



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



In the matter of:)
)
) ISCR Case No. 20-03224
)
Applicant for Security Clearance)

Appearances

For Government: Raashid S. Williams, Esquire, Department Counsel
For Applicant: *Pro se*

11/29/2021

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 March 29, 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 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 January 9, 2021. On February 20, 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 both March 14, 2021, and March 16, 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 August 3, 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 August 24, 2021. His response was due on September 23, 2021. Applicant chose not to respond to the FORM, for as of October 19, 2021, no response had been received. The case was assigned to me on November 18, 2021. The record closed on September 23, 2021.

Findings of Fact

In his Answer to the SOR, Applicant admitted, without comments, the factual allegations pertaining to drug involvement and substance misuse (SOR ¶¶ 1.a. through 1.o.). 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 33-year-old prospective employee of a defense contractor. He was sponsored for an unidentified position in July 2019, but because of delays in the processing of his background investigation, while "technically employed" by the defense contractor, he has not been given a specific position. In February 2020, while awaiting the conclusion of his background investigation, he obtained temporary employment as a data entry operator with a staffing agency. A 2007 high school graduate, he received a bachelor's degree in 2013 and a master's degree in 2018. 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 18-year period were 3,4 – methylenedioxymethamphetamine (MDMA), known as Ecstasy [used approximately 12 times between February 2006 and February 2015]; tetrahydrocannabinol (THC), known as marijuana [used weekly depending on responsibilities from February 2003 until January 2021]; diacetylmorphine, known as heroin [used daily from July 2007 until December 2016]; psilocybin mushrooms [used approximately 10 times between March 2005 and May 2018] and lysergic acid

diethylamide (LSD) [used approximately 12 times between January 2007 and August 2015] – all Schedule I Controlled Substances; amphetamine (Adderall®) [used during mid-term and final examinations from August 2009 and December 2017]; and methamphetamine – both Schedule II or IIN Controlled Substances; alprazolam, known as Xanax® [used on odd occasions between February 2007 and June 2013] – a Schedule IV Controlled Substance; and powder cocaine [used weekly from April 2006 and October 2018] and crack cocaine [used approximately 10 times between August 2013 and June 2015] – a Schedule II Controlled Substance. Each of the substances used by him were purchased by him. (Item 3; Item 4; <https://www.deadiversion.usdoj.gov/schedules/>) Two of the substances purchased (Adderall® and Xanax®) were prescription drugs for which Applicant had no prescription. (Item 4)

His introduction to drug involvement and substance misuse regarding marijuana was initially due to peer pressure and wanting to be considered “cool.” During his teen years, he enjoyed the intoxicating effects. As an adult, it helped with boredom in his spare time and enhanced his mood. It also had a calming effect and increased his appetite. The relationships with the other substances began as experiments and produced a variety of effects. The hallucinogenic substances led to immediate intoxication, dissociation, hallucinations, pseudo-religious experiences, connectivity, and fits of laughter. The stimulants, used as an alternative to cocaine to enable him to keep partying, caused euphoria, mild hallucinations, stimulation, fast speech, increased heart rate, and positive neurotransmitters, accompanied by a hang-over and feeling awful the following day. It also negated the need to sleep. The cocaine caused stimulation, increased socialization, and negated the effects of alcohol. It also caused severe nausea. The depressants led to lethargy, memory loss, and reduced muscle pain, and they were used to supplement opiates during his withdrawal from heroin. The heroin caused lethargy, euphoria, and nausea, and such use helped him deal with an abusive relationship. He became addicted to heroin. (Item 4)

Applicant was aware that most of the substances he used were illegal, but that his marijuana use, while prohibited federally, was legal in the states where he used it. He claimed, that with the exception of marijuana, he repeatedly attempted to stop using the other substances because of their increasingly unpleasant effects on him, as well as his desire to eventually apply for a government job. His first major effort to permanently remove “serious drugs,” identified by him as heroin, methamphetamine, and crack cocaine, from his life occurred in 2013 when he relocated from one university to another, and “kicked” his opiate dependency. After four or five instances, he relapsed and resumed his use of those substances. A year or two later, he started using “party drugs,” identified by him as cocaine and Ecstasy, in addition to LSD, with new friends. In 2015, upon being accepted into a graduate program, he resolved to stop using “party drugs,” though he was, again, not completely successful. (Item 4)

