



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



In the matter of:)	
)	
)	ISCR Case No. 23-00926
)	
Applicant for Security Clearance)	

Appearances

For Government: Karen Moreno-Sayles, Esq., Department Counsel
For Applicant: *Pro se*

11/27/2023

Decision

MURPHY, Braden M., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H, drug involvement and substance misuse, regarding his illegal drug use. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 20, 2022. On April 27, 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). 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, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

When Applicant answered the SOR on May 4, 2023, he admitted all of the allegations in the SOR without further comment, and requested a decision based on the administrative (written) record, without a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). He provided additional information in an e-mail to Department Counsel on May 18, 2023. (Answer and Supplemental Answer to SOR)

On May 31, 2023, Department Counsel submitted the Government's File of Relevant Material (FORM), including documents identified as Items 1 through 3. Item 1 is comprised of the pleadings in the case (the SOR and Answers). Item 2 is the SCA and Item 3 is the summary of Applicant's November 2022 background interview.

The FORM was mailed to Applicant on June 2, 2023. He was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation, and was given 30 days from receipt of the FORM to do so. Applicant received the FORM on June 13, 2023. Applicant did not respond to the FORM, nor did he note any objections to the Government's proposed evidence. FORM Items 2 and 3 are admitted into evidence without objection. The case was assigned to me on October 31, 2023.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a - 1.h and added further comments in his Supplemental SOR response. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 29 years old. He has never married, and he has no children. He graduated from high school in 2012, and he attended college from 2012-2013 and again from 2015-2019, when he earned his bachelor's degree. After college, he founded his own company building and maintaining scientific equipment. He has never held a clearance. (Item 2)

Applicant disclosed marijuana use and a wide variety of other illegal drug use on his SCA and discussed it further in his background interview, months later. His drug use is alleged as a security concern under Guideline H.

Applicant began using marijuana, or THC, in high school, beginning in about June 2010. He began using marijuana daily in college. He disclosed on his August 2022 SCA that his most recent marijuana use was in June 2022, two months before he submitted his SCA. He used it recreationally and to relax, either alone or at parties. He also purchased it either from a local dealer, or, after college, by driving to a neighboring state where it was legal to do so, and then returning to his home state to use it. (SOR ¶ 1.a) (Items 2, 3) Applicant stated in his Supplemental SOR response that his last use of marijuana was in June 2020, not June 2022. (Item 1) He said on his SCA that he quit

using cannabis to pursue a security clearance. (Item 2) He gave no explanation, and no further information, for the disparity in dates.

Applicant also experimented with other drugs during college. This included hallucinogens such as LSD, PCP, and psychedelic mushrooms, about once a month between August 2013 and April 2019. (SOR ¶ 1.b) He used cocaine at parties, bars, and concerts, every few months between August 2016 and August 2018. (SOR ¶ 1.c) He snorted ketamine on one occasion, between August and October 2016. (SOR ¶ 1.d) He used and purchased Adderall, a prescription medication that was not prescribed to him, to assist him in concentrating and studying better, between 2012 and 2019. (SOR ¶¶ 1.e, 1.h) (Items 2, 3)

In addition to his out-of-state cannabis purchases for his own use (SOR ¶ 1.a), Applicant also cultivated psychedelic mushrooms between August 2013 and October 2016 (SOR ¶ 1.f), and he both purchased and sold LSD between about August 2016 and August 2018 to support his own drug use. (SOR ¶ 1.g) (Items 2, 3)

In his Supplemental SOR response, Applicant stated that he understood that marijuana is “federally illegal, regardless of state laws.” He said he understood that “drug use is incompatible with holding a security clearance.” He said, “I do not intend to use illegal drugs in the future.” (Item 1) Applicant did not respond to the Government’s FORM or otherwise offer any mitigating evidence beyond what he had previously stated.

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.

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).

Further, 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 the 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.” 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)

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

Applicant’s use of Adderall and ketamine without a prescription establishes AG ¶ 25(a) since misuse of prescription drugs is considered an illegal use of a controlled substance, as addressed in AG ¶ 24. His use of marijuana, cocaine, LSD, PCP, and psychedelic mushrooms establishes AG ¶ 25(a). AG ¶ 25(c) is also applicable to Applicant’s cultivation, purchase, sale, distribution, and possession of illegal drugs.

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.

No mitigating conditions fully apply. Applicant’s illegal substance use was not infrequent and not isolated. While some of Applicant’s illegal drug use was college-era experimentation, he also used marijuana daily up to at least June 2020, if not June 2022. He also used cocaine as well as hallucinogenic drugs like mushrooms, PCP, and LSD. He purchased marijuana and both sold and purchased LSD to finance his own drug use. His drug involvement is also recent, as, at best, it ended about three years ago. He also did not establish that he has disassociated from drug-using associates and contacts, or that he has changed or avoided the environment where drugs were used.

His marijuana use continued after college, and he acknowledged driving out of state to purchase marijuana for his home use. The only changed circumstance appears to be his desire to hold a clearance.

Applicant's recent assertions that he understands that marijuana use is federally illegal, and that illegal drug use is incompatible with holding a security clearance, as well as his assertions that he no longer intends to use marijuana must be balanced against his overall record. Further, Applicant offered no mitigating evidence in responding to the Government's FORM.

Since Applicant elected a decision on the written record, in lieu of a hearing, I did not have the opportunity to ask him questions about his conduct. I also had no opportunity to observe his demeanor during a hearing, and thus, to assess his credibility beyond the documentary record. The fact that I cannot assess his credibility undercuts the strength of his case in mitigation. The recency of his most recent use, and its circumstances, preclude full application of either AG ¶ 26(a) or AG ¶ 26(b).

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. I conclude Applicant did not provide sufficient evidence to mitigate the security concerns about his drug involvement and substance misuse. 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.h: 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