



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



In the matter of:)	
)	
)	ISCR Case No. 23-00172
)	
Applicant for Security Clearance)	

Appearances

For Government: Jenny Bayer, Esq., Department Counsel
For Applicant: *Pro se*

03/19/2024

Decision

LAFAYE, Gatha, Administrative Judge:

Applicant failed to provide sufficient evidence to mitigate security concerns raised under Guideline H (drug involvement and substance misuse). Eligibility for access to classified information is denied.

Statement of the Case

Applicant signed and submitted a security clearance application (SCA) on May 16, 2022. On March 2, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (CAS) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H. The CAS acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on June 8, 2017.

Applicant responded to the SOR on March 24, 2023, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on May 25, 2023, including Items 1 through 6.

On May 30, 2023, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. Applicant received the FORM on June 13, 2023. He responded without objection, and submitted a two-page memorandum dated July 5, 2023. The Government did not object to the submission.

Applicant's documentary evidence was marked as Applicant's Exhibit (AE) A. Items 1 through 6 and AE A, were admitted in evidence without objection. The case was assigned to me on September 28, 2023.

Findings of Fact

In his answer to the SOR, Applicant admitted all five allegations of drug involvement and substance misuse, SOR ¶¶ 1.a – 1.e. His admissions are incorporated in my findings of fact.

Applicant is 30 years old. He has worked as a financial analyst for a defense contractor since March 2017. He attended college from August 2012 through December 2016. He was awarded a bachelor's degree in December 2016. He subsequently attended an online college from August 2019 through December 2019, but did not complete a degree program. Applicant has never been married and does not have children. (Items 3, 4, and 6)

Applicant has been sponsored by the same major defense contractor since March 2017. He completed his first SCA in February 2017. In it, he disclosed that he used marijuana, with varying frequency, from about March 2015 through about November 2016. He disclosed receiving marijuana from his friends, and stated he only smoked it when they had some to share. He said that marijuana helped him to sleep. He estimated he used marijuana during this period "a couple dozen times." (Item 4 at 22-24) He denied any intent to use marijuana or any illegal drugs in the future, commenting as follows:

I do not intend to use this controlled substance in the future because I am focused on my career and I would never do anything that would put my career or the company in jeopardy. I want to be the best person/employee I can be and this is why I no longer use/intend to use this substance. (*Id.*)

On November 2, 2018, Applicant was granted a secret security clearance by DOD. He signed a non-disclosure agreement (NDA) on November 8, 2018, and has held a secret security clearance since. (Item 5 at 1-2) His employer is currently sponsoring him for a top-secret security clearance. (*Id.*)

In May 2022, Applicant completed his second SCA. (Item 3; Item 5 at 2) He disclosed additional illegal drug use and involvement, including that he used marijuana from about March 2015 to about October 2020. He discussed the nature and frequency of his illegal drug use as follows:

I smoked marijuana in college with friends or classmates at night as a social aspect. (2015-2017) Once I was hired at (major defense contractor) I did not participate in smoking marijuana for some time, but would on rare occasions if at a social event with friends and someone offered (2017-2019). Once I received my security clearance I stopped smoking marijuana, however in 2020 I made a mistake and smoked marijuana on the weekend a few times. I no longer enjoy the way it makes me feel along with the side effects. (Item 3 at 27-30)

When asked whether he used marijuana while possessing a security clearance, he responded “yes.” When asked whether he intended to use marijuana in the future, he responded “no,” stating:

I do not intend to use this controlled substance in the future because I no longer enjoy it due to side effects (paranoid, increased heart rate) and it made me feel uncomfortable. I love working at (major defense contractor) and my career is very important to me and so is the company. I want to be the best person/employee I can be and that is why I no longer use/intend to use this substance. (Item 3 at 28)

In his May 2022 SCA, Applicant also disclosed that he cultivated marijuana from about April 2020 to about December 2020. He stated he “grew a few marijuana plants,” five to six, in his backyard “for fun” and to keep himself busy during the pandemic. He stated he followed state laws for cultivating marijuana, and acknowledged his understanding that cultivating marijuana was illegal under federal law. He described his decision to cultivate marijuana as “just a one-time phase,” stating it was “purely a hobby” and that he also grew other vegetables. He stated he would not do this again. Applicant also admitted he cultivated marijuana while granted access to classified information or holding a sensitive position. He denied any future intent to cultivate marijuana, stating he destroyed all plants he owned when he left the place he rented. (Item 3 at 28-29; Item 6 at 4-5; Response to SOR ¶ 1.e)

In his May 2022 SCA, Applicant also admitted that he misused the prescription drug Adderall, from about February 2021 to about March 2021, after he was granted a security clearance. He received the Adderall from a family member who was legally prescribed the drug. Applicant stated he would consume Adderall “whenever work was very busy” during this period. (Item 3 at 30)

During his June 2022 interview with a government investigator, Applicant provided the following details about his history of illegal drug use. From March 2015 to about August 2016 he consumed marijuana about once every two weeks. From about January 2017 to about December 2018, he consumed it three to four times per month. He claimed he stopped using marijuana from about December 2018 until about January 2020. From January 2020 through about October 2020, he consumed marijuana two or three times per month. He said he primarily consumed marijuana with friends. They smoked

marijuana together at private residences, parties, and group gatherings at bars or other public venues. (Item 6 at 4)

