



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



In the matter of:)
)
) ISCR Case No. 23-01549
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

02/28/2024

Decision

GALES, Robert Robinson, Administrative Judge:

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

Statement of the Case

On November 9, 2022, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On September 6, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) 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 J (criminal conduct) and detailed reasons why the DCSA CAS 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 September 15, 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 Applicant by the Defense Office of Hearings and Appeals (DOHA) on October 3, 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, Applicant was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on November 8, 2023. His response was due on December 8, 2023. The record closed on December 8, 2023. Applicant chose not to respond to the FORM, for as of December 15, 2023, no response had been received. The case was assigned to me on February 7, 2024.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with brief comments, the factual allegations pertaining to drug involvement and substance misuse (SOR ¶¶ 1.a. through 1.e.) and criminal conduct (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 23-year-old prospective employee of a defense contractor. He has been prospectively serving as a systems engineer with his current employer since November 2021. He previously held a variety of full-time and part-time positions and internships while he was a student in college. A 2019 high school graduate, he received a bachelor's degree in 2023. He has never served with the U.S. military. He has never been married. He has never been granted a security clearance.

Drug Involvement and Substance Misuse, and Criminal Conduct

Applicant was a social and recreational multi-substance abuser whose substances of choice during a seven-year period were tetrahydrocannabinol (THC), known as marijuana – a Schedule I Controlled Substance; Adderall, a combination of amphetamine and dextroamphetamine – central nervous system stimulants – used to treat attention deficit hyperactivity disorder (ADHD) and available only by prescription; cocaine – a stimulant and Schedule II Controlled Substance; and Xanax®, used to treat anxiety and panic disorder and available only by prescription. He purchased marijuana from dealers and used it with varying frequency with friends and roommates at home from about August 2015 to at least September 2022; used Adderall, prescribed for others and given to him and used with varying frequency to complete assignments from about October 2019 to at least September 2022); used cocaine at parties with varying frequency from

about December 2019 to at least September 2022; and used Xanax® that was prescribed for someone else and given to him and used at a party in about October 2020.

In addition, in order to generate money during the COVID-19 pandemic Applicant and his college roommates and close friends contributed hundreds of dollars to purchase half-pounds of marijuana that they would then sell and split the profits. He estimated that he sold a total of two and one-half pounds of marijuana over the course of two to three months between March and May 2021. (Item 2 at 34-38; Item 3 at 4-6)

In his SF 86, Applicant reported that he had “dabbled in smoking marijuana” throughout college and a little in high school. He estimated using marijuana 75 times in his entire life, and it was usually done with others and rarely alone. As for selling marijuana, he saw the practice as “a very low risk way to make some money. Did not see anyone getting hurt....” (Item 2 at 37)

Applicant has never received drug counseling or treatment and was never professionally diagnosed as abusing drugs or for being drug dependent. (Item 3 at 4-5) He claims that he does not intend to use any of the illegal substances or medications prescribed for others for the sake of his career; the lack of a social setting that he will be in; a lack of enjoyment; or danger of the substance. (Item 2 at 35-36)

Applicant acknowledged that the issues are serious and do violate Guideline H – without mentioning Guideline J – but he believes that the individuals interviewed on his behalf during his investigation should mitigate any concerns raised by the issues. He admits that there were individuals who contributed to his making poor decisions during his college experience. But he graduated and entered the next stage of his life and has removed the bad influences and situations. He takes full ownership and fully regrets his earlier decisions. He believes his overall character and good reputation show that he is worthy to be granted a security clearance. (Response to SOR) Applicant did not submit any character evidence to support his claimed overall character and good reputation.

Policies

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, sale, or distribution. . . ; 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 Schedule I and Schedule II Controlled Substances, as well as two medications that were prescribed for others but not for him. He frequently purchased marijuana, and, for a multi-month period, he sold and distributed large quantities of marijuana – an activity that he considered to be “a very low risk way to make some money,” where no one was getting hurt. He claims that he does not intend to use any of the illegal substances or medications prescribed for others for the sake of his career and other reasons. AG ¶¶ 25(a) and 25(c) have been established. Applicant claimed he has abstained and discontinued such misuse since September 2022. AG ¶ 25(g) 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;
- (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; and
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended.

