



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



In the matter of:)
)
 [Name Redacted]) ISCR Case No. 23-01792
)
 Applicant for Security Clearance)

Appearances

For Government: Brian Farrell, Esq., Department Counsel
For Applicant: *Pro se*

02/29/2024

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 July 11, 2022. The Defense Counterintelligence & Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR) on August 15, 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 August 28, 2023, and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On October 26, 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 November 2, 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 February 7, 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 39 years old. He has been employed by a defense contractor since 2005 and is applying for a security clearance for the first time. He is a high-school graduate. He has no military service. He is single and has no children. (Item 3)

The SOR alleges under Guideline H that Applicant used marijuana (THC) with varying frequency from January 2020 to June 2023. (SOR ¶ 1.a: Item 3 at 20; Item 4 at 3-4, 8); and that Applicant intends to use marijuana in the future. (SOR ¶ 1.b: Item 4 at 7)

Applicant listed his illegal marijuana use on his July 2022 SCA in response to Section 23 - Illegal Use of Drugs or Drug Activity. He estimated he used marijuana recreationally one or two times a month on the weekend. He uses it in social settings to relax after the work week. He indicated his intent to use marijuana in the future. (Item 3 at 25)

In response to DOHA Interrogatories, dated June 14, 2023, Applicant listed that he used THC edibles on a weekly basis. The amount of THC in the edibles was 5 mg. He intends to continue to use THC edibles in the future. He indicated his state legalized edibles with 5 mg THC. He uses it to relax at night and to help him sleep. He has taken THC edibles for over a year. He buys the edibles at stores in the area. They improve his mood, help with body pain, improve his sleep, and reduce his anxiety. (Item 4 at 3-4) He intends to continue his weekly use of THC edibles. (Item 4 at 7)

Applicant does not use drugs at work. His use of edibles on the weekend has not affected his ability to do his job. He has never been in trouble with the law or had disciplinary issues. He claims low-dose THC has far more benefits than alcohol without the hangovers. It does not affect his ability to keep national security a top priority. (Item 4 at 8)

Applicant's company has a Drug-Free Workplace Policy. The policy mentions that all federal state and local laws must be followed. Even if Applicant's state has legalized the use of marijuana/THC, it remains illegal under federal law. (Item 4 at 9-14)

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;

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

AG ¶ 25(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The record evidence shows Applicant has a history of habitual marijuana and THC edible use from January 2020 to June 2023. He admits to purchasing THC edibles on numerous occasions and intends to continue using THC edibles. AG ¶¶ 25(a), 25(c), and 25(g) 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 THC edibles on a weekly basis since 2020. Even if THC edibles are legal in the state where Applicant resides, it is illegal under federal law. He intends to continue to use THC edibles on a weekly basis. He 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 (THC edibles) on a weekly basis since January 2020. He intends to continue using THC edibles on the weekends. His use of THC edibles is in violation of federal law as well as his employer's Drug-Free Workplace policy. 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.b:	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