He claimed to have no future intentions to distribute any of the substances. He also claimed that with the possible exception of marijuana, he would not use any of the other substances in the future. The exception for marijuana was reported by him as “possible” future intentions based on the following conditions: if he is not in a position of national trust, working for the U.S. Government, and if he is doing so legally. (Item 4)

Applicant had several encounters with the police as a result of his substance abuse. In May 2007, while parked in his vehicle with friends, he was detained by campus police for consuming alcohol (while under age) and smoking marijuana. He was charged, handcuffed, and released to his parents. He appeared in court in June 2007 and was fined, ordered to perform community service, and required to participate in court-ordered counseling. In May 2008, he was stopped for speeding by the police and charged with driving under the influence (DUI) and use and possession of a controlled substance (marijuana). He appeared in court in June 2008 and was fined, required to perform community service, and ordered to continue his substance abuse counseling. In October 2008, he was charged with use and possession of marijuana. The disposition of the charges was not reported. In June 2013, while visiting a European country, Applicant purchased an unspecified quantity of heroin from a local drug dealer. The police confronted them, and Applicant was searched and found to be in possession of the heroin. He was brought to the central booking station and strip searched. He was released by the police when he informed them that he was leaving the country within 48 hours. (Item 4)

He participated in court-ordered counseling and treatment at a behavioral counseling center between August 2008 and August 2009. The specifics of the program were not reported. While he had no other drug treatment or counseling, when he felt that he was slipping into addiction, and in moments of struggle to get clean, or he needed a support group to do so, following a relapse, he claimed he would turn to Alcohol Anonymous (AA) or Narcotics Anonymous (NA). (Item 4)

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, II, IIN, and IV Controlled Substances. He frequently purchased and used all of those substances for over an 18-year period, until January 2021. He recently noted that with the possible exception of marijuana, he would not use any of the other substances in the future. The exception for future marijuana use was reported by him as "possible" future intentions based on the following conditions: if he is not in a position of national trust, working for the U.S. Government, and if he is doing so legally. His

expressed conditions regarding future marijuana use fails 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 18 years of regular multi-substance drug involvement and substance misuse involving “serious drugs” and “party drugs,” with several relapses, and police and court interventions, Applicant continued using marijuana as recently as January 2021, a little less than one year ago. He was open about his use of the illegal substances when he completed his SF 86, and for that candor, he is given credit. He acknowledged his drug involvement and substance misuse, but he offered no substantial evidence of actions taken to overcome those issues, such as exploring drug treatment and therapy more recently than his court-mandated counseling ending in 2009; changing or avoiding the environment where marijuana was used, especially when he left university campuses for the corporate world, or overseas, where he continued his drug involvement; providing a signed statement of intent to abstain from all drug involvement and substance misuse, without any conditions; or evidence to support his claimed abstinence since January 2021.

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 18 years of multi-substance use and misuse, the relatively brief period of a little less than one year of reported abstinence is considered insufficient to conclude that the abstinence will continue, especially after he admitted numerous relapses in the

past. 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, and misuse of the prescription drugs (without possessing a prescription for the drugs), despite knowing that such use was prohibited by both the Federal Government and, in most cases, with the state laws (with the exception of marijuana which was legal in some of the states where he used it), and his continued use of marijuana, until recently, to completely disavow future marijuana use without possible conditions, 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 33-year-old prospective employee of a defense contractor. He was sponsored for an unidentified position in July 2019, but because of delays in the processing of his background investigation, while "technically employed" by the defense contractor, he has not been given a specific position. In February 2020, while awaiting the conclusion of his background investigation, he obtained temporary employment as a data entry operator with a staffing agency. A 2007 high school graduate, he received a bachelor's degree in 2013 and a master's degree in 2018. When completing his SF 86, he was candid in acknowledging that he had used a variety of illegal substances. He now claims that, with the possible exception of marijuana, 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 multi-substance abuser. Because of his drug

