



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



In the matter of:)
)
) ISCR Case No. 23-00065
)
Applicant for Security Clearance)

Appearances

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

07/11/2023

Decision

HARVEY, Mark, Administrative Judge:

Guideline H (drug involvement and substance misuse) security concerns are not mitigated, and eligibility for access to classified information is denied.

Statement of the Case

On August 5, 2022, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Item 4). On February 1, 2023, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Item 1)

The SOR detailed reasons why the CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline H. (Item 1)

On February 16, 2023, Applicant provided a response to the SOR, and he requested a decision without a hearing. (Item 3) Department Counsel completed a File of Relevant Material (FORM). Department Counsel included Items 1-5 as exhibits with the FORM; Applicant did not object, and Items 1-5 were admitted into evidence. On April 5, 2023, Applicant received the FORM. Applicant did not respond to the FORM. On June 28, 2023, the case was assigned to me.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Findings of Fact

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.a through 1.h. (Item 3) He also provided mitigating information. (*Id.*) Applicant's admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 24-year-old systems engineer who is employed by a DOD contractor. (Item 4 at 5, 15) In 2017, he graduated from high school. (*Id.* at 13) In 2021, he was awarded a bachelor's degree. (*Id.* at 14) He is not married, and he does not have any children. (*Id.* at 24-25) He disclosed his involvement with marijuana, LSD, cocaine, and nitrous oxide, and his abuse of prescription drugs Adderall, Xanax, and Vyvanse on his SCA. (*Id.* at 36-42) He has never been arrested. (*Id.* at 35) He does not abuse alcohol. (*Id.* at 42-43) He does not have any disclosable delinquent financial accounts. (*Id.* at 43-44) He has not had any security violations. (*Id.* at 44-45) The information provided during his Office of Personnel Management interview about his drug involvement and substance misuse was consistent with his disclosures on his SCA. (Item 5)

Drug Involvement and Substance Misuse

The SOR states as follows:

SOR ¶¶ 1.a and 1.b allege from about December 2019 to about May 2022, Applicant used the prescription medications Adderall and Vyvanse with varying frequency without a prescription.

SOR ¶¶ 1.c and 1.d allege from about August 2013 to about January 2022, Applicant purchased, used, and sold marijuana with varying frequency.

SOR ¶ 1.e alleges from about December 2019 to about January 2022, Applicant used, purchased, and sold cocaine with varying frequency.

SOR ¶ 1.f alleges in about November 2019, Applicant used and purchased Xanax, which was not prescribed to him.

SOR ¶ 1.g alleges in about March 2019, Applicant used lysergic acid diethylamide (LSD).

SOR ¶ 1.h alleges in about February 2018, Applicant used nitrous oxide.

Applicant used Adderall and Vyvanse when he was studying. (Item 3 at 1-2) He maintains a healthy lifestyle. (*Id.*) He engages in daily exercise, eats a careful diet, manages his time, and maintains a consistent sleep schedule. (*Id.*) He acknowledged his marijuana, cocaine, and Xanax uses were not healthy and could adversely affect his future. (*Id.* at 1-3) His marijuana purchases and sales averaged “no more than 30 dollars, if not less.” (*Id.* at 2) He purchased and sold cocaine on 7 to 13 occasions. (*Id.* at 3) He used Xanax on one occasion. (*Id.*) He used LSD and nitrous oxide on one occasion when he was in college. (*Id.*) He acknowledged that “LSD is extremely powerful and heavily impairs the user.” (*Id.*) He said, “Nitrous oxide is an extremely damaging drug to one’s brain, and I can’t believe how stupid I was to try it even once.” (*Id.*) He does not intend to use, purchase, or sell marijuana or cocaine or abuse prescription drugs in the future. (*Id.* at 2-4)

Applicant wants to be the best possible employee. (Item 3 at 4) He passed his employer’s urinalysis test around July or early August 2022. (*Id.*) He volunteered to submit to future urinalysis tests to establish he is not using illegal drugs. (*Id.*) He concluded his statement: “I love and have so much passion for my job, and I hope I am granted this clearance so that I continue helping and pursuing our company’s mission.” (*Id.*)

In the FORM, Department Counsel described Applicant’s security-significant behavior and noted the absence of persuasive mitigation. The FORM informed Applicant that he had 30 days from the receipt of the FORM “**in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate.** . . . If [Applicant does] not file any objections or submit any additional information . . . [his] case will be assigned to an Administrative Judge for a determination based solely” on the evidence set forth in this FORM. (FORM at 6 (emphasis added)) Applicant did not provide any response to the FORM.

