant was asked if, in the last seven years, he had been fired from a job; quit a job after being told he would be fired; left a job by mutual agreement following charges or allegations of misconduct; left a job by mutual agreement following notice of unsatisfactory performance; or received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of a security policy. He answered “no” to the questions. His response was false, for Applicant deliberately failed to disclose that he had been terminated from employment for a positive urinalysis and violation of the employer's zero-tolerance drug policy. (Item 3, at 14-15)

(Section 23): Applicant was asked if, in the last seven (7) years, he had illegally used any drugs or controlled substances. Applicant answered “no” to the question. (Item 3, at 30) He omitted and concealed his subsequently admitted use of marijuana.

Applicant certified that his responses to those three sets of questions were “true, complete, and correct” to the best of his knowledge and belief. In fact, because of his omissions and concealments, the responses to those questions were, in fact, false.

On March 6, 2019, Applicant underwent an interview with an investigator from the U.S. Office of Personnel Management (OPM). In response to an inquiry regarding any involvement with illegal drugs in the last seven years, Applicant falsely responded “no,” and deflected the inquiry to alcohol issues. (Item 4 – Enhanced Subject Interview, dated March 6, 2019, at 6-7) On May 23, 2019, Applicant acknowledged that he had been terminated because of his failed drug test. On May 30, 2019, Applicant was confronted with his false response on his SF 86 with respect to his illegal substance use. He explained that he had said “no” because he feared a true answer (“yes”) would be detrimental to his employment. (Item 4 – Subject Contact, dated May 30, 2019, at 12)

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 a condition under AG ¶ 25 that could raise security concerns in this case:

(a) any substance misuse (see above definition).

Applicant was admittedly a recreational substance abuser. He used marijuana, a controlled substance, with varying frequency, for a period of over four decades, reportedly ending as recently as September 2018. He claimed that he generally used marijuana while alone or when he was at the beach with others who were partying and having a good time. AG ¶ 25(a) has 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(b) minimally applies, but no other condition applies. Applicant used marijuana for a period of over four decades, reportedly ending as recently as September 2018. 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. In fact, even after he was terminated for violation of his employer's zero tolerance drug policy following a positive urinalysis for marijuana, Applicant continued using marijuana for two and a quarter more years. He acknowledged that his wrongful use of marijuana caused issues at home with his wife. While Applicant now acknowledges his past drug involvement and substance misuse, he has only stated that he is abstinent since September 2018. There is no documentation that might support his position. 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, after over four decades of marijuana use, the most recent drug involvement and substance misuse, was in September 2018. Continued abstinence is to be encouraged, but the relatively brief period of such abstinence is in stark contrast to the lengthy decades-old period of marijuana use, and is considered insufficient to conclude that the abstinence will continue. Given Applicant's cavalier attitude towards laws, rules, and regulations, his use of marijuana, 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;

(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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing. . . .

My discussions related to Applicant's drug involvement and substance misuse are adopted herein. At the time Applicant completed his SF 86 in January 2019, he intentionally concealed any references to his history of drug involvement and substance misuse. When he was subsequently interviewed by an OPM investigator, he again denied any such involvement and deflected the inquiry to alcohol issues. It was only after he was confronted with the developed facts regarding his employment termination and positive urinalysis that he opened up about the truth of his lengthy history of marijuana use. Applicant explained that he had denied and concealed any drug references, or employment issues with respect to his marijuana use because he feared a true answers would be detrimental to his employment. Furthermore, since he had already been terminated in 2016, it would appear to be a reasonable conclusion that he continued to deny his decades of marijuana use because it might have negative impact of his security clearance eligibility.

I have considered the entire record, including Applicant's admissions of the SOR allegations. Applicant did not controvert the falsification allegations. In other words, he intentionally concealed his substance misuse and falsified his responses. As to the deliberate falsifications on the 2019 SF 86 and his OPM interviews regarding his drug activity, and his employment issues arising from those activities, pertaining to SOR ¶¶ 1.b. through 1.e., AG ¶¶ 16(a) and 16(c) have been established. With respect to Applicant's use of marijuana and his termination from employment, pertaining to SOR ¶¶ 1.a., 2.a., and 2.b., AG ¶ 16(e) 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 false responses to the SF 86 inquiry occurred in January 2019, and he finally told the truth to the OPM investigator in May 2019, after a series of interviews. Before his May 30, 2019 interview, he made no efforts to correct the omissions, concealments, or falsifications associated with his SF 86 or his earlier interviews. Applicant's refusal to comply with laws, rules, and regulations, as well as with employment rules and policies, lasted over four decades. Despite his claimed new compliance with all of the above, 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 64-year-old employee of a defense contractor. He has been serving as a driver with his current employer since October 2018. He previously served as a delivery driver with another company from October 2016 until October 2018, and as a warehouse inventory control

with a different company from May 2007 until May 2016. He is a 1973 high school graduate. He finally confessed to the OPM investigator in May 2019 that he had previously used marijuana; the impact on him about using it; that he has not used marijuana since September 2018; and that he no longer intends to use it in the future.

The disqualifying evidence under the whole-person concept is more substantial. Applicant used marijuana, with varying frequency, from about January 1975 until at least September 2018, for a period of over four decades. He generally used marijuana while alone or when he was at the beach with others who were partying and having a good time. After a vehicle incident in 2016, he was directed to undergo a urinalysis. The test results were positive for marijuana. In compliance with the employer's zero-tolerance drug policy, Applicant was immediately terminated from his employment. Nevertheless, he continued to use marijuana until at least September 2018. When he completed his SF 86 in January 2019, and was interviewed by an OPM investigator several times thereafter, Applicant repeatedly falsely denied any negative employment issues or drug issues. It was only after he was confronted by the OPM investigator in May 2019 with known facts that Applicant finally confessed. Applicant has never received treatment and counseling as a result of his illegal use of drugs or controlled substances. He acknowledged that his wrongful marijuana use caused issues at home with his wife.

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 E:	AGAINST APPLICANT
Subparagraphs 1.a. through 1.e.:	Against Applicant
Paragraph 2, Guideline H:	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