



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



In the matter of:)
)
) ISCR Case No. 23-00662
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esquire, Department Counsel
For Applicant: *Pro se*

09/07/2023

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding drug involvement and substance misuse and personal conduct. Eligibility for a security clearance is denied.

Statement of the Case

On October 6, 2022, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On December 5, 2022, an investigator from the U.S. Office of Personnel Management (OPM) interviewed him. On April 5, 2023, the Department of Defense (DOD) 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 Guideline E (Personal Conduct) and detailed reasons why the

DOD 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.

On April 6, 2023, 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 him by the Defense Office of Hearings and Appeals (DOHA) on May 8, 2023, 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, he was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on May 12, 2023. His response was due on June 12, 2023. Applicant chose not to respond to the FORM, for as of June 15, 2023, no response had been received. The case was assigned to me on August 1, 2023, and there was still no response to the FORM.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with substantial comments, the factual allegations pertaining to drug involvement and substance misuse (SOR ¶¶ 1.a. through 1.c.) and the personal conduct allegation (SOR ¶ 2.a.). 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 24-year-old employee of a defense contractor. He has been serving as a mechanical engineer with his current employer since November 2020. He previously worked for other employers as a line cook (June 2020 – November 2020); and meat department worker (August 2018 – May 2020). A 2016 high school graduate, he received a bachelor's degree in 2020. He has never served with the U.S. military. He has never held a security clearance. He has never been married.

Drug Involvement and Substance Misuse, and Personal Conduct

Applicant was an illegal substance user whose substance of choice was marijuana – also known as tetrahydrocannabinol (THC) – a Schedule I Controlled Substance. (<https://www.deadiversion.usdoj.gov/schedules/>; 21 U.S.C. § 812 (c)) He first started using marijuana in June 2016 while he was in high school, either alone or with a friend approximately one time every four months. His use of marijuana increased to daily while in college in October 2018, and he did so either alone or while with friends. Although Applicant contends that he was aware that smoking marijuana was illegal under federal law at the time he used it, he denied knowing that his employer – a defense contractor – had a policy or procedure regarding marijuana use. (Item 4 at 4) Nevertheless, from September 2020 until October 2020, in preparation of being hired by his current employer, and with the anticipation of being administered a drug test, he ceased his marijuana use.

Once he was hired in November 2020, he resumed his daily use of marijuana. In September 2022, in anticipation of obtaining a security clearance, he again purportedly stopped using marijuana. In April 2023, he claimed that he has not resumed using marijuana. (Item 2 at 1; Item 3 at 33-35; Item 4 at 3-4)

Applicant claims that he has no interest in using marijuana in the future and no longer socializes with individuals who use drugs illegally. (Item 2 at 1; Item 4 at 2) However, as noted by Department Counsel, as of June 2023, Applicant had not submitted 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 had not submitted verifiable proof that he had disassociated himself from drug-using associates and had avoided the environments where drugs are used.

Applicant initially purchased approximately 1/8th of an ounce of marijuana (\$35 per purchase) one time every four months from local area dealers whose names he could not recall. In October 2018, he increased his purchases to 1/8th of an ounce of marijuana (\$60 per purchase) one time every three weeks from unnamed local dealers and recreational dispensaries. (Item 4 at 1) His marijuana purchases took place in three different states. (Item 3 at 35)

There is no evidence to indicate that Applicant ever reported his marijuana use to his employer's security manager or to anyone else where he worked.

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 several 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 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 two 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
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Commencing in about January 2016, Applicant used marijuana – a Schedule I Controlled Substance – sometimes periodically but more frequently daily, until at least September 2020 until October 2020. He stopped in preparation of being hired by his current employer, and with the anticipation of being administered a drug test. Once he was hired in November 2020, he resumed his daily use of marijuana, again stopping In September 2022, in anticipation of obtaining a security clearance. In April 2023, he claimed that he has not resumed using marijuana. During the periods of his marijuana use, Applicant also purchased marijuana. AG ¶¶ 25(a) and 25(c) have been established. While it appears that the position that Applicant has held since November 2020 might be a sensitive position, there is no evidence other than speculative evidence that it is a sensitive position, and thus AG ¶ 25(f) has not 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.

