



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



In the matter of:)
)
) ISCR Case No. 21-00504
)
Applicant for Security Clearance)

Appearances

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

09/28/2021

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 September 16, 2019, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On May 21, 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 May 13, 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 the Defense Office of Hearings and Appeals (DOHA) on July 7, 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 15, 2021. His response was due on August 16, 2021. Applicant chose not to respond to the FORM, for as of August 20, 2021, no response had been received. The case was assigned to me on September 24, 2021. The record closed on August 16, 2021.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with brief comments, the factual allegations pertaining to drug involvement and substance misuse (SOR ¶¶ 1.a. and 1.b.). 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 35-year-old principal proposal analyst of a defense contractor. He has been serving in that position with his current sponsor since May 2019. He previously served with other employers as a senior associate from 2016 until 2018; and as a senior auditor from 2008 until 2016. He received a bachelor's degree in 2008, and has earned additional college credits, but no degree. He has never served with the U.S. military. It is unclear if he was ever granted a security clearance, but, as stated by Applicant, if he did, it was a confidential clearance. He has never been married, but he has been cohabiting since 2019. He has no children.

Drug Involvement and Substance Misuse, and Personal Conduct

Applicant was a recreational substance abuser whose substances of choice were marijuana and methylenedioxymethamphetamine (MDMA), also known as Ecstasy, – both Schedule I Controlled Substances. Applicant's self-reported history of drug involvement, as well as his declared future intentions, are inconsistent, and it appears that he was not fully candid.

On September 11, 2009, he was interviewed by an investigator with the U.S. Office of Personnel Management (OPM). During that interview, he claimed that he had initially experimented with marijuana in August 2007, when a friend (K) brought some marijuana to his residence. The marijuana made him feel light headed and happy, and he liked the experience. He admitted that he continued using marijuana on about ten occasions from

January 2008 until April 2008, also at his residence and at K's house, when the same friend brought the marijuana to his apartment. He also acknowledged that on at least two of those occasions, he paid his friend for the marijuana. He said that he last smoked marijuana in April 2008, and that he quit using the substance because he is graduating from college and looking for a job, and no longer needed to experiment with marijuana any longer. He specifically stated that he will not use any illegal drugs because it would jeopardize his job, his future, and his health. (Item 4, at 4) Between his April 2008 marijuana use and September 18, 2009, when he was again interviewed by the OPM investigator, Applicant stated that he had not socialized or associated with anyone who uses or to his knowledge has access to marijuana or any other illegal drug. He intended to dis-associate himself from anyone who he subsequently learns falls into those categories. (Item 4, at 5)

In his September 2019 SF 86, Applicant added to the narrative with respect to his drug involvement. He acknowledged that he had used marijuana from December 2004 until December 2018. He admitted that he used it "dozens of times over the past decade," daily at times and less frequently at other times. Once again, he repeated his earlier declared intention not to use marijuana in the future so as not to jeopardize his employment or security clearance. (Item 2, at 58-59)

Applicant underwent another OPM interview on October 16, 2019. During that interview he noted that a friend since childhood (T) had used marijuana with him, and sometimes Applicant smoked marijuana alone at home. He obtained the marijuana from dispensaries. The marijuana had a relaxing effect on him. As of the date of the interview, Applicant and T had contact every few weeks via text message or face-to-face interaction. (Item 3, at 9-10)

Applicant's SF 86 also revealed that, from April 2014 and continuing until July 2019, he used Ecstasy. He used it recreationally over that period, estimated to be about a dozen times. He stated that he had no intent to use Ecstasy in the future. (Item 2, at 59-60)

During his October 2019 OPM interview, Applicant elaborated about his Ecstasy use by noting that he generally obtained the drug from another friend (J), and that he used it at music festivals. Ecstasy has a euphoric effect on him. As of the date of the interview, Applicant and J had contact every two-to-three weeks, and the past few times they went to dinner together. He identified his current cohabitant as an individual with information regarding his Ecstasy use. (Item 3, at 10)

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 is admittedly a recreational substance abuser whose substances of choice was marijuana and Ecstasy – both Schedule I Controlled Substances. He used marijuana with varying frequency from December 2004 until at least December 2018. He also used Ecstasy with varying frequency from April 2014 until at least July 2019. He periodically purchased marijuana. In September 2009, he specifically stated that he will not use any illegal drugs because it would jeopardize his job, his future, and his health. Despite that expressed intention, he continued to use illegal drugs. AG ¶¶ 25(a) and 25(g) have been established, but for reasons set forth below, AG ¶ 25 (c) was not established. While Applicant's purchases of marijuana were known to the DCSA CAF before the SOR was issued, his purchases were not alleged in the SOR. Nevertheless, it is appropriate to consider such unalleged issues in the whole-person analysis.

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

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; and (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Neither condition applies. Applicant has purchased and used marijuana frequently for over two decades; has never received treatment and counseling as a result of his illegal use of marijuana; has been disciplined by the military for a positive urinalysis; has been arrested, charged, and convicted of use, possession, or delivery of drug paraphernalia; and he has no intention of ceasing his marijuana use. He was open about his past, continuing, and future relationship with marijuana, and for that candor, he is given credit.

He has objected to any compliance with marijuana laws and regulations, simply because he disagrees with them. In a free society, he is free to object to those laws and

regulations, but in ignoring them, he runs the risk of additional punishment should he violate the law. Moreover, his position is inconsistent with eligibility for a security clearance. Applicant's refusal to disavow future marijuana use continues to cast substantial 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. He is a 37-year-old project engineer of a defense contractor. He has been serving in that position with his current sponsor since May 2013. He previously served in an identical capacity with a subcontractor from 2011 until 2013. He is a 2001 high school graduate, and received a bachelor's degree in 2011. He enlisted in the U.S. Army in August 2001, and remained on active duty until August 2005 when he was honorably discharged. He has been candid in acknowledging his past, current, and future association with marijuana.

The disqualifying evidence under the whole-person concept is more substantial. Applicant is admittedly a recreational substance abuser, and he has had a close affiliation with marijuana for over two decades. He has purchased, used, and shared marijuana frequently; has never received treatment and counseling as a result of his illegal use of marijuana; has been disciplined by the military for a positive urinalysis; and has been arrested, charged, and convicted of use, possession, or delivery of drug paraphernalia. He has no intention of ceasing his marijuana use. He has shown a proven unwillingness to comply with rules and regulations in using marijuana, and he intends to continue using marijuana in the future.

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

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