



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



In the matter of:)
)
) ISCR Case No. 21-01106
)
Applicant for Security Clearance)

Appearances

For Government: Kelly M. Folks, Esq., Department Counsel
For Applicant: *Pro se*

08/31/2022

Decision

MURPHY, Braden M., Administrative Judge:

Applicant has a history of use and experimentation with marijuana and a variety of other illegal drugs, including as recently as late 2020. Marijuana use remains illegal under federal law. Security concerns alleged under Guideline H (drug involvement and substance misuse) and cross-alleged under Guideline E (personal conduct) are not mitigated. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 5, 2021. On September 28, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, cross-alleged under Guideline E. The DOD issued the SOR under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Security Executive Agent Directive 4 (SEAD 4), *National Security Adjudicative Guidelines* (AG), effective June 8, 2017. When Applicant answered the SOR on October 7, 2021, he requested a

decision by an administrative judge from the Defense Office of Hearings and Appeals (DOHA) based on the administrative (written) record, without a hearing.

On December 15, 2021, Department Counsel submitted the Government's File of Relevant Material (FORM). The FORM included the documentary and legal support for the Government's case. This included the SOR and the Answer (FORM Items 1 and 2), two substantive exhibits (Applicant's SCA and an Interrogatory Response (FORM Items 3 and 4)), as well as copies of three federal laws and two DOD policy memos relating to marijuana use under federal law and by cleared personnel. (FORM Admin. Notice Items I through IV).

The FORM was mailed to Applicant on January 28, 2022. He was afforded an opportunity to note objections and to submit material in refutation, extenuation, or mitigation, and was given 30 days from receipt of the FORM to do so. Applicant signed for receipt of the FORM on February 7, 2022. No subsequent response from Applicant was received by DOHA, and the case was assigned to me on May 4, 2022. Since Applicant did not respond to the FORM, he did not submit any evidence after submitting the answer to the SOR, nor did he pose any objections to admission of the Government's evidence or consideration of the administrative notice documents.

Findings of Fact

The SOR largely alleges that Applicant used certain illegal drugs, while granted access to classified information. He denied SOR ¶¶ 1.a-1.d and ¶ 2.a, and provided narrative explanations for each allegation. He denied using illegal drugs while possessing an active clearance, but he acknowledged using the illegal drugs during the timeframe alleged. He admitted SOR ¶ 1.e, also with an explanation. That admission, and his explanations, are incorporated into the findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 33 years old. He was married from October 2016 until January 2020, when he and his wife divorced. He has no children. Applicant graduated from high school in 2007. He earned a bachelor's degree in 2011 and a master's degree in 2012. From June 2012 until August 2014, he worked as an engineer for defense contractor 1. He left that job for his current position with defense contractor 2, a job he has held since August 2014. (Item 3)

Applicant disclosed on his January 2021 SCA that he was granted a secret security clearance in 2012, in connection with his job with defense contractor 1. (Item 3 at 44-45)

Applicant also disclosed a history of illegal drug use. He disclosed using marijuana four times with friends in the summer of 2009. He disclosed that he has "smoked weed and eaten edibles with friends since it's been legalized" in the state

where Applicant lives, between January 2019 and November 2020. He said he had been “curious to try THC and have tried it a few times.” (Item 3 at 40-41)

Applicant disclosed that has used MDMA (ecstasy/molly) three times between September 2019 and November 2020, once at a music festival, and twice at parties. (Item 3 at 41) Applicant disclosed “snorting cocaine powder a few times (fewer than five times)” with friends between August 2020 and November 2020. (Item 3 at 41-42) Applicant disclosed using LSD once and “magic mushrooms” a few times with friends, also between August 2020 and December 2020. (Item 3 at 42)

On his SCA. Applicant described his use of each drug as experimental, and driven by curiosity. He repeatedly stated that he had never used illegal drugs while in possession of a security clearance, and in answering the question “Was your use while possessing a security clearance?” in each instance Applicant answered, “NO.” Applicant also stated that he did not intend to use illegal drugs in the future due to the impact on his clearance and his career. (Item 3 at 40-42)

Applicant had a background interview in February 2021. He affirmed during the interview that he had not used illegal drugs since December 2020, as previously disclosed. In August 2021, he authenticated and adopted his interview summary as valid and accurate. When asked to detail his history of illegal drug use, he referred to his previous disclosures and affirmed that “no further instances have occurred.” (Item 4)

