



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



In the matter of:)	
)	
)	ISCR Case No. 22-02468
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

06/20/2023

Decision

LOUGHRAN, Edward W., Administrative Judge:

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

Statement of the Case

On January 5, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse). Applicant responded to the SOR on January 20, 2023, and requested a decision based on the written record in lieu of a hearing.

The Government’s written case was submitted on February 1, 2023. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on February 16, 2023. As of April 6, 2023, he had not responded. The case was assigned to me on June 1, 2023. The Government exhibits included in the FORM are admitted in evidence without objection.

Findings of Fact

Applicant is a 31-year-old employee of a defense contractor. He worked as a contractor for his current employer from September 2019 until he was hired by the company as an employee in June 2020. He is applying for a security clearance for the first time. He attended college for a period, but he did not earn a degree. He has never married, and he has no children. (Item 5)

Applicant used a variety of illegal drugs from about 2008 through November 2022. He was cited or charged in about March 2011 with possession of drug paraphernalia; in about April 2011 with possession of toxic chemicals (inhalants, etc.); and in May 2012 with possession of marijuana. He paid fines for the offenses. (Items 4, 5)

Applicant reported on a Questionnaire for National Security Positions (SF 86) in September 2021 that he used hallucinogenic mushrooms twice in his life (2011 and 2017), both times in safe environments in nature on hiking or camping trips for “medical/spiritual purposes.” He wrote that he intended to use the drug in the future, with the comment, “[m]ushrooms have mental health benefits when used medicinally/spiritually in nature and I enjoy their benefits. I only plan to use this substance in safe settings and on rare occasions.” (Item 5)

Applicant lives in a state where recreational marijuana possession and use do not violate state law. He reported his marijuana use on the same SF 86 in September 2021. He wrote that he intended to use marijuana in the future, with the comment, “I am not under the belief that occasional marijuana use is terribly harmful to mental health or evil.” (Item 5)

Applicant was interviewed for his background investigation in November 2021. He openly discussed his illegal drug use. He stated that he smoked marijuana about once every other week, and he purchased it about every two months, most recently in October 2021. He stated that he knew marijuana possession violated federal law, but he disagreed with the law and intended to continue to use marijuana. He also disagreed that possession of hallucinogenic mushrooms should be unlawful; there was research showing the benefits of the drug; and he did not intend to give up the use of the drug. (Item 6)

Applicant responded to interrogatories on December 21, 2022. He reported that he continued to purchase and use marijuana, with November 25, 2022, as the most recent time he purchased and used marijuana. He stated that he did not intend to use illegal drugs in the future if granted a security clearance. He added, “I would rather quit using any illegal substances than be denied a security clearance. I am far from addicted and will uphold the federal laws while maintaining a security clearance.” (Item 6)

On January 20, 2023, Applicant wrote in his response to the SOR:

While marijuana is legal in my state, I admit I have indulged responsibly several times throughout the years on holidays or long weekends. I believe that it should be made legal federally as it is not an extremely harmful substance. However, to achieve a security clearance, I have decided to stop using marijuana and all federally illegal substances. I can currently pass a drug test and have been sober since the turn of the year. I understand that marijuana and psychedelic mushrooms remain federally illegal. And I intend to follow these, and all other laws set out by the government. I am psychologically and physically sound and am willing to comply with all laws, rules, and regulations.

Policies

This case is adjudicated under Executive Order (EO) 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), which became effective on June 8, 2017.

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(c), 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 EO 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* EO 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 several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

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

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

Applicant used a variety of illegal drugs from about 2008 through November 2022. He was cited or charged in about March 2011 with possession of drug paraphernalia; in about April 2011 with possession of toxic chemicals; and in about May 2012 with possession of marijuana. AG ¶¶ 25(a) and 25(c) are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. 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.

The 2011 and 2012 charges against Applicant are mitigated by time. SOR ¶¶ 1.c through 1.e are concluded for Applicant.

Applicant used marijuana after he submitted his SF 86 in September 2021, after he was interviewed for his background investigation in November 2021, and as recently as November 2022. The Appeal Board has "long held that applicants who use marijuana after having been placed on notice of the security significance of such conduct may be lacking in the judgment and reliability expected of those with access to classified information." ISCR Case No. 20-01772 at 3 (App. Bd. Sep. 14, 2021). See *also* ISCR Case No. 21-02534 at 4 (App. Bd. Feb. 13, 2023) ("[A]fter applying for a security clearance and being adequately placed on notice that such conduct was inconsistent with holding a security clearance, an applicant who continues to use marijuana demonstrates a disregard for security clearance eligibility standards, and such behavior raises substantial questions about the applicant's judgment, reliability, and willingness to comply with laws, rules, and regulations.")

Applicant only used hallucinogenic mushrooms twice, in 2011 and 2017. That conduct would be mitigated except that in November 2021, he stated that he intended to use the drug in the future. Someone who picks and chooses what laws he will follow is not a good candidate for a security clearance. Applicant does not currently hold a security clearance. His recent contingent promise that he will not use illegal drugs if he is granted a security clearance does not generate confidence that he has not continued to use illegal drugs or that he will not use them in the future. None of the mitigating conditions are applicable, and Applicant's illegal drug use is not mitigated.

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 did not mitigate the drug involvement and substance misuse security concerns.

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 F:	Against Applicant
Subparagraphs 1.a-1.b:	Against Applicant
Subparagraphs 1.c-1.e:	For Applicant

Conclusion

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.

Edward W. Loughran
Administrative Judge