



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 19-03527
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: Michael V. Davis, Esq.

05/12/2022

Decision

MALONE, Matthew E., Administrative Judge:

Applicant used illegal drugs five times between 2012 and 2018, at times while holding a security clearance. There has been no recurrence of that conduct in four years and his current lifestyle makes future drug use unlikely. Available information is sufficient to mitigate the security concerns raised by Applicant’s use of illegal drugs. His request for a security clearance is granted.

Statement of the Case

On December 6, 2018, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to renew his eligibility for a security clearance required for his employment with a federal contractor. Based on the results of the ensuing background investigation, adjudicators for the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) could not, as required by

Security Executive Agent Directive (SEAD) 4, Section E.4, and by Department of Defense (DOD) Directive 5220.6, as amended (Directive), Section 4.2, make an affirmative determination that it is clearly consistent with the interests of national security for Applicant to continue to have access to classified information.

On May 18, 2020, the DCSA CAF issued a Statement of Reasons (SOR) alleging facts that raise security concerns under the adjudicative guideline for drug involvement and substance misuse (Guideline H). The guideline cited in the SOR was one of the adjudicative guidelines (AG) issued by the Director of National Intelligence on December 10, 2016, to be effective for all security clearance adjudications on or after June 8, 2017.

Applicant timely responded to the SOR (Answer) and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on October 25, 2021, and I scheduled a hearing for February 25, 2022. The parties appeared as scheduled.

Department Counsel proffered Government Exhibits (GX) 1 and 2. Department Counsel also provided a copy of a Discovery Letter to Applicant, dated November 24, 2020, and a Government's Exhibit List. They are included in the record as Hearing Exhibits (HX) 1 and 2, respectively. Applicant and one other witness testified. Applicant also proffered Applicant Exhibits (AX) A and B. All exhibits were admitted without objection. The record closed at the end of the hearing, and I received a transcript of the hearing (Tr.) on March 4, 2022.

Findings of Fact

Under Guideline H, the Government alleged that Applicant used marijuana with varying frequency between June 2012 and February 2018, at times while holding a security clearance (SOR 1.a); and that he used cocaine in about March 2016 while holding a security clearance (SOR 1.b). In response, Applicant admitted, with explanations, both of the SOR allegations (Answer). In addition to the facts established by Applicant's admissions, I make the following findings of fact.

Applicant is 38 years old and has worked for a defense contractor since November 2018 in a position that requires eligibility for a security clearance. He served on active duty in the U.S. military between June 2006 and June 2016, when he received an honorable discharge. Applicant first received a security clearance after completing basic training in 2006. Applicant was married between 2007 and 2012, when he and his ex-wife divorced. He has no children. (GX 1 and 2)

In his e-QIP, Applicant disclosed that he smoked or ingested marijuana, once in June 2012 and once in February 2018. He also listed that he used cocaine once in March 2016. He discussed those disclosures with a government investigator during a personal subject interview (PSI) on January 22, 2019. In a February 3, 2020, response to interrogatories (RTI) about his use of illegal drugs, Applicant disclosed that in August or

September 2016, he used marijuana, an event he had not recalled when he completed his e-QIP or during his PSI. He also disclosed in the RTI that in 2017, he unintentionally ingested an illegal drug when he ate a brownie he did not know contained tetrahydrocannabinol (THC), the active psychoactive ingredient in marijuana. (Answer; GX 1; GX 2; Tr. 26 – 30)

Applicant's first use of marijuana occurred while he was on extended military leave during a permanent change of stations (PCS) in June 2012. He was at an outdoor bar and had consumed too much alcohol when he accepted an invitation to smoke marijuana. Applicant was on active duty with an active security clearance. (Answer; GX 1; GX 2; Tr. 26 – 27, 40 – 42, 52 – 53)

In March 2016, Applicant was at a bachelor party in Las Vegas with some friends he had known most of his life. Everyone, including Applicant, was drinking, gambling, and having a good time. Someone at the party produced cocaine and Applicant tried some. It is the only time he has used cocaine. Applicant was still on active duty with an active security clearance. (Answer; GX 1; GX 2; Tr. 27, 42 – 43)

In late summer 2016, after his discharge from the military, but while his security clearance was likely still active, Applicant was at another bachelor party. When some of the attendees started smoking marijuana, Applicant used the drug when it was offered. Again, he had consumed a lot of alcohol during the party. (Answer; GX 2; Tr. 43 – 44)

In 2017, after Applicant's discharge, he worked with a longtime friend repairing, renovating, and flipping houses. One day he went to his friend's brother's house to check on a repair. He was hungry when he got there, and helped himself to some brownies that were left out in the kitchen. He did not know the brownies contained THC until he felt odd not long after eating one of them. (Answer; GX 2; Tr. 28 – 29, 44 – 45, 56 – 58)

