



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



In the matter of:)
)
) ISCR Case No. 21-00509
)
Applicant for Security Clearance)

Appearances

For Government: Mary Margaret Foreman, Esquire, Department Counsel
For Applicant: *Pro se*

09/07/20201

Decision

GALES, Robert Robinson, Administrative Judge:

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

Statement of the Case

On January 28, 2020, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a set of interrogatories containing an Enhanced Subject Interview, dated April 23, 2020. He responded to the interrogatories on March 16, 2021. On April 16, 2021, the Defense Counterintelligence and Security Agency (DCSA) 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), effective June 8, 2017.

The SOR alleged security concerns under Guideline H (Drug Involvement and Substance Misuse) and detailed reasons why the DCSA CAF 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 sworn statement, dated April 22, 2021, 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 DOHA on June 1, 2021, 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 July 2, 2021. His response was due on August 1, 2021. He timely responded and submitted two documents, to which there were no objections, and both documents were marked and admitted into evidence as Applicant Exhibits (AE) A and B. The case was assigned to me on August 27, 2021. The record closed on August 1, 2021.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with extensive comments, the factual allegations pertaining to drug involvement and substance misuse (SOR ¶¶ 1.a. through 1.c.). Applicant's admissions and 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:

Background

Applicant is a 23-year-old employee of a defense contractor that is a management and information technology consulting firm. It is unclear when he joined his employer, although it had to occur after he was interviewed by an investigator from the U.S. Office of Personnel Management (OPM) in April 2020, or what position he holds with his employer, as the record is silent as to those details. He received a bachelor's degree in 2019, and was recognized as a college all-region scholar-athlete. There is an unverified indication that he may have received a master's degree. He has never served with the U.S. military. He has never held a security clearance. He has never been married. He has no children.

Drug Involvement and Substance Misuse

Applicant was a recreational substance abuser whose primary substance of choice was marijuana – a Schedule I Controlled Substance. He started casually smoking marijuana several times per week in November 2016, and continued such use through at least January 2020 when he completed his SF 86. At that time, he candidly indicated an intention to continue using marijuana in anticipation of such use becoming legalized. (Item 3, at 28-29) During his April 2020 OPM interview, he acknowledged that he continued his use of marijuana until at least April 2020. (Item 4, at 9) However, in his March 2021

Answers to the interrogatories, and in his April 2021 Answer to the SOR, he admitted that he was still using marijuana until at least March 2021. (Item 2, at 1; Item 4, at 5) He used marijuana because he enjoyed the feeling of being high. He continues to associate with friends who use marijuana illegally. He has purchased marijuana with varying frequency until at least March 2021. (Item 4, at 10; Item 2, at 1)

Applicant's secondary substance of choice was cocaine – a Schedule II Controlled Substance. He started using cocaine in casual party-settings with friends in March 2017, and continued such use on about ten occasions through at least January 2020 when he completed his SF 86. At that time, he stated that he intended to eliminate all drug use after college. (Item 3, at 29) However, in his March 2021 Answers to the interrogatories, and in his April 2021 Answer to the SOR, he admitted that he was still using cocaine until at least March 2021 – approximately two years after he graduated from college. He also modified his previously-stated future intentions regarding cocaine by stating that he “will stop using the drug if need be.” (Item 2, at 1; Item 4, at 5) He used cocaine, initially because of peer pressure, and eventually because it caused him to have an energizing feeling. (Item 4, at 9) He continues to associate with friends who use cocaine illegally.

On two occasions he also experimented with hallucinogenic psilocybin mushrooms – a Schedule I Controlled Substance. He used the substance in December 2017 and March 2018 due to peer pressure from two friends at a friend's home in “a controlled environment” – not otherwise described. (Item 3, at 29; Item 4, at 10) During his April 2020 OPM interview, he stated that he had no future intent to use the substance because he had “no need” to do so. (Item 4, at 10) He continues to associate with friends who use psilocybin mushrooms illegally.