Applicant stated he received marijuana from friends who would buy it legally at dispensaries in the state. However, from about April 2020 through about October 2020, he used marijuana that he cultivated at his residence. (*Id.*)

In his June 2022 investigative interview, Applicant admitted he knew marijuana was federally illegal, but stated he consumed it anyway because he enjoyed using it during interactions with his friends, and because it helped him sleep. He believed marijuana was harmless, and it helped him to feel relaxed. He stated he did not believe he would be drug-tested, although he was aware of his employer's drug prohibition policy. He indicated he would have side effects the next day: he would feel paranoid, lazy or lacking in focus, and his heart rate would increase. (*Id.*)

In his SOR Response, Applicant stated he had not been involved with marijuana or any controlled substances in more than two years, and stated he has no future intent to be involved with controlled substances. He also expressed regret for his past decisions to use illegal drugs, especially while holding a security clearance. He indicated he recently distanced himself from friends and the environment where he used illegal drugs. He said he was scheduling an evaluation with a psychiatrist, and that he planned to return to a "favorable prognosis." (SOR Response of March 24, 2023)

Applicant stated he received awards and recognition in several of his prior employment positions. For example, while working part-time as a banker from June 2014 through March 2017, Applicant was awarded a "Star" member services award for exceeding 10-times more loan referrals. He also received recognition for outstanding productivity, and for being 100% accurate in balancing his daily books. Applicant also earned an "outstanding customer service" award in another position, for going "above and beyond" expectations while serving shoppers, and mystery shoppers when he worked for a popular grocery chain. (GE 3 at 12-13)

Policies

"[N]o 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 applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." EO 10865 § 2.

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, an administrative judge applies these guidelines 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 and 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 that 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 made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” EO 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988); see AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse 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.

The guidelines note several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

AG ¶ 25(a): any substance misuse (see above definition);

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant's admissions and other record evidence establish the disqualifying conditions in AG ¶¶ 25(a), 25(c), and 25(f). For AG ¶ 25(f), though Applicant admitted his drug use occurred "while granted access to classified information," there is insufficient evidence to make a finding with respect to this aspect of the allegation, as defined in ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022), affirmed in ISCR Case No. 22-01661 at 4 (App. Bd. Sep. 21, 2023). I find that Applicant used marijuana "while holding a sensitive position" consistent with the Appeal Board's analysis in the above cited case. Applicant's admitted use and cultivation of marijuana, and his misuse of Adderall while holding a sensitive position are corroborated by the following: his detailed admissions in his SCAs, his June 2022 investigative interview, and evidence he was granted a secret security clearance and signed a DOD nondisclosure agreement in November 2018.

The allegation in SOR ¶ 1.d appears to address the same disqualifying conduct already alleged in SOR ¶ 1.b. Both allegations are listed below for ease of comparison:

SOR ¶ 1.b: You used prescription medication Adderall that was not prescribed to you, from about February 2021 to about March 2021, with varying frequency, while granted access to classified information or holding a sensitive position.

SOR ¶ 1.d: You used prescription medication Adderall that was not prescribed to you, from about February 2021 to about March 2021 with varying frequency.

The allegation in SOR ¶ 1.b is sufficient to allege disqualifying conduct within the scope of AG ¶¶ 25(a) and 25(f). SOR ¶ 1.d alleges the same disqualifying conduct, but only within the scope of AG ¶ 25(a). The Appeal Board has held that when the same

conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005). SOR ¶ 1.d, therefore, is resolved in Applicant's favor.

Guideline H lists conditions in AG ¶ 26 that could mitigate security concerns raised by disqualifying conditions listed above. The following are potentially applicable:

AG ¶ 26(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

AG ¶ 26(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(a) and 26(b) are not established. Applicant used marijuana from about March 2015 to about October 2020, including use and cultivation of marijuana after he was granted a security clearance, and while holding a sensitive position. He also admitted misusing the prescription medication Adderall as recently as March 2021 while holding a sensitive position.

Applicant admitted using marijuana in his first SCA, completed in February 2017. In that SCA, he admitted using marijuana from March 2015 through November 2016, and stated he did not intend to use marijuana in the future because he was career-focused and would not do anything to jeopardize it, or the defense company for whom he worked. Based on these assurances, the CAS granted him a security clearance in November 2018. Despite holding a secret security clearance, he continued to use marijuana "on rare occasions" with friends, up until about October 2020, as he disclosed in his second SCA completed in May 2022. His involvement with illegal drugs or controlled substances was not infrequent; nor did it happen under circumstances that are unlikely to recur. He has also maintained continuous relations with the same friends with whom he used drugs, though he states he has recently distanced himself from these friends. He has not provided a signed statement of intent to abstain from all drug involvement or substance misuse in the future.

Applicant's cultivation and use of illegal drugs after being granted a security clearance reflect poor judgment and raise questions about his reliability and trustworthiness. His statements and evidence are insufficient to overcome concerns and doubts about his current judgment, reliability, and willingness to comply with laws, rules, and regulations.

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 relevant 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), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline H in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline H and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his drug involvement. Overall, the record evidence leaves me with questions and doubts about his eligibility and suitability for a security clearance.

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.c, 1.e: Against Applicant
- Subparagraph 1.d: For Applicant

Conclusion

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.

Gatha LaFaye
Administrative Judge