In February 2018, Applicant received in the mail a bag of between 10 and 20 gummy candies with THC in them (gummies). They were sent, with Applicant's knowledge and approval, by a friend he served with in the military. That person lived in a state where marijuana is legal under certain conditions. Applicant did not consider that this conduct -- possessing or using THC -- might be illegal where he lived. Applicant ate one or two of the gummies before giving the rest away. (Answer; GX 1; GX 2; Tr. 30 – 31, 45 – 48, 61)

After Applicant left the military, he worked in a variety of jobs, none of which required a security clearance. When he received the THC gummies in 2018, he was working at a civilian power plant. Later in 2018, he was hired by a temporary personnel company for work at the same government facility and on the same project for which his current employer hired him in November 2018. (GX 1; GX 2; Tr. 23 – 26, 45 – 47)

Before 2018, Applicant's lifestyle included attending parties and frequenting bars and nightclubs, at times drinking to the point of intoxication. However, since October

2018, he has been in a committed relationship and leads a stable, healthy lifestyle. Applicant has not been intoxicated since 2017 and he no longer associates with old friends or anyone else who uses illegal drugs. Applicant asserted that he has no intention of using any illegal substance and he understands the adverse consequences that would ensue relative to his eligibility for access to classified information. Further, Applicant has a solid reputation for good judgment and reliability at work and among his personal associates. A family member with extensive experience in government work that requires access to classified information, and who has known Applicant for most of his life, testified that Applicant is trustworthy, reliable, and of good character, and that Applicant has matured significantly over the past few years. (Answer; GX 1; GX 2; AX A; AX B; Tr. 17 – 19, 31 – 34, 59 – 61, 65 – 75)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). (See Directive, 6.3) Decisions must also reflect consideration of the factors listed in ¶ 2(d) of the guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest for an applicant to either receive or continue to have access to classified information. (See *Department of the Navy v. Egan*, 484 U.S. 518)

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion. (See *Egan*, 484 U.S. at 528, 531) A person who has access to classified information enters into a fiduciary relationship

with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. (See Egan; AG ¶ 2(b))

Analysis

Drug Involvement and Substance Misuse

Applicant used or ingested marijuana four times between 2012 and 2018. He also used cocaine once in 2016. His use of marijuana in 2012 and his use of cocaine occurred while he was on active duty in the U.S. military and while holding an active security clearance in connection with his military duties. He also used marijuana a few months after leaving the military in 2016 while his security clearance was still active, but while he was not employed in a position requiring a security clearance. In 2018, Applicant agreed to receive through the mail THC-laced gummies from a friend. Applicant ate two of them before giving the rest away. And in 2017, Applicant unintentionally ingested a brownie containing THC. Aside from the 2017 incident, available information reasonably raises a security concern about Applicant’s use or involvement with illegal drugs. That security concern is expressed at 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.

More specifically, available information requires the application of the following AG ¶ 25 disqualifying conditions:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

By contrast, Applicant's use of illegal drugs, while not isolated, was sporadic at most. Applicant has not used any illegal drugs since February 2018. He no longer associates with anyone who uses illegal drugs. More importantly, he has a lifestyle conducive to sobriety that militates against the possibility that his use of illegal drugs will recur. Available information supports the application of the following AG ¶ 26 mitigating conditions:

(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;

For the past four years, Applicant has been healthy and physically active; he has stopped going to parties and bars, circumstances where he was likely to experience impaired judgment through drinking, which was a common factor in at least three of the occasions when he used illegal drugs. He now consumes alcohol only in moderation, and he lives a more stable lifestyle supportive of better judgment and reliability. All of the foregoing makes it highly unlikely he will use illegal drugs again.

I also have evaluated this record in the context of the whole-person factors listed in AG ¶ 2(d). Applicant's use of illegal drugs while on active duty and with a security clearance is not a minor concern. Such significant disregard for rules and regulations may indicate that he would not properly safeguard classified information were he to again be given a security clearance. However, the passage of time since his last use of illegal drugs, along with maturation and a significant change in his personal circumstances, are sufficient to overcome the security concerns about his previous misconduct. Additionally, Applicant has been forthcoming about his drug involvement and I found him credible in his assertions that he does not intend to use illegal drugs again. He also presented reliable, recent information that shows him to be of good character and trustworthiness. On balance, Applicant has mitigated the Guideline H security concerns, and the record evidence as a whole supports a fair and commonsense conclusion in favor of granting his request for access to classified information.

Formal Findings

Formal findings 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:

FOR APPLICANT

Subparagraphs 1.a and 1.b:

For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for a security clearance is granted.

MATTHEW E. MALONE
Administrative Judge