



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



In the matter of:)
)
) ISCR Case No. 20-03437
)
Applicant for Security Clearance)

Appearances

For Government: Erin P. Thompson, Esquire, Department Counsel
For Applicant: *Pro se*

08/30/2021

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 April 29, 2019, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On January 4, 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 January 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 DOHA on May 26, 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 June 9, 2021. His response was due on July 9, 2021. Applicant chose not to respond to the FORM, for as of July 20, 2021, no response had been received. The case was assigned to me on August 27, 2021. The record closed on July 9, 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.). His response was essentially a manifesto regarding drug laws:

. . . I find the implication that one's moral or ethical worth can be defined by such simplistic/deterministic matrices to be lacking at best, prejudiced at worst. I can personally find no logical chain of events wherein my relaxation/free time proclivities would override my common sense, ethics, or morality, especially in regard to my occupation & quality of my work. I am not prone to acting in ways that are not deliberate & measured, and one would assume forthright honesty to one's potential detriment to prove more moral worth than "don't question the rules", but I am not responsible for such decisions.

From my perspective the ruling on the table is fairly arbitrary, especially considering that much larger clearances are given to individuals that in no rational world should have them (e.g. the current president). I rather doubt any amount of common sense or eloquences on my end could convince anyone inclined to arbitrate clearance granting in a binary way. One either follows "the rules" or not, whether it makes sense to do so is somehow beside the point. As a logical argument, far worse drugs are legal (and thus deemed moral/ethical within society . . . somewhat irrationally) and not under scrutiny. Alcohol for example has far more profound effects on judgment, reaction time, etc. and is not noted as a "security issue", never mind prescription painkillers or anything else like that. Without getting too far down the rabbit hole, my stance is "the federal illegality of marijuana is arbitrary." The medical & scientific facts all agree with this, the federal government appears to listen more to special interest groups & a sincere desire to not look like they overreacted with the whole "war on drugs" campaign of the 1980s. In the future I would council over (sic) gov't to stop declaring war on nouns, it rarely goes well or has an endgame.

My employment is secure with or without the security clearance, it merely dictates which projects that I will specifically work. My loyalty to my employer, and by extension the nation is in no way negatively impacted by any extracurricular activities I may engage in now or the perceived future. I can think of no way to adequately prove this, and so I will request written arbitration to avoid having the hassle of an in person hearing. I am not opposed, I just see little point in arguing about the differences in legal & moral behaviors & the assumed linkages/baggage people bring to the table.

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 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. Because of a failed urinalysis, he was denied a security clearance in 2002. He was married in 2011 and divorced in 2016. He has two children, born in 2011 and 2013.

Drug Involvement and Substance Misuse, and Personal Conduct

Applicant was a recreational substance abuser whose substance of choice was marijuana – a Schedule I Controlled Substance. He initially used marijuana in September 1997, and has continued using it on a weekly basis (including a few times per week) until at least June 2019, when he was interviewed by an investigator from the U.S. Office of Personnel Management (OPM). He has every intention of using it in the future because he does not view marijuana use as being wrong, despite the fact that such use may be a crime. He generally uses marijuana in bowls, alone or with friends. He purchases marijuana monthly for personal use in "flower format" or shares marijuana furnished to him by others, and did so until at least June 2019. He uses marijuana to relax, and denies being coerced to use it. Marijuana helps him to not "overthink." He has never received drug counseling or treatment. He has never attempted to stop using marijuana. (Item 3; Item 4)

In December 2001, while on active duty, Applicant was administered a command-directed urinalysis, and he tested positive for Tetrahydrocannabinol (THC). As a result, he was administered non-judicial punishment under Article 15, Uniform Code of Military Justice (UCMJ) for violation of Article 112a, UCMJ (10 U.S.C. § 812a). He was given 45 days of extra duty and restriction, and ordered to forfeit \$522 for two months. (Item 7; Item 4; Item 5)

On July 5, 2009, Applicant and his brother were sitting in Applicant's car when they were approached by the police. The vehicle was searched, and unspecified drug paraphernalia was uncovered. Applicant was arrested and charged with use, possession, or delivery of drug paraphernalia, a misdemeanor. He was subsequently convicted as charged, and ordered to perform between 40 and 80 hours of community service. Item 3; (Item 4; Item 5; Item 6)

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);
- (b) testing positive for an illegal drug;
- (c) illegal possession of a controlled substance, including . . . purchase, sale, or distribution; or possession of drug paraphernalia; 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 substance of choice is marijuana – a Schedule I Controlled Substance. He has regularly used marijuana from September 1997 until at least June 2019, when he was interviewed by an OPM investigator. He has regularly purchased marijuana and shared it with others. In 2001, while enlisted in the U.S. Army, he tested positive for THC following a command-ordered urinalysis, and he received non-judicial punishment. In 2009, he was arrested, charged, and convicted of use, possession, or delivery of drug paraphernalia. He has repeatedly expressed an intent to continue to use marijuana because he disagrees with the law and does not believe using marijuana is wrong, despite the fact that such use may be a crime. AG ¶¶ 25(a), 25(b), 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.

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

