



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



In the matter of:)
)
 _____) ISCR Case No. 23-01544
)
 Applicant for Security Clearance)

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: Christopher Snowden, Esq.

08/23/2024

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, and exhibits, Applicant did not mitigate drug concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

Statement of the Case

On August 25, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) issued a statement of reasons (SOR) to Applicant detailing reasons why under the drug involvement and substance misuse guideline the DCSA CAS could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, Department of Defense (DoD) Directive 5220.6 (January 2, 1992) (Directive); 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.

Applicant responded to the SOR on October 9, 2023, and requested a hearing. The case was assigned to me on April 17, 2024. A hearing was scheduled for June 20, 2024, and heard on the scheduled date. At the hearing, the Government's case consisted of two exhibits (GEs 1-2). Applicant relied on one witness (himself) and 21 exhibits. The transcript (Tr.) was received on June 28, 2024.

Procedural Issues

Before the opening of the hearing, the Government filed an amendment to the SOR that added the following allegations under SOR ¶ 1 of Guideline H: (b) used cocaine with varying frequency from about April 2017 until at least December 2022; (c) used hallucinogenic drugs (such as LSD, PCP, mushrooms, etc.) with varying frequency from about May 2014 until at least February 2017; and (d) used Ketamine with varying frequency from about October 2016 until at least January 2017. Applicant did not object to the Government's amendment and admitted the amended allegations in his November 14, 2023, supplemental response with explanations.

Prior to the closing of the hearing, I afforded the parties 14 days following the hearing to provide Appeal Board authorities for minimum periods of abstinence from cocaine use required to mitigate cocaine use. Neither of the parties provided any Appeal Board guidance on the minimum year of abstinence required to mitigate recurrence risks.

Summary of Pleadings

Under Guideline H, Applicant allegedly used marijuana and other federally-controlled drugs with varying frequency between 2012 and December 2022. By amendment, he (b) used cocaine with varying frequency from about April 2017 until at least December 2022; (c) used hallucinogenic drugs (such as LSD, mushrooms, etc.) with varying frequency from about May 2014 until at least February 2017; and (d), used Ketamine with varying frequency from about October 2016 until at least January 2017.

In his responses to the SOR and amended SOR, Applicant admitted the allegations covered by Guideline H with explanations. He claimed he used the cited drugs in the SOR infrequently and has ceased using them.

Findings of Fact

Applicant is a 27-year-old employee of a defense contractor who seeks a security clearance. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant never married and has no children. (GE 1; Tr. 74-75) He earned a high school diploma in May 2017 and attended college classes between August 2015 and December 2017 without earning a degree or diploma. (GE 1 and AE A) More recently,

he has returned to community college to enhance his engineering training and job skills. (GE 1; Tr. 19, 41-42) He reported no military service.

Since February 2023, Applicant has been employed by his current employer as an engineering technician. (AE A; Tr. 23, 38) He continues to co-own with his sister a cultivating plant business. (GEs 1-2) Previously, he worked for other employers in various jobs. (GEs 1-2) Applicant has never held a security clearance. (GE 1; Tr. 23)

Applicant's drug history

Applicant was introduced to marijuana in 2012 while in high school. (GEs 1-2) During his high-school and post-high school years (May 2012 through December 2022), he smoked marijuana four to five times a week on average. (GEs 1-2; Tr. 25-26) He attributed his use of the substance to boredom after breaking up with his girlfriend. (GE 2) He obtained his marijuana from friends and limited his use to parties and social events. (Tr. 29)

Over time, Applicant became disenchanted with the effect that marijuana was having on his health and quit using it in 2020 for several months before resuming his use of the drug (estimated twice a week) later in 2020. (GE 2; Tr. 26-27) In search of a healthier lifestyle, he ceased using marijuana altogether in December 2022 and no longer associates with persons who use marijuana. (Tr. 29)

Besides marijuana, Applicant used multiple other federally-controlled drugs. Between April 2017 and December 2022, he used cocaine two to three times a week, either at home, at social events and parties, or whenever opportunities were presented. (GE 2; Tr. 30-31) The cocaine was furnished to him by a local friend. Cocaine use made him feel hyper-active, and he ceased using the drug in December 2012, weeks before he applied for work with his current employer. (GEs 1-2; Tr. 31) He assured that he has no intention of ever using cocaine again and shed his past relationships and contacts with cocaine users and sources. (GEs 1-2 and AE P; Tr. 32) Pleased with his life without drugs, he assured he has no intention of ever using illegal drugs again.