AG ¶ 26(b) minimally applies, but the other mitigating condition does not apply. As noted above, Applicant progressed from a periodic marijuana user to a daily marijuana user. Nevertheless, from September 2020 until October 2020. In preparation of being

hired by his current employer, and with the anticipation of being administered a drug test, Applicant temporarily ceased his marijuana use. Once he was hired in November 2020, he resumed his daily use of marijuana. In September 2022, in anticipation of obtaining a security clearance, although he claimed to have no knowledge of any employer policy or procedure regarding marijuana use, he again purportedly stopped using marijuana. In April 2023, he claimed that he has not resumed using marijuana.

Although Applicant claims that he has no interest in using marijuana in the future and no longer socializes with individuals who use drugs illegally, Applicant had not submitted 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 had not submitted verifiable proof that he had disassociated himself from drug-using associates and had avoided the environments where drugs are used.

If Applicant's abstinence in 2020 had continued, there would be no security clearance eligibility issues before us today. But his abstinence was only temporary to avoid any possible urinalysis if he had been given one. Once the probability of a random urinalysis passed, he resumed his daily use of marijuana. However, a similar situation arose when he was sponsored for a security clearance. He again supposedly stopped using marijuana in September 2022. During his December 2022 OPM interview, he claimed to have no future interest in marijuana. To his credit, Applicant did report his use of marijuana on his SF 86 and discussed that use candidly with the OPM investigator. However, after repeated efforts to evade the system with temporary periods of abstinence, Applicant has offered no verifiable justification to believe him now.

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 marijuana use, the relatively brief period of reported abstinence is considered insufficient to conclude that the abstinence will continue, especially after so many temporary interruptions indicating that he would no longer use marijuana. Applicant's use of marijuana for such a lengthy period, even though such use was prohibited by both the Federal Government and government contractors, continues to cast doubt on his current reliability, trustworthiness, and good judgment.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in

an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

¶ 16: The guideline also includes conditions that could raise security concerns under AG

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing. . . .

My discussions related to Applicant's drug involvement and substance misuse are adopted herein. In fact, the cross-allegation under Guideline E refers to one of the allegations under Guideline H, and the credible adverse information alleged under Guideline H is sufficient for an adverse determination solely under that single guideline. AG ¶ 16(e) has been established, along with the general concern under AG ¶ 15 that Applicant's conduct involves questionable judgment and unwillingness to comply with rules and regulations that raises questions about his reliability, trustworthiness, and ability to protect classified or sensitive information.

The guideline also includes an example of a condition under AG ¶ 17 that could mitigate security concerns arising from personal conduct. It includes:

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

The condition does not apply. Applicant has acknowledged using marijuana for several years. He is aware that marijuana is illegal on the federal level but denied knowing that it was prohibited while employed as a DOD contractor. Ignorance of the law is no excuse. While he has acknowledged the behavior involving repeated use of marijuana, he has never obtained counseling to change his behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that motivated him to indulge in using marijuana. He has failed to furnish any verifiable evidence to support his claimed

abstinence. Applicant's actions under the circumstances 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 considering 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 24-year-old employee of a defense contractor. He has been serving as a mechanical engineer with his current employer since November 1920. He previously worked for other employers as a line cook and meat department worker. A 2016 high school graduate, he received a bachelor's degree in 2020. Applicant was candid in his SF 86 and spoke freely with the OPM investigator regarding his marijuana use.

The disqualifying evidence under the whole-person concept is more substantial. Applicant started using marijuana – a Schedule I Controlled Substance – in January 2016 and progressed from being a periodic marijuana user to a daily marijuana user. From September 2020 until October 2020, in preparation of being hired by his current employer, and with the anticipation of being administered a drug test, Applicant temporarily ceased his marijuana use. Once he was hired in November 2020, he resumed his daily use of marijuana. In September 2022, in anticipation of obtaining a security clearance, although he claimed to have no knowledge of any employer policy or procedure regarding marijuana use, he again purportedly stopped using marijuana. In April 2023, he claimed that he has not resumed using marijuana, but has offered no verifiable evidence to support his claim.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I

conclude Applicant has failed to mitigate the security concerns arising from his drug involvement and substance abuse and personal conduct. 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. through 1.c.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant

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