AG ¶ 26(b) minimally applies. For about a seven-year period, commencing in 2015 while he was in high school and continuing until September 2022, Applicant was a frequent social and recreational multi-substance abuser. He regularly purchased, used, sold, and distributed marijuana; regularly used cocaine and Adderall, and used Xanax® on one occasion. As he described such substance abuse, it was a regular part of his everyday social and recreational life or assisted him in studying. He saw the practice of selling marijuana as “a very low risk way to make some money.” He essentially ignored the fact that selling or distributing marijuana was against the law. Applicant claims he stopped his involvement with drugs in September 2022 when he started to consider his future, and he does not intend to renew his involvement in the future. It is significant that he was candid about his involvement with illegal substances and wrongful use of prescription drugs when he completed his SF 86 and during his OPM interview, and for that candor, he is given substantial credit. Moreover, while he has apparently abstained since September 2022 – a period a little under a year and one-half – that period of abstinence is nowhere close to the seven years of regular drug activity. Nevertheless, such abstinence should continue to be encouraged. The above factors continue to cast doubt on his current reliability, trustworthiness, and good judgment.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30: Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

The guideline notes two conditions under AG ¶ 31 that could raise security concerns:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

My discussion related to Applicant's Drug Involvement and Substance Misuse is adopted herein. Commencing in about 2015 and continuing until about September 2022, Applicant was admittedly a recreational multi-substance abuser of Schedule I and Schedule II Controlled Substances (marijuana and cocaine) as well as two medications (Adderall and Xanax®) that were prescribed for others but not for him. He frequently purchased marijuana from drug dealers, and, for a multi-month period, he sold and distributed large quantities of marijuana – an activity that he considered to be “a very low risk way to make some money,” where no one was getting hurt. He essentially ignored the fact that possessing, purchasing, selling, or distributing marijuana, and possessing prescribed medications that were not prescribed for him, was a crime under federal law.

Furthermore, Applicant's relatively brief service as a drug dealer is substantially more serious than his simple possession of marijuana. Based on the actions described above, AG ¶¶ 31(a) and 31(b) have been established.

The guideline also includes examples of conditions under AG ¶ 32 that could mitigate security concerns arising from Criminal Conduct:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Neither condition applies. Appellant's criminal behavior occurred over a seven-year period, ending in September 2022. There is no evidence of criminal conduct since then – a period a little under a year and one-half. However, that period free from criminal conduct is nowhere close to his seven years of regular criminal activity. It is a positive factor that Applicant stopped his criminal behavior, and it is understandable why he is now trying to place that criminal history behind him. Under these circumstances, Applicant's criminal conduct continues 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 23-year-old prospective employee of a defense contractor. He has been prospectively serving as a systems engineer with his current employer since November 2021. He has previously held a variety of full-time and part-time positions and internships while he was a student in college. A 2019 high school graduate, he received a bachelor's degree in 2023. When completing his SF 86, he was candid in acknowledging that he had used a variety of illegal substances and medications that were prescribed for others. When questioned by an OPM investigator, he was again candid regarding his illegal drug involvement and substance misuse. He has abstained from all drug activities since September 2022, and claims that he will not resume such activities in the future.

The disqualifying evidence under the whole-person concept is more substantial. Commencing in 2015, while he was in high school, and continuing until September 2022, Applicant was a frequent social and recreational multi-substance abuser. He regularly purchased, used, sold, and distributed marijuana; regularly used cocaine and Adderall, and used Xanax® on one occasion. His substance abuse was a regular part of his every-day social and recreational life or assisted him in studying. He considered his drug-dealing practice of selling marijuana to be a very low risk way to make some money, essentially ignoring that selling or distributing marijuana was against the law. Despite his current abstinence, the relative recency of his involvement with drugs, when compared with the length of such activity, continues 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 and criminal conduct. See SEAD 4, App. A, ¶¶ 2(d) (1) through AG 2(d) (9).

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to be eligible for a security clearance. The determination of Applicant's eligibility and suitability for a security clearance is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under his current circumstances, a clearance is not warranted. In the future, he may well demonstrate persuasive evidence of his security worthiness.

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.e.:	Against Applicant
Paragraph 2, Guideline J:	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