



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



In the matter of:)	
)	
)	ISCR Case No. 23-00471
)	
Applicant for Security Clearance)	

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: *Pro Se*

11/17/2023

Decision

HOGAN, Erin C., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H, Drug Involvement and Substance Misuse. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 13, 2022. The Defense Counterintelligence & Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR) on May 10, 2023, detailing security concerns under Guideline H, Drug Involvement and Substance Misuse. DCSA CAS acted 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

Applicant answered the SOR on June 20, 2023, and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On July 5, 2023, Department Counsel submitted the Government's file of

relevant material (FORM), including documents identified as Items 1 through 4. Applicant received the FORM on July 17, 2023. He was afforded 30 days after receiving the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any information within the prescribed time period. The SOR and the answer (Items 1 and 2) are the pleadings in the case. Items 3 through 4 are admitted into evidence without objection. The case was assigned to me on November 3, 2023.

Findings of Fact

In Applicant's SOR response, he admitted all SOR allegations. Applicant's admissions are accepted as findings of fact. (Item 2)

Applicant is 23 years old. Since 2022, Applicant has been employed by a defense contractor and is applying for a security clearance. He attended college from 2018 to 2022, but did not graduate. He is single and has no children. (Item 3)

The SOR alleges under Guideline H that Applicant used marijuana (THC) with varying frequency from March 2018 to February 2023. (SOR ¶ 1.a: Item 3 at 33; Item 4 at 6-7, 13); that Applicant used mushrooms on one occasion in November 2021 (SOR ¶ 2.a: Item 4 at 7); and that Applicant used Lysergic Acid Diethylamide (LSD) on two occasions in March 2019 and August 2020. (SOR ¶ 3.a: Item 4 at 7).

Applicant listed his illegal marijuana use on his September 2022 SCA in response to Section 23 - Illegal Use of Drugs or Drug Activity. He estimated he used marijuana on numerous occasions between March 2018 and September 2022. He further explained that he used medical marijuana a few times a week since 2020. He indicated he intends to use marijuana in the future. He states medical marijuana helps him with his stress and anxiety. He took a break from using marijuana in September 2022, but he may use it in the future. (Item 3 at 33)

The investigator who interviewed Applicant on October 13, 2022, prepared an unsworn summary of Applicant's Personal Subject Interview. On March 15, 2023, Applicant certified that the unsworn summary of his October 13, 2022, personal subject interview was accurate in response to DOHA interrogatories. (Item 4) He indicated:

I swear (or affirm) that I have read the enclosed report of my interview(s) conducted on October 13, 2022, October 18, 2022, and November 9, 2022, and I either found the report to be accurate or amended the report so that it is now accurate.

During his personal subject interview, Applicant confirmed that he used marijuana recreationally between March 2018 and 2020, and that he used marijuana medically from July 2020 to September 2022. He also used marijuana in October 2022 on two occasions. (Item 4 at 6). He purchased marijuana for his personal use approximately once every two weeks from July 2020 to August 2020 and July 2021 to August 2021. He obtained a medical marijuana card in the state where he resides to help with anxiety and stress. He

was not aware that the use of marijuana remained illegal under federal law. He does not plan to use marijuana in the future if he is granted a security clearance. (Item 4 at 7)

Applicant volunteered during the interview that he used hallucinogenics on three occasions. He used mushrooms once in November 2021 and LSD twice – once in March 2019 and once in August 2020. He failed to list the use of hallucinogenics on his SCA due to oversight. He used drugs with his friends and sometimes by himself. He has not attended drug treatment. (Item 4 at 7)

In April 2023, Applicant answered supplemental questions that were listed in the interrogatories. One of the questions read as follows:

Have you used marijuana or any product containing THC since your personal subject interview conducted on October 13, 2022?

He responded that he used marijuana “2/24/23 – present 2-3 times a week.” A follow-up question asked him when he last used marijuana. He listed 2/24/2023. This conflicts with the answer to the first question. At the very least, Applicant used marijuana between October 13, 2022, to February 24, 2023, on average of two to three times a week. 2023. He is aware that his employer has a drug free workplace policy. He believes it prohibits the use of intoxicating substances at work. He answered that he did not intend to use marijuana or any illegal drugs in the future. (Item 4 at 13-15)

Question 12 of the April 2023 Interrogatories asked:

Are you willing to provide 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 answered: “Not at this time.” (Item 4 at 15)

Policies

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

The adjudicative 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 access to classified information 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 avoided drawing 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 as to obtaining 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline H: Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern for drug involvement:

The illegal use of controlled substances . . . 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.

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

AG ¶ 25(a) any substance misuse; and

AG ¶ 25(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The record evidence shows Applicant has a long history of habitual marijuana use from March 2018 to February 2023. He also admits to purchasing marijuana on numerous occasions. He also admits to using hallucinogenic mushrooms on one occasion and LSD on two occasions. AG ¶¶ 25(a) and 25(c) apply.

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014, memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

The Government's substantial evidence and Applicant's admissions raise security concerns under Guideline H. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 22, 2005))

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement and substance misuse. The following mitigating conditions under AG ¶ 26 potentially apply:

AG ¶ 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; and

AG ¶ 26(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence on 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.

Neither mitigating condition applies. Applicant has used marijuana on a semi-regular basis since 2018. Applicant was initially unaware that medical marijuana remained illegal under federal law even if it is legalized under state law. However, he continued to use marijuana until at least February 2023, after being informed that marijuana remains illegal under federal law during his October 2022 background investigation interview. While Applicant expressed an intent to not use marijuana in the future, he was not willing to provide a signed statement of intent to refrain from all drug involvement and substance misuse. His failure to do so, makes his expressed intention not to use marijuana in the future less persuasive. Applicant did not mitigate the concerns under Drug Involvement and Substance Misuse.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position 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 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 and the AG ¶ 2(d) factors in this whole-person analysis.

Applicant illegally used marijuana on many occasions since 2018. He last used marijuana in February 2023, less than one year ago. Applicant's continued regular use of marijuana after being made aware that it remained illegal under federal law makes his intentions to discontinue marijuana use in the future questionable, especially since he declined to provide a signed statement of intent to abstain from all drug involvement when given the opportunity to do so. Applicant's history of poly-substance abuse raises questions about his trustworthiness and reliability. Overall, I conclude the concerns under Drug Involvement and Substance Abuse are not mitigated.

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.c:	Against Applicant

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

Erin C. Hogan
Administrative Judge