



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



In the matter of: )  
)  
) ISCR Case No. 21-01188  
)  
Applicant for Security Clearance )

**Appearances**

For Government: William Miller, Esq. & Nicole A. Smith, Esq., Department Counsel  
For Applicant: *Pro se*

01/31/2023

**Decision**

GARCIA, Candace Le'i, Administrative Judge:

Applicant did not mitigate the security concerns involving drug involvement and substance misuse. Eligibility for access to classified information is denied.

**Statement of the Case**

On September 28, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse). The action was taken 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 adjudicative guidelines (AG) implemented by DOD on June 8, 2017.

Applicant responded to the SOR on December 20, 2021 (Answer), and requested a hearing before an administrative judge. The case was assigned to me on July 21, 2022. Applicant waived the 15-day hearing notice requirement, and the Defense Office of Hearings and Appeals (DOHA) issued a notice of video teleconference hearing on September 9, 2022, scheduling the matter for a virtual hearing on September 12, 2022. I convened the virtual hearing as scheduled.

At the hearing, I admitted in evidence, without objection, Government's Exhibits (GE) 1 and 2. Applicant testified. He did not present any documentary evidence. At Applicant's request, I kept the record open until September 26, 2022, for additional documentation. By that date, Applicant submitted documentation that I marked as Applicant's Exhibit (AE) A and admitted in evidence, without objection. DOHA received the hearing transcript (Tr.) on September 22, 2022.

### **Findings of Fact**

Applicant admitted all of the SOR allegations in his Answer with the exception of SOR ¶ 1.d, which he denied. He is 30 years old. As of the date of the hearing, he was single, he did not have any children, and he rented an apartment with a roommate since approximately February 2021. (Answer; Tr. at 18-19, 38, 46; GE 1-2)

Applicant graduated from high school in 2011. He earned a bachelor's degree in psychology in May 2015. He attended classes towards a master's degree from August 2016 to March 2017, but he had not yet earned that degree. He was unemployed after college from May 2015 to September 2015, July 2016 to June 2017, February 2020 to May 2020, and August 2020 to February 2021. He completed his security clearance application (SCA) in November 2020. As of the date of the hearing, he worked for his employer, a DOD contractor, since February 2021. He has never held a security clearance. (Tr. at 5, 7-8, 18-19, 43, 46; GE 1-2)

The SOR alleged that Applicant used and purchased marijuana, with varying frequency, from approximately September 2013 to at least May 2021, and that he had not committed to discontinue his marijuana use clearly and convincingly. (SOR ¶¶ 1.a-1.b) It also alleged that he used and purchased hallucinogenic mushrooms twice from approximately April 2018 to June 2020, and that he used ecstasy in approximately April 2018. (SOR ¶¶ 1.c-1.e)

Applicant first used marijuana in September 2013. He was 20 years old and in college. He spent about \$40 every two to three weeks to purchase marijuana from college friends, and he used it with those friends approximately weekly. He stopped using marijuana as he approached his graduation date, because he knew he would be returning to live with his parents and they would not permit marijuana use in their home. He used marijuana during two periods when he did not live with his parents, from August 2016 to March 2017 and January 2018 until August 2020. (Tr. at 21-31, 35-39, 49-50, 61-62; GE 1-2)

Sometime in 2019, Applicant obtained a medical marijuana card. He obtained a medical marijuana card after he read that marijuana could help treat the neurological disorder he has had since birth, and for which he was officially diagnosed at around age 11. He sought to supplement with marijuana the medication his doctor prescribed him for his disorder. He consulted with his neurologist, and the neurologist advised him that marijuana could not hurt to try. He also enjoyed using marijuana recreationally. He spent around \$120 every three to four weeks to purchase marijuana from a dispensary using his medical marijuana card, and he used marijuana daily, at times, for almost a year.

When Applicant lived in state B from February 2020 to August 2020, he spent around \$40 every three weeks to one month to purchase marijuana from his roommates, and he used marijuana daily, at times. After he obtained a medical marijuana card, his parents' attitude toward his marijuana use somewhat changed, and they permitted him to use marijuana in their backyard. He used marijuana while he resided with them, from approximately August 2020 to February 2021. In his June 2021 response to interrogatories, he stated that he last purchased marijuana in March 2021, from a marijuana dispensary. He also stated in his response to interrogatories that he last used marijuana in May 2021, and that his frequency of marijuana use up to that point was approximately once every two to three weeks. He testified that he last used marijuana in approximately March 2022, and that his medical marijuana card expired in May 2022. (Tr. at 21-31, 35-39, 49-59, 62-66, 68, 71; GE 1-2)

Applicant disclosed his marijuana use on his SCA. In response to a question in section 23 that inquired whether he intended to use it in the future, Applicant stated:

Honestly, this is a maybe. If my employment is contingent on not using medical marijuana, then I will fully commit to not using it. However, due to its medicinal nature and the fact that I have a qualifying condition, if my employment is not contingent on remaining THC free, then I would be inclined to resume use.

