



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



In the matter of:)
)
) ISCR Case No. 21-02491
)
Applicant for Security Clearance)

Appearances

For Government: Nicholas T. Temple, Esquire, Department Counsel
For Applicant: *Pro se*

06/02/2022

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 May 11, 2021, 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 November 17, 2021. On December 8, 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 7, 2022, 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 February 14, 2022, 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 March 8, 2022. His response was due on April 7, 2022. Applicant chose not to respond to the FORM, for as of April 26, 2022, no response had been received. The case was assigned to me on May 19, 2022. The record closed on April 7, 2022.

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.g.). Applicant's admissions are incorporated herein as findings of fact. At some point between January 7, 2022, and February 11, 2022, SOR ¶ 1.b. was withdrawn. 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 29-year-old employee of a defense contractor. He has been serving as a mechanical engineer with his current employer since July 2014. A 2010 high school graduate, he received a bachelor's degree in May 2014. Although he had previously applied for a security clearance, his eligibility was denied in 2016, essentially because of drug involvement and substance misuse, personal conduct, and issues regarding his candor over the frequency of his drug involvement and substance misuse. (Item 3 at 83-84) He has never served with the U.S. military. He has never been married.

Drug Involvement and Substance Misuse

Applicant was a recreational or experimental multi-substance abuser whose substances of choice during an 13-year period were tetrahydrocannabinol (THC), known as marijuana [used for recreation and to assist him to sleep for leisure and enjoyment somewhere between 150 and 300 times from about July 2008 to about April 2021]; psilocybin mushrooms [used four times from June 2014 to about January 2019]; and methylenedioxymethamphetamine (MDMA), also known as Ecstasy [used out of curiosity one time about July 2016] – all Schedule I Controlled Substances; amphetamine (the prescription medication Adderall® which was not prescribed for him) [used out of curiosity and to assist him to focus on a college paper once in about February 2011]; and cocaine

[used out of curiosity two times from about August 2017 to about January 2019] – both Schedule II Controlled Substances; and Ketamine (a prescription drug used primarily for induction and maintenance of anesthesia and for its hallucinogenic and dissociative effects which was not prescribed for him [used once out of curiosity] – a Schedule III Controlled Substance. (Item 2 at 2-4; Item 3 at 77-81; Item 4 at 10-11; (<https://www.deadiversion.usdoj.gov/schedules/>; 21 U.S.C. § 812 (c)) He purchased the marijuana he used under 50 times while in high school and college before marijuana became legalized in the state in which he was residing. (Item 3 at 80-81)

Applicant was interviewed by an investigator from the U.S. Office of Personnel Management (OPM) on June 17, 2021. He acknowledged his involvement in the illegal use of controlled substances, including his misuse of prescription drugs, as described above. With one exception, he claimed he could not recall the identities of the individuals from whom he obtained his drugs or with whom he used the substances. (Item 4 at 10-11)

With regard to Applicant's future intentions, he placed the drugs in separate categories. In order to obtain and retain a security clearance, he is willing to abstain from certain substances so long as they remain illegal and he has a security clearance. However, if they become legalized, or if he no longer has a security clearance, he may return to using them. Marijuana and psilocybin mushrooms fall within that category. As for cocaine, Ecstasy, and Ketamine, because he did not enjoy them when he tried them, he had no intentions of using them in the future. (Item 3 at 77-80; Item 4 at 11)

However, past performance and actions may, instead, prove to be more reliable than stated future intentions. As noted above, in 2016, Applicant's eligibility for a security clearance was denied essentially because of drug involvement and substance misuse, personal conduct, and issues regarding his candor over the frequency of his drug involvement and substance misuse. Nevertheless, although he has been employed by a defense contractor since 2014, and he had applied for a security clearance, Applicant continued to experiment with a number of the above identified substances as well as regularly continue to use other illegal substances, regardless of the fact that such use was illegal in most instances.

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.

In addition, on December 21, 2021, the DNI issued Memorandum ES 2021-01529, *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*, which states in part:

. . . disregard of federal law pertaining to marijuana remains relevant, but not determinative, to adjudications of eligibility for access to classified information or eligibility to hold a sensitive position. . . .

Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 . . . , Questionnaire for 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, Schedule II, and Schedule III Controlled Substances. He frequently purchased and used marijuana; consumed psilocybin mushrooms; used Ecstasy; used the prescription medications Adderall® and Ketamine which were 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, his intentions are considered essentially contingent on his holding a security clearance and the legality of the substance(s) in question. The legality obviously had no bearing on his use of various substances in the past, and he continued to use them. 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 13 years of regular multi-substance drug involvement and substance misuse, and one failed attempt to obtain a security clearance, Applicant continued using Ecstasy as recently as July 2016; using Ketamine as recently as April 2018; using cocaine until as recently as January 2019; consuming psilocybin mushrooms as recently as January 2019; and purchasing and using marijuana until as recently as April 2021. His misuse of Adderall® took place a decade earlier. He was actually open about his use of illegal substances when he completed his SF 86, responded to the investigator's questions, and answered the SOR, and for that candor, he is given some credit. While he has acknowledged his drug involvement, he has offered no 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; or disassociation from drug-using associates and contacts.

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 13 years of multi-substance use and misuse, the relatively brief period of approximately one year of reported unverified abstinence is considered insufficient to conclude that the abstinence, or promise of contingent abstinence, will continue, especially after he admitted using various drugs after unsuccessfully applying for a security clearance in 2016, and now offering a contingent promise regarding future substance abuse.

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 casual, experimental, repeated, or regular use of all of the identified substances; his repeated purchase of marijuana; and his misuse of prescription drugs without possessing a prescription for the drugs despite knowing that such use was prohibited; his failure to furnish information regarding his drug-using friends; the absence of any drug-counseling or treatment; and his apparent 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 29-year-old employee of a defense contractor. He has been serving as a mechanical engineer with his current employer since July 2014. A 2010 high school graduate, he received a bachelor's degree in May 2014. When completing his SF 86, he was candid in acknowledging that he had used a variety of illegal substances. When questioned by an OPM investigator, he was candid regarding his illegal drug involvement and substance misuse. His professed claims regarding future intentions were actually contingent upon certain factors. He claims, without verifiable support, that he has been abstinent since April 2021.

The disqualifying evidence under the whole-person concept is more substantial. Over a 13-year period, Applicant was admittedly a recreational multi-substance abuser of a variety of Schedule I, Schedule II, and Schedule III Controlled Substances. He frequently purchased and used sold marijuana; consumed psilocybin mushrooms; used Ecstasy; used the prescription medications Adderall® and Ketamine, neither of which were 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, his intentions are considered essentially contingent on his holding a security clearance and the legality of the substance(s) in question. The legality obviously had no bearing on his use of various substances in the past, and he continued to use them, even after a failed application for a security clearance in 2016. His failure to furnish information regarding his drug-using friends; the absence of any drug-counseling or treatment; and his apparent 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., and 1.c. through 1.g.:	Against Applicant
Subparagraph 1.b.:	Withdrawn

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