Other controlled drugs used by Applicant consisted of hallucinogenic drugs (between May 2014 and February 2017) and Ketamine (between October 2016 and January 2017). (GEs 1-2; Tr. 35-39) The mushrooms and LSD were supplied by friends who Applicant later reimbursed. (Tr. 49) He used these drugs infrequently (only one or two times with the mushrooms and 20 to 30 times with the LSD). Introduced to Ketamine by his ex-girlfriend, he tried the drug out of curiosity and used it infrequently over a four-year period before permanently abandoning his use of the drug in February 2017. (GE 2; Tr. 39-41)

Since giving up illegal drugs, Applicant is able to think more clearly and enjoy a much healthier lifestyle. (GE 2; Tr. 51) He credited his intended employment applications (inclusive of his current employer) with his *a priori* decision to abandon all illegal drug use in December 2022. (Tr. 48-49) In four non-randomized drug tests

conducted by his current employer in 2023 and 2024, he received negative test results for controlled substances. (AEs F and L-O) Applicant also completed an on-line course covering illegal drugs in 2024. (AE P) Throughout the investigative process, Applicant has been completely honest and upfront about his past use of illegal drugs. His assurances of sustained abstinence from illegal drug use since December 2022 and expressed intentions to avoid illegal drugs in the future and disassociate from old friends who used drugs are credible and accepted.

Endorsements and performance evaluations

Applicant is well-regarded by his program manager, co-workers, and friends who have known him for many years. (AEs G-K and S-U) They consider him a reliable and trusted engineer technician, who responsibly and proficiently develops, maintains, and coordinates highly technical projects. Uniformly, they credit Applicant with being professional, trustworthy, hardworking, and steadfast in executing his duties. Most of his references, however, expressed no knowledge or awareness of his past use of marijuana and other illegal drug products. His program manager credited him with meeting all of his performance requirements and consistently exemplifying the values and leadership qualities stressed by his employer. (AE G)

Policies

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), “no one has a ‘right’ to a security clearance.” 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. Eligibility for access to classified information may only be granted “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 AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These AG guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified information. The AG guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any. These guidelines must be considered before deciding whether or not a security clearance should be granted,

continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Drug Involvement and Substance Abuse

The Concern: The illegal use of controlled substances, to include the misuse of 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.

Burdens of Proof

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. See also Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

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

Security concerns are raised over Applicant’s recurrent use of federally-controlled marijuana and other illegal drug products over a number of years. Applicant’s admissions of his involvement with marijuana and other illegal drugs warrant the application of two disqualifying conditions (DCs) of the AGs for drug involvement and substance misuse to Applicant’s situation. DC ¶¶ 25(a), “any substance misuse” and 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of illegal drugs or drug paraphernalia,” apply to Applicant’s situation.

To his credit, Applicant has committed to abandoning all use and involvement with marijuana and other illegal drugs and has remained abstinent from marijuana and cocaine use, respectively, for over 18 months. Currently, he exhibits no visible signs or indications of succumbing to any risks or pressures he might encounter to return to illegal drug use and involvement in the foreseeable future. However, while the Appeal Board has not provided any bright lines for the sustaining of abstinence of cocaine use, it has consistently stressed the importance of vigilance and caution when assessing recurrence risks for dangerous drugs like cocaine. An abstinence period of only 18-plus months does not achieve the amount of risk-free confidence in the avoidance of recurrence needed to make safe predictive judgments about his ability to sustain his abstinence from cocaine use resumption.

So, based on Applicant's furnished abstinence time line of his recurrent marijuana and cocaine use, his entitlement to reliance on the mitigation benefits of MC ¶ 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," is still too soon to receive the full benefit of MC ¶ 26(a). This is not to minimize his honesty and candor about his past drug use that he displayed throughout the investigation process, or the trust and reliability he has engendered with his program manager and colleagues at work.

Whole-person assessment

From a whole-person perspective, Applicant has not established enough independent probative evidence of his ability to avert recurrence risks of illegal drug use (especially cocaine). At this time, while he has added considerable positive reinforcements, his time in sustained abstinence from active use and involvement with illegal drugs is not enough to facilitate safe predictions he is at no risk of recurrence. Considering the record as a whole, and granting due weight to Applicant's positive commitments to abstinence and his defense contributions, there is insufficient probative evidence of sustainable mitigation in the record to make safe, predictable judgments about his ability to avoid illegal drugs in the foreseeable future.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person, I conclude drug involvement and substance abuse security concerns are not mitigated. Eligibility for access to classified information is denied.

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:

GUIDELINE H (DRUG INVOLVEMENT): AGAINST APPLICANT

Subparagraphs 1.a-1.d: 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.

Roger C. Wesley
Administrative Judge