(GE 1)

Applicant indicated, during his December 2020 interview with a background investigator, that he would not use marijuana if it negatively affected his chances for employment or a security clearance. He also indicated that if there were no issue with his medical marijuana use, he would continue to use marijuana because he believed it helped treat his neurological disorder. He testified that at the time he made the above-quoted statement on his SCA, "my thinking was if I don't have to stop, I wouldn't like to because I don't personally see any -- I mean, it's never affected my work . . ." He testified, ". . . I have stopped smoking marijuana in the last six months or so. And I'm willing certainly to continue that." (Tr. at 20-21, 31, 39; GE 1-2)

Applicant testified that he was aware when he completed his SCA, when the background investigator interviewed him, and when he responded to the interrogatories, that marijuana is illegal under federal law and that his illegal drug use raised concerns. He acknowledged that he continued to use marijuana when he completed his SCA, in his response to interrogatories, and since receiving the SOR. He testified that he was unaware that illegal drug use was inconsistent with holding a security clearance. (Tr. at 20-21, 31, 39, 50-61, 70; GE 1-2)

Applicant used hallucinogenic mushrooms twice between April 2018 and June 2020. He purchased it from friends on both occasions. He initially used it out of curiosity, and then he used it again because he knew that he liked that it made him feel happy and carefree. He purchased and used ecstasy once in April 2018, out of curiosity, and he did

not like how it made him feel. He testified that he had no future intention of using hallucinogenic mushrooms or ecstasy. (Tr. at 39-43, 49-50, 66-68; GE 1-2)

Applicant testified that he submitted to a pre-employment drug test by his employer in February 2021, and that he tested negative for illegal drugs. He stated that he was subject to random drug testing by his employer, but he had not yet been selected for such a test. He testified that he submitted to six pre-employment drug tests for each of his employers, and all tested negative for illegal drugs aside from one that was inconclusive after he dropped the urine sample in the toilet. He maintained that the inconclusive test would not have tested positive for illegal drugs had he not dropped it. He acknowledged that he used marijuana during the periods leading up to, and in the periods after, each of the pre-employment drug tests, to include the one administered by his current employer. He testified, in reference to a pre-employment drug test administered to him in April 2020 when he lived in state B and was using marijuana daily, "I knew that I needed to clean up as it were." He testified that, aside from his marijuana use, he felt he has demonstrated a consistent pattern of employability and good citizenship. He endeavored to be honest about his marijuana use, and stated that it never affected his work performance. (Tr. at 31-36, 50-61, 66; GE 2)

Applicant is aware that his roommate uses marijuana "extremely infrequently," although he has never witnessed it, and that his roommate had products containing marijuana in their apartment. He has two friends who also use marijuana infrequently, sometimes in his presence. As of the date of the hearing and since March 2022, he has found himself in situations where marijuana was being used and where he was offered marijuana, and he instead had a beer or entertained himself another way. He stated that he still possessed a dried flower containing marijuana and marijuana-related paraphernalia. In September 2022, he signed a statement of intent not to abuse any drugs in the future. He stated that as a showing of good faith and commitment, he remained abstinent from illegal drug use and he removed all products containing marijuana and marijuana-related paraphernalia from his apartment. (Tr. at 47-50, 61-62, 66-72; AE A)

## **Policies**

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 to be 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, administrative judges apply the guidelines 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.”

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant 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. Section 7 of Exec. Or. 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## 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 guideline notes the following applicable conditions that could raise security concerns under AG ¶ 25:

(a) any substance misuse . . . ;

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

(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used and purchased marijuana between approximately 2013 and 2022. He stated in his SCA and during his background interview that he would continue to use marijuana, due to his disorder, if his employment were not contingent on abstaining from illegal drug use. He continued to use marijuana after completed his SCA, after he responded to interrogatories, and after he received the SOR. He used and purchased hallucinogenic mushrooms twice between April 2018 and June 2020, and he used ecstasy once in April 2018. AG ¶¶ 25(a), 25(c), and 25(g) are established.

Conditions that could mitigate the drug involvement and substance misuse security concerns are provided 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 or misuse is grounds for revocation of national security eligibility.

Applicant's single use of ecstasy occurred in 2018, nearly five years ago. AG ¶ 26(a) applies to his ecstasy use and I find SOR ¶ 1.e in Applicant's favor. However, his last use and purchase of hallucinogenic mushrooms in 2020 was less than three years ago. His last purchase of marijuana was less than two years ago, and less than a year has passed since he last used marijuana. Although he signed a statement of intent in September 2022 not to abuse any drugs in the future, he continued to socialize with individuals who use marijuana. He possessed a product containing marijuana and marijuana-related paraphernalia as of the date of the hearing. His history of marijuana involvement since 2013, coupled with his use of marijuana after he submitted to a pre-employment drug test by his employer through March 2022, continue to raise doubts about his reliability, trustworthiness, and judgment. AG ¶¶ 26(a), 26(b)(1), 26(b)(2), and

26(b)(3) are not established as to SOR ¶¶ 1.a through 1.d and I find against Applicant on these allegations.

### **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 Guideline H in my whole-person analysis. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated the security concerns involving drug involvement and substance misuse.

### **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

## **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's eligibility for a security clearance. Eligibility for access to classified information is denied.

---

Candace Le'i Garcia  
Administrative Judge