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.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s

overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information. 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 it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “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 guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Drug Involvement and Substance Misuse

AG ¶ 24 provides the security concern arising from drug involvement and substance misuse stating:

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.

AG ¶ 25 provides conditions that could raise a security concern and may be disqualifying in this case: "(a) any substance misuse (see above definition)"; and "(c) illegal possession of a controlled substance. . . ." The record establishes AG ¶¶ 25(a) and 25(c). Additional discussion will be in the mitigation section, *infra*.

AG ¶ 26 lists four conditions that could mitigate security concerns:

(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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA 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, [App. A] ¶ 2(b).

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c). Possession of controlled substances without a lawful prescription is a federal criminal offense. For marijuana, a lawful prescription is not authorized under federal law. The following substances are listed on Schedules I, II, and IV: marijuana (I); LSD (I); cocaine (II); Adderall (II); Vyvanse (II); and Xanax (IV). See Drug Enforcement Administration listing of controlled substances on Schedules I through IV at https://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf. Nitrous oxide is not listed on Schedules I through IV. Nitrous oxide is a dangerous inhalant. See DEA Fact Sheet, Inhalants, https://www.dea.gov/sites/default/files/2020-06/Inhalants-2020_1.pdf. Use of nitrous oxide can cause physical or mental impairment when used in a manner inconsistent with its intended purpose. (*Id.*)

The Security Executive Agent (SecEA) promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications as follows:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a “whole-person concept.” This requires adjudicators to carefully weigh a number of variables in an individual’s life to determine whether that individual’s behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. 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 (SF-86), Questionnaire for National Security Positions.

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 (Dec. 21, 2021) at 2 (quoted in ISCR Case No. 20-02974 at 3-4 (App. Bd. Feb. 1, 2022)).

From about December 2019 to about May 2022, Applicant used the prescription medications Adderall and Vyvanse with varying frequency without a prescription. From about August 2013 to about January 2022, he purchased, used, and sold marijuana with varying frequency. From about December 2019 to about January 2022, he used, purchased, and sold cocaine with varying frequency. In about November 2019, he used and purchased Xanax, that was not prescribed to him, and in about March 2019, he used LSD. In about February 2018, he used nitrous oxide in a manner inconsistent with its intended purpose.

Applicant provided some important mitigating information. He voluntarily disclosed his drug involvement and misuse during the security clearance process. He made important changes in his lifestyle, and he promised that he would not abuse drugs in the future.

However, notwithstanding this mitigating information, I am not convinced his extensive drug involvement and substance misuse “happened under such circumstances that it is unlikely to recur [and] does not cast doubt on [his] current reliability, trustworthiness, [and] good judgment.” More time without abuse of drugs is needed to increase assurance that future drug involvement and substance misuse will not recur. Guideline H security concerns are not mitigated at this time.

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 AG ¶ 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 AG ¶ 2(c), “[t]he 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. My comments under Guideline H are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 24-year-old systems engineer who is employed by DOD contractor. In 2021, he was awarded a bachelor’s degree. He disclosed his involvement with marijuana, LSD, cocaine, and nitrous oxide, and his abuse of prescription drugs Adderall, Xanax, and Vyvanse on his SCA. He has never been arrested. He does not abuse

alcohol. He does not have any disclosable delinquent financial accounts. He has not had any security violations. The information provided during his Office of Personnel Management interview about his drug involvement and substance misuse was consistent with his SCA.

The evidence against grant of a security clearance is more substantial at this time. From August 2013 to May 2022, Applicant possessed, used, or sold multiple substances listed in Schedule I, II, and IV of the Controlled Substance Act. He was involved with marijuana, LSD, cocaine, and nitrous oxide, and he abused prescription drugs Adderall, Xanax, and Vyvanse.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No.12-00270 at 3 (App. Bd. Jan. 17, 2014)).

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With a longer track record of behavior consistent with his obligations, he may be able to demonstrate persuasive evidence of his security clearance worthiness. I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate drug involvement and substance misuse security concerns.

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 through 1.h: Against Applicant

Conclusion

In light of all of the circumstances in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge