



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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[NAME REDACTED]) ISCR Case No. 23-00869
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Applicant for Security Clearance)

Appearances

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

01/02/2024

Decision

MALONE, Matthew E., Administrative Judge:

Applicant did not mitigate the security concerns raised by his past use of illegal drugs, and by his unwavering intention to continue to use drugs in the future. His request for eligibility for access to classified information is denied.

Statement of the Case

On October 24, 2022, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain eligibility for access to classified information as part of his employment with a federal contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Counterintelligence and Security Agency (DCSA) could not determine that it was clearly consistent with the interests of national security for Applicant to have access to classified information.

On June 14, 2023, the DCSA issued a Statement of Reasons (SOR) alleging facts that raise security concerns addressed under Guideline H (Drug Involvement and

Substance Misuse). The DCSA acted as required by Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines implemented by the DOD on June 8, 2017.

Applicant timely responded to the SOR (Answer) and requested a decision without a hearing. As provided for by paragraph E3.1.7 of the Directive, Department Counsel for the Defense Office of Hearings and Appeals (DOHA) issued a File of Relevant Material (FORM) that Applicant received on August 9, 2023. The FORM proffered four exhibits (Items 1 – 4) on which the Government relied to support the SOR allegations. Applicant had 30 days from receipt of the FORM to object to any of the Government's exhibits or to provide other additional information. He did not respond to the FORM, and he did not file any objections to the Government's exhibits within the allotted time. Accordingly, GX 1 – 4 became part of the record, which closed on September 13, 2023. I received the case for decision on November 15, 2023.

Findings of Fact

Under Guideline H, the SOR alleged that between May 2017 and at least June 2023, Applicant used marijuana "multiple times a week" (SOR 1.a); that between December 2017 and at least April 2023, he used hallucinogenic mushrooms (SOR 1.b); that he used LSD once in 2020 (SOR 1.c); and that he intends to continue his use of marijuana and hallucinogenic mushrooms (SOR 1.d). In addition to admitting each of those allegations, he provided the following statement:

[M]y use of recreational drugs on my personal time in no way reflects upon my trustworthiness as a keeper of national secrets. I do not plan to change my lifestyle because that would be absurd, and directly contradictory to the first sentence of this statement. If the DOD wants a dog who has no personal principles, they can find one elsewhere. (FORM, Items 1 and 2)

In addition to the facts established by Applicant's admissions, and based on my review of the information presented in the FORM, I make the following findings of fact.

Applicant is a 27-year-old employee of a federal contractor, for whom he has worked as a software engineer since June 2016. In his e-QIP, he disclosed the drug use listed in the SOR. Specifically, he disclosed he was a regular (sometimes daily) and ongoing user of marijuana, both by smoking and in edible form. He also disclosed he had used LSD on one occasion in 2020, but that he would not use it again because he did not have a good experience with that drug. Finally, he disclosed that he had used hallucinogenic, or "magic," mushrooms in 2017 and 2018. During his personal subject interview (PSI) with a government investigator in January 2023, and in a June 9, 2023, response to interrogatories propounded by DOHA Department Counsel, he confirmed and updated the information about his drug use provided in his e-QIP. Notably, he told the investigator that he had purchased hallucinogenic mushrooms just before he

submitted his e-QIP and that he had used them between then and the date of his PSI. (FORM, Items 3 and 4)

The drugs in question – marijuana containing tetrahydrocannabinol (THC), LSD, and hallucinogenic “magic” mushrooms – are or contain federally controlled substances, the unauthorized possession and use of which are criminal violations of the Controlled Substances Act, 21 U.S.C. § 801 et seq. During his PSI, he acknowledged his understanding that use of marijuana is still a violation of federal criminal law. Nonetheless, he affirmed his intention to continue using marijuana and magic mushrooms. In response to Department Counsel’s interrogatories, he stated he intends to continue using marijuana and hallucinogenic mushrooms because they are “integral to [his] artistic process.” He has not provided any details regarding what that process might entail. He also relies on the fact that use and possession of marijuana are generally legal in the state where he lives. (FORM, Items 2 – 4)

Guidance issued by the Office of the Assistant Secretary of Defense (OASD) in February 2013, which was updated by the Director of National Intelligence (DNI) in December 2021, makes clear that changes in the laws pertaining to marijuana by the various states, territories, and the District of Columbia do not alter the current National Security Adjudicative Guidelines. Because federal law supersedes state laws on this issue, Applicant’s use of marijuana, regardless of location or even medical justification in his state of residence, was illegal. Further, federal workplaces prohibit illegal drug use by civilian federal employees and by persons employed for work on federal contracts.

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). (See Directive, ¶ 6.3) Decisions must also reflect consideration of the factors listed in AG ¶ 2(d). Commonly referred to as the “whole-person” concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. A security clearance decision is intended only to resolve whether it is clearly

consistent with the national interest for an applicant to either receive or continue to have access to classified information. (*Department of the Navy v. Egan*, 484 U.S. 518 (1988))

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion. (See *Egan*, 484 U.S. at 528, 531) A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. (See *Egan*; AG ¶ 2(b))

Analysis

Drug Involvement and Substance Misuse

Available information reasonably raises the security concern about drug involvement stated at AG ¶ 24 as follows:

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.

More specifically, available information requires application of the following AG ¶ 25 disqualifying conditions:

- (a) any drug abuse (see above definition);
- (c) illegal drug possession, 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.

In response to the Government's information, Applicant did not provide any information that addresses any of the mitigating conditions presented under AG ¶ 26. As of June 2023, he was still using marijuana on a regular basis, and he reaffirmed his intentions to continue using illegal drugs despite his clear understanding that his conduct is illegal. The security concerns raised by the Government's information are not mitigated.

In addition to my evaluation of the facts and my application of the appropriate adjudicative factors under Guideline H, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). In that context, it is difficult to decide which is more concerning – Applicant's continued and frequent drug use and the effects it might have on his judgment, or his willful disdain and disregard for basic rules and regulations in furtherance of his own interests. Such conduct is directly at odds with the government's compelling interest in trusting that those who have access to classified information will put the national interest ahead of their own. Applicant has made it abundantly clear that he is not interested in such an arrangement. Based on all of the foregoing, significant doubts about Applicant's judgment and suitability for clearance persist. Because protection of the national interest is the principal focus of these adjudications, those doubts must be resolved against the Applicant.

Formal Findings

Formal findings 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

Conclusion

In light of all available information, it is not clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for security clearance eligibility is denied.

MATTHEW E. MALONE
Administrative Judge