The SOR alleges that Applicant’s various instances of illegal drug use (marijuana, MDNA, cocaine and LSD) occurred with varying frequency, during the timeframes listed above (with one exception noted below), “while granted access to classified information.” (SOR ¶¶ 1.a-1.d)

SOR ¶ 1.a alleges that Applicant used marijuana, with varying frequency, in June 2009 and again from about July 2011 to at least November 2020, while granted access to classified information.” (Emphasis added) Notwithstanding Applicant’s statement in answering SOR ¶ 1.a that he “used marijuana during the time specified,” there is no other evidence that he resumed marijuana use in “July 2011.” Rather, the record otherwise supports a finding that he resumed marijuana use in January 2019. (Item 3 at 40-41; Item 4 at 8) It therefore appears that the reference to “July 2011” in SOR ¶ 1.a is erroneous, and likely a typographical error. I find accordingly and consider that he resumed using marijuana in January 2019.

As noted, Applicant admitted using the illegal drugs in question but denied using any illegal drugs while in possession of a clearance. He reported having been granted a clearance while with defense contractor 1, in March 2012. (Item 3) However, the Government did not submit documentary evidence from its own records to verify the status of Applicant’s clearance eligibility, such as from the DOD’s Joint Personnel Adjudication System (JPAS) or its successor database, DISS.

SOR ¶ 1.e states that Applicant “continue[s] to associate with others who are involved in illegal drug use.” Applicant admitted the allegation, noting that marijuana use is widespread in the state where he lives. He noted that it would be “virtually impossible to associate only with people who do not use illegal drugs.” (Answer)

Applicant attested that his illegal drug use has ceased; he is not tempted to partake in illegal substances; he has been truthful about his prior drug use, which demonstrates his honesty and his ability and willingness to comply with laws, rules and regulations, and thus, his eligibility for access to classified information. (Answer) Applicant did not respond to the Government’s FORM so no more recent information about him is available.

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” 484 U.S. 518, 531 (1988).

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing 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. According to AG ¶ 2(a), 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 decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” 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 not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision.”

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. The Government reposes a high degree of trust and confidence in 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 of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline H, Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern regarding drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

(a) any substance misuse (see above definition); and

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

The Controlled Substances Act ("CSA") makes it illegal under Federal law to manufacture, possess, or distribute certain drugs, including marijuana. (Controlled Substances Act, 21 U.S.C. § 801, et seq. See § 844). All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. §§811, 812. Marijuana is classified as a Schedule I controlled substance, §812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment. §812(b)(1). See *Gonzales v. Raich*, 545 U.S. 1 (2005).

In October 2014, the Director of National Intelligence (DNI) issued a memorandum entitled "*Adherence to Federal Laws Prohibiting Marijuana Use*," (2014

DNI Memo) which makes clear that changes in the laws pertaining to marijuana by the various states, territories, and the District of Columbia do not alter the existing National Security Adjudicative Guidelines, and that Federal law supersedes state laws on this issue:

[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. . . . 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.

The DOHA Appeal Board, which I am required to follow, has cited the 2014 DNI Memo in holding that "state laws allowing for the legal use of marijuana in some limited circumstances do not pre-empt provisions of the Industrial Security Program, and the Department of Defense is not bound by the status of an applicant's conduct under state law when adjudicating that individual's eligibility for access to classified information." ISCR Case No. 14-03734 at 3-4 (App. Bd. Feb. 18, 2016).

The current National Security Adjudicative Guidelines went into effect on June 8, 2017, after 2014 DNI memo was issued. Nevertheless, the principle continues to apply.

Moreover, on December 21, 2021, DNI Avril D. Haynes issued a memorandum entitled, "*Security Executive 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.*" (2021 DNI Memo) The memo incorporates the AGs (at reference B) and the 2014 DNI Memo (at reference G) among various other relevant federal laws, executive orders, and memoranda. I take administrative notice of the 2021 DNI memo here, given its relevance to this case, its reliance on the AGs, and its recency.

The 2021 DNI memo specifically notes that "under policy set forth in SEAD 4's adjudicative guidelines, the illegal use or misuse of controlled substances can raise security concerns about an individual's reliability and trustworthiness to access classified information or to hold a sensitive position, as well as their ability or willingness to comply with laws, rules, and regulations." (citing Guideline H, alleged in this case, and the AGs for personal conduct and criminal conduct, Guidelines E and J, not alleged here). Thus, consistent with these references, the AGs indicate that "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.” (2021 DNI Memo)

Applicant has a history of using and experimenting with a variety of illegal drugs. This includes marijuana, MDMA (ecstasy), cocaine and LSD, all as recently as November or December 2020. AG ¶ 25(a) applies to all of Applicant’s drug use, as all of these drugs are illegal under federal law. AG ¶ 25(a) applies to Applicant’s illegal drug use, as alleged in SOR ¶¶ 1.a-1.d.

