



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



In the matter of:)
)
) ISCR Case No. 20-00035
)
Applicant for Security Clearance)

Appearances

For Government: Brian Farrell, Esquire, Department Counsel
For Applicant: *Pro se*

12/20/2021

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 November 30, 2017, 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 him a set of interrogatories, and also asked him to verify the accuracy of an investigator’s summary of an interview. He responded to those interrogatories and verified the summary on February 4, 2020. On January 18, 2021, and again on June 1, 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.

While there are two SORs, the content of both SORs is identical, and any further references to the SOR below refers to the version Applicant answered, the one dated June 1, 2021. No explanation was given for the separate SORs. 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 August 15, 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 September 8, 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 September 16, 2021. His response was due on October 16, 2021. Applicant chose not to respond to the FORM, for as of November 1, 2021, no response had been received. The case was assigned to me on December 14, 2021. The record closed on November 1, 2021.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with comments, the factual allegations pertaining to drug involvement and substance misuse (SOR ¶¶ 1.a. through 1.f.). 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 28-year-old employee of a defense contractor. He has been serving as an engineer with his current employer since July 2016. He previously served as a full-time intern in several different disciplines with another company from May 2014 until August 2015. He was unemployed from August 2015 until July 2016. A 2011 high school graduate, he received a bachelor's degree in May 2016. He has never served with the U.S. military. He has never been married. He has never been granted a security clearance.

Drug Involvement and Substance Misuse

Applicant was a recreational multi-substance abuser whose substances of choice during an 11-year period were tetrahydrocannabinol (THC), known as marijuana [used with varying frequency from about August 2007 to about March 2018]; psilocybin mushrooms [used in or about October 2014]; and methylenedioxymethamphetamine (MDMA), also known as Ecstasy [used in about May 2018] – all Schedule I Controlled Substances; amphetamine (the prescription medication Adderall® which was not

prescribed for him) [used in or about October 2017]; and cocaine [used with varying frequency from about March 2017 to about July 2018] – both Schedule II Controlled Substances. (Item 3; Item 4; (<https://www.deadiversion.usdoj.gov/schedules/>; 21 U.S.C. § 812 (c)) In order to fund his own use of marijuana, he also sold marijuana with varying frequency from about August 2012 until about March 2013, and again in March 2018. (Item 2, at 1-2; Item 3, at 57; Item 4, at 9)

In his SF 86, Applicant reported that he had smoked or eaten marijuana through marijuana-infused food an estimated 1,000 times between August 2007 and November 2017. He admitted consuming 0.2 grams of psilocybin mushrooms on one “experimental” occasion in October 2014. He also admitted snorting cocaine on two “experimental” occasions while he was visiting Nicaragua on vacation in March 2017. (Item 3, at 54-57)

Applicant expanded on his history of drug involvement and substance misuse during two interviews with an investigator from the U.S. Office of Personnel Management (OPM) on January 4, and 7, 2019. During the initial interview, he reported using marijuana until January 2017. Acknowledging that he initially had not been candid, during the second interview he admitted that he had actually continued using marijuana with friends until March 2018. His initial comments regarding cocaine use were also incomplete, for he also used cocaine on two occasions in June and July 2018 while attending parties. During the second interview, he also reported that he had used Ecstasy on one “experimental” occasion while at a concert with friends in May 2018; and that he had used Adderall® on another “experimental” occasion while at a football game with friends in October 2017. (Item 4, at 6-11, 15) Applicant refused to divulge the names of anyone who was involved in his drug involvement and substance misuse. (Item 4, at 6-7)

Although Applicant consistently claimed to have no future intentions of using certain identified drugs or controlled substances, in fact, he continued to do so. In his SF 86, with regard to marijuana, psilocybin mushrooms, and cocaine, he stated that he was passionate about his job and “if using the substance risks the advancement of [his] career, [he] will not use this drug.” (Item 3, at 54-56) The SF 86 was submitted in November 2017, yet he continued using marijuana and cocaine, and also added Ecstasy, well past that date. In his Answer to the SOR, he wrote what he considered to be a statement of future intent. (Item 2, at 2) In his second OPM interview, he stated that he “cannot say he will not associate with other people that do use marijuana.” (Item 4, at 9) In his response to the interrogatories, Applicant acknowledged that at least once a month, he is still in contact with his hallucinogenic drug-using friends, but that while he will not participate in the drug use, he will remove himself from those situations. (Item 4, at 15)

There is no evidence of Applicant ever having received drug-counseling or treatment.

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 multi-substance abuser of a variety of Schedule I and Schedule II Controlled Substances. He frequently purchased, used, and sold marijuana; consumed psilocybin mushrooms; used Ecstasy; used the prescription medication Adderall® which was not prescribed for him); and used cocaine. Although he consistently claimed to have no future intentions of using certain identified drugs or controlled substances, in fact, he continued to do so. His expressed comments regarding future drug involvement and substance misuse fail to clearly and convincingly commit himself to discontinue such misuse. 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;
- (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;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and
- (d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of the mitigating conditions apply. After approximately 11 years of regular multi-substance drug involvement and substance misuse, and repeated promises to

cease such use, Applicant continued purchasing, using, and selling marijuana until as recently as March 2018; using Ecstasy as recently as May 2018; and using cocaine until as recently as July 2018. He was partially open about his use of some illegal substances when he completed his SF 86, and for that partial candor, he is given some credit. He continued being partially candid during his OPM interviews. While he has acknowledged his drug involvement, he has offered no substantial evidence of actions taken to overcome those issues, such as exploring drug treatment and therapy; changing or avoiding the environment where the drugs were used; disassociation from drug-using associates and contacts; or evidence to support his claimed abstinence since 2018.

A person should not be held forever accountable for misconduct from the past. Continued abstinence is to be encouraged, but, when balanced against his full history of approximately 11 years of multi-substance use and misuse, the relatively brief period of approximately three years of reported unverified abstinence is considered insufficient to conclude that the abstinence will continue, especially after he admitted using various drugs after claiming he would not do so in the future.

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 all of the identified substances; his repeated purchase and sale of marijuana; and his misuse of a prescription drug without possessing a prescription for the drug despite knowing that such use was prohibited; his refusal to furnish information regarding his drug-using friends; the absence of any drug-counseling or treatment; and his refusal to disassociate from his drug-using associates and contacts, 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 28-year-old employee of a defense contractor. He has been serving as an engineer with his current employer since July 2016. He previously served as a full-time intern in several different disciplines with another company from May 2014 until August 2015. A 2011 high school graduate, he received a bachelor's degree in May 2016. When completing his SF 86, he was partially candid in acknowledging that he had used a variety of illegal substances. When questioned twice by an OPM investigator, he was initially partially candid regarding his illegal drug involvement and substance misuse. His professed claims regarding future intentions were not actually true, but he now claims that he will not use illegal drugs in the future. He claims, without verifiable support, that he has been abstinent since 2018.

The disqualifying evidence under the whole-person concept is more substantial. Over an 11-year period, Applicant was admittedly a recreational multi-substance abuser of a variety of Schedule I and Schedule II Controlled Substances. Although he consistently claimed to have no future intentions of using certain identified drugs or controlled substances, in fact, he continued to do so. His expressed comments regarding future drug involvement and substance misuse fail to clearly and convincingly commit himself to discontinue such misuse. Moreover, his lack of total candor in both his SF 86 and during his OPM interviews; his refusal to furnish full information regarding his drug-using friends; the absence of any drug-counseling or treatment; and his refusal to disassociate himself from his drug-using associates, continue to cast doubt on his current reliability, trustworthiness, and good judgment.

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. 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

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