



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



In the matter of:)
)
) ISCR Case No. 20-03432
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

11/03/2022

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s evidence is insufficient to mitigate his illegal polysubstance use between 1999 and 2020. He failed to establish he disassociated from his illegal substance-using friends, and presented no evidence of substance abuse counseling or treatment. Drug involvement and substance misuse (Guideline H) security concerns are not mitigated. Clearance denied.

Statement of the Case

Applicant submitted his first security clearance application (SCA) on March 13, 2020. Government background investigators interviewed him between April and June 2020. After reviewing the information gathered during the background investigation, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement and substance misuse) on January 7, 2021 [See Procedural Issue, *supra.*] Applicant answered the SOR on January 24, 2021, and requested a decision based on the written record in lieu of a hearing.

The Government submitted its written case, containing the evidence supporting the security concerns, on March 26, 2021. The Defense Office of Hearings and Appeals (DOHA) provided Applicant a complete copy of the file of relevant material (FORM) on August 2, 2021. He acknowledged receipt of the FORM on August 6, 2021. He was afforded a period of 30 days from receipt of the FORM to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant did not submit an answer to the FORM. The case was assigned to me on August 17, 2022. Without objections, I admitted and considered all of the FORM's proffered evidence.

Procedural Issue

Department Counsel noted in the FORM that the year the SOR was issued is incorrect. I agreed and amended the SOR by deleting the year 2020, and substituting the year 2021.

Findings of Fact

SOR ¶ 1.a alleged that Applicant illegally used nitrous oxide between June 2014 and January 2020, and that he intended to continue using it in the future. In his SOR answer, Applicant admitted the use, but denied his intent to use it in the future. SOR ¶ 1.b alleged, and Applicant admitted, that he used marijuana from June 1999 to about June 2018. SOR ¶ 1.c alleged, and Applicant admitted, that he used MDMA (3, 4-methylenedioxy-methamphetamine – Ecstasy/Molly) in June 2018. SOR ¶ 1.d alleged that Applicant used amyl nitrate (poppers) between June 2013 and June 2017, and that he intended to continue using “poppers” in the future. In his SOR answer, Applicant admitted the use, but denied his intent to use it in the future.

Applicant's SOR admissions are incorporated as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is 41 years old. He received a bachelor's degree in 2004. He married in 2007 and divorced in 2013. He has no children. He has been living with a cohabitant since 2018. Applicant has been working for his clearance sponsor, a federal contractor, since September 2019. This is his first security clearance application (SCA).

In Section 23 (Illegal Use of Drugs or Drug Activity) of his March 2020 SCA, Applicant disclosed that he experimented with marijuana in 1999, and then used it with varying frequency between 2014 and 2018. He purchased the marijuana from state licensed dispensaries to self-medicate anxiety and focus issues, no more than two to three times per year, the latest use in 2018. He used amyl nitrate (and similar formulations of inhalants; poppers) six to eight times a year between 2013 and 2017. He noted he had not used poppers for several years, but stated his intent to do so in the future.

Applicant disclosed he used nitrous oxide three to five times per year between 2014 and 2020, at social gatherings and for recreational purposes. He stated his intent to

use nitrous oxide in the future. He used MDMA (molly) once in June 2018. He does not intend to use it in the future. (Item 4)

During his 2020 interviews, government investigators questioned Applicant about his illegal use of drugs. (Item 5) Applicant confirmed his drug use as disclosed in his March 2020 SCA, but indicated he no longer intended to continue using illegal drugs in the future, except for nitrous oxide, which he intended to use again, but not regularly. He admitted to socializing with individuals who use illegal drugs at least twice a year.

Applicant noted that if he were assigned to a position where the use of nitrous oxide was prohibited, he would not use it. He claimed he is now focused on his professional life and has chosen to settle down his social life, which is why he is no longer using illegal drugs. He presented no documentary evidence to show that he sought or received any medical or psychological treatment or counseling for substance abuse. He has never participated in any drug counseling, treatment, or education.

Policies

The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, § 2. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in National Security Adjudicative Guidelines (Security Executive Agent Directive 4, effective June 8, 2017, or SEAD 4) App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The

applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

In reaching my decision, I specifically considered the following:

On October 25, 2014, the Director of National Intelligence Memorandum *Adherence to Federal Laws Prohibiting Marijuana Use*, made it clear that state laws do not authorize citizens to violate federal law, including the Controlled Substances Act (21 U.S.C. §§ 801-971 (1970)), which identifies marijuana as a Schedule I controlled drug.

Changes to state laws or the District of Columbia, pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines. An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains relevant in national security determinations. 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 Intelligence Reform and Terrorism Prevention Act (IRTPA), as amended, 50 U.S.C. § 3343 (2008), specifically prohibits a federal agency from granting or renewing a clearance to an unlawful user of a controlled substance or an addict, and under federal law, use of marijuana remains unlawful. (See, SEAD 4, App. B)

Executive Order 12564, *Drug Free Federal Workplace* (September 25, 1985) mandates a drug-free workplace and drug-free federal workforce, and expressly states that use of illegal drugs on or off duty by federal employees in positions with access to sensitive information may pose a serious risk to national security and is inconsistent with the trust placed in such employees as servants of the public.

On December 21, 2021, the Director of National Intelligence signed the memorandum, *Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*. It emphasizes that federal

law remains unchanged with respect to the illegal use, possession, production and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the “whole-person concept” stated under SEAD 4, to determine whether the applicant’s behavior raises a security concern that has not been mitigated.

Analysis

Drug Involvement and Substance Misuse

AG ¶ 24 articulates the security concern for the illegal use of drugs:

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.

Applicant used marijuana with varying frequency, from about 1999, to June 2018. He used nitrous oxide from about June 2014 to about January 2020. He used MDMA (molly) in about June 2018. He used amyl nitrate (poppers) with varying frequency from about June 2013 to about June 2017.

In his 2020 SCA, Applicant stated his intent to continue using both amyl nitrates and nitrous oxide in the future. He told a government investigator during a 2021 interview that he no longer intended to continue using illegal drugs in the future, except for nitrous oxide, which he intended to use again, but not regularly. He also admitted to socializing with individuals who use illegal drugs at least twice a year. In his answer to the SOR, Applicant denied any intent to use illegal drugs in the future.

AG ¶ 25 provides disqualifying conditions that could raise a security concern and may be disqualifying in this case:

(a) any substance misuse; and

(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The record established the above disqualifying conditions. An evaluation of applicable mitigating conditions is required.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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;

(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; 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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Considering the evidence as a whole, none of the mitigating conditions apply. Applicant has a long history of polysubstance possession and use, starting at age 18, in

1999, until age 39, in January 2020. He socializes with individuals who use drugs at least twice a year. He failed to establish that he has disassociated from his illegal substance-using friends and coworkers.

Applicant claimed he had not used marijuana after 2018, nitrous oxide after January 2020, amyl nitrate after June 2017, and that he only used MDMA once in 2018. After stating his intent to continue using both amyl nitrates and nitrous oxide in his March 2020 SCA, he told an investigator in June 2020 that he intended to use only amyl nitrate, but not regularly. In his January 2021 answer to the SOR, Applicant denied any intent to use illegal drugs in the future.

Considering Applicant's polysubstance misuse of about 21 years, his reluctance to forego using some of the substances, his failure to show he disassociated from his illegal substance-using friends, and the lack of evidence of substance abuse counseling or treatment, the passage of time so far is insufficient to establish that his substance misuse is unlikely to recur. Applicant's polysubstance misuse and possession cast doubt on his current reliability, trustworthiness, good judgment, and his ability or willingness to comply with laws, rules, and regulations.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. SEAD 4, App. A, ¶¶ 2(a) and 2(d). I have incorporated my comments under Guideline H in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant is a 41-year-old employee of a federal contractor. He has been working for his employer since September 2019. His polysubstance misuse between 1999 and 2020 shows lack of judgment and his unwillingness to comply with federal rules and regulations. It raises serious questions about his current reliability, trustworthiness, and ability to protect classified or sensitive information. Considering the record as a whole, the passage of time since his most recent polysubstance use is insufficient to establish that his polysubstance use is unlikely to recur. The drug involvement and substance misuse security concerns are not mitigated.

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 - 1.d:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest of the United States to grant Applicant's eligibility for a security clearance. Clearance is denied.

JUAN J. RIVERA
Administrative Judge