Applicant chose not to provide information of individuals who were directly involved in his drug use, whether it applied to the marijuana, cocaine, or the psilocybin mushrooms. (Item 4, at 9-10) There is no evidence that Applicant ever tested positive for any illegal substance, or that he has ever received treatment and counseling as a result of his illegal use of controlled substances. It was not until he received the FORM that he altered his direction regarding drug involvement and substance misuse. He contends that since he is now removed from the college environment, he intends to abstain from all illegal drug behavior, drug involvement, and substance misuse. (AE B)

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 some 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. . . purchase. . . ;
and

(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant was admittedly a recreational substance abuser. He frequently purchased and used marijuana, and periodically used cocaine, both controlled substances, for several years, until as recently as March 2021 – approximately five months ago. On several occasions in the past, he stated that he intended to continue using marijuana in the future, and stated that he would no longer use cocaine. He continued to use both substances. AG ¶¶ 25(a), 25(c), and 25(g) 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(b) minimally applies. After several years of illegally using two controlled substances, Applicant finally reportedly stopped doing so about five months ago, hardly qualifying as “so long ago.” His use of marijuana was a frequent occurrence over the years, and his periodic use of cocaine still was not infrequent. His experimentation with psilocybin mushrooms is considered unalleged conduct.

Unalleged conduct can be considered for certain purposes, as discussed by the DOHA Appeal Board. (Conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole-person analysis under Directive § 6.3.). See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006); (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See *also* ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). Applicant's unalleged experimentation with psilocybin mushrooms will be considered only for the five purposes listed above.

There is no evidence of Applicant ever having received treatment and counseling as a result of his illegal use of controlled substances. The circumstances of his use of

marijuana, and his previous assertions that he would continue to do so in the future, do not constitute evidence to indicate that it is unlikely to recur. He was open about his use of marijuana and cocaine when he completed his SF 86, and for that candor, he is given credit. He acknowledged his drug involvement and substance misuse, but his evidence of actions purportedly taken to overcome his problems has been far from convincing or substantial.

He has, as of only one month ago, stated an intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement in such activities is grounds for revocation of national security eligibility. He contends he has avoided the environment where drugs were used, but he acknowledged that he continues to associate with friends who used drugs with him. Applicant established a pattern of clearly intending to use marijuana in the future, and continued doing so. Only now has he claimed to have altered his future path. He also established a pattern of intending to avoid cocaine, only to have ignored his stated intent by continuing to use cocaine.

A person should not be held forever accountable for misconduct from the past, but in this instance, he repeatedly used marijuana and cocaine for several years, continuing to do so as recently as March 2021 – approximately five months ago. Continued abstinence is to be encouraged, but, when balanced against his full history, the relatively brief five-month period of such abstinence, and his changing intentions regarding marijuana and cocaine in the future, are considered insufficient to conclude that the abstinence will continue. Applicant's claimed new compliance with laws, rules, and regulations, is in stark contrast to his cavalier attitude towards those same laws, rules, and regulations. His use of marijuana and cocaine, despite knowing that such use was prohibited by both the Government and his sponsors, and his refusal, until recently, to disavow future marijuana use, as well as his previously abandoned intent to cease using cocaine, continue to cast doubt on his current reliability, trustworthiness, and good judgment.

With regard to the SOR allegation that Applicant continued to use marijuana and cocaine after he had submitted his SF 86 in January 2020, that allegation is merely a restatement of the facts that such use continued after that particular date, and it fails to state any disqualifying conduct that actually differs from that already alleged.

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 23-year-old employee of a defense contractor that is a management and information technology consulting firm. It appears that he joined his employer sometime after April 2020. He received a bachelor's degree in 2019, and was recognized as a college all-region scholar-athlete. There is an unverified indication that he may have received a master's degree. When completing his SF 86, he was candid in acknowledging that he had used marijuana and cocaine. He now claims that he will abstain from all illegal drug behavior, drug involvement, and substance misuse.

The disqualifying evidence under the whole-person concept is more substantial. Applicant was admittedly a recreational substance abuser. He regularly purchased and used marijuana and periodically used cocaine, both controlled substances, for several years, continuing to do so until as recently as March 2021 – approximately five months ago. On several occasions in the past, he stated that he intended to continue using marijuana in the future, and stated that he would no longer use cocaine. He continued to use both substances. In addition, on two occasions in December 2017 and March 2018, he also experimented with hallucinogenic psilocybin mushrooms – a Schedule I Controlled Substance. It is also significant that he chose not to provide information of individuals who were directly involved in his drug use. There is no evidence that he ever received treatment and counseling as a result of his illegal use of controlled substances.

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 his 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
Subparagraph 1.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