Applicant’s use of illegal drugs “while in possession of a security clearance,” however, is not established. Applicant denied that portion of all of the allegations on the SOR. He repeatedly stated on his SCA, in his interview, and in his Answer, that he has not used illegal or controlled substances while holding a clearance. His denials put the burden of proof on the Government to establish those claims.

Applicant said in his SCA that he had been granted a secret clearance in March 2012, while he was working with defense contractor 1. He left that job in August 2014, and has worked for defense contractor 2 ever since. Clearances do not “expire” but they do require sponsorship by an employer (either Governmental or private industry) who needs the applicant to have access to classified information. The record does not contain documentation from the Government’s own records, such as the JPAS or DISS database, that might have verified this. It is not established that Applicant used illegal drugs “while granted access to classified information or holding a sensitive position.” AG ¶ 25(f) is not established.

SOR ¶ 1.e is also not established as disqualifying conduct. An applicant’s “disassociation from drug using associates and contacts” is a factor for consideration in mitigation. (See AG ¶ 26(b)(1), discussed below) But an applicant’s continued association with such contacts is not disqualifying under Guideline H. SOR ¶ 1.e is therefore found for Applicant, whether or not it is established in mitigation.

I have considered the mitigating conditions under AG ¶ 26. The following are potentially applicable:

(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 is grounds for revocation of national security eligibility.

As the 2021 DNI memo notes, relevant mitigating factors under the AGs include, but are not limited to,

frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. 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 (SF-86), Questionnaire for National Security Positions.”

Applicant has used and experimented with a variety of illegal drugs in recent years. His use includes not only marijuana or THC, but also MDMA/ecstasy, LSD, and cocaine. His use of MDMA was on multiple social occasions between September 2019 and November 2020, and his use of cocaine and LSD was on multiple social occasions between August 2020 and December 2020. He submitted his SCA only weeks later, in early January 2021.

Applicant asserts that his use of marijuana or THC is now legal in the state where he lives. Applicant makes no such assertion as to MDMA/ecstasy, cocaine, or LSD. Further, legality of Applicant’s conduct under state law is not mitigating where his use of marijuana, a Schedule 1 controlled substance, continues to violate Federal law.

With the exception of his marijuana use in 2009, all of Applicant’s subsequent use of illegal drugs came as a mature adult, in his early 30s. He was employed by a defense contractor at the time (his current employer) whether or not he held a clearance at the time, or had actual access to classified information. Regardless, he should have known better. Applicant’s history of illegal drug use is too recent and too varied to provide much evidence of mitigation.

Applicant did not establish that his illegal drug use is infrequent, isolated, or occurred under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment. He did not provide sufficient evidence to establish that he has disassociated from drug-using associates or contacts, nor that he has changed the environment where drugs were used. AG ¶¶ 26(a) and 26(b) do not apply.

Guideline E, Personal Conduct

AG ¶ 15 details the personal conduct security concern:

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. . .

SOR ¶ 2.a is merely a cross-allegation of the drug involvement allegations in SOR ¶ 1. The personal conduct general concern (AG ¶ 15) is established given that Applicant's admitted conduct establishes his questionable judgment and his unwillingness to comply with rules and regulations. The Guideline E cross-allegation is largely redundant and unnecessary, since all of the issues are addressed under Guideline H, above. Nevertheless, the resulting personal conduct security concerns are also unmitigated for the same reasons as set forth under Guideline H.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis.

Applicant did not request a hearing, nor did he respond to the FORM, opportunities where he might have offered additional evidence, either in mitigation or at

least explanation, either under the guidelines alleged or under the whole-person concept.

Applicant seeks a security clearance with the U.S. Department of Defense, and marijuana remains a Schedule 1 controlled substance under federal law, as do the other controlled substances he used as recently as late 2020, only weeks before submitting his SCA. Applicant has not met his burden of showing that he has fully mitigated the security concerns set forth by his illegal drug use. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility 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.d: | Against Applicant |
| Subparagraph 1.e: | For Applicant |
| Paragraph 2: Guideline E: | AGAINST APPLICANT |
| Subparagraph 2.a: | Against Applicant |

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Braden M. Murphy
Administrative Judge