



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



In the matter of:)	
)	
[Name Redacted])	ISCR Case No. 23-01894
)	
Applicant for Security Clearance)	

Appearances

For Government: John Hannink, Esq., Department Counsel
For Applicant: *Pro se*

04/18/2024

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 November 21, 2022. The Defense Counterintelligence & Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR) on November 13, 2023, detailing security concerns under Guideline H. DCSA CAS acted under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

Applicant timely answered the SOR and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On January 31, 2024, Department Counsel submitted the Government’s file of relevant

material (FORM), including documents identified as Items 1 through 4. Applicant received the FORM on February 8, 2024. He was afforded 30 days after receiving the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant timely submitted a response to the FORM. The case was forwarded to the Hearing Office on February 29, 2024, and assigned to me on April 2, 2024.

Several names and other facts have been modified to protect Applicant's privacy interests. More detailed facts can be found in the record.

Findings of Fact

In Applicant's SOR response, he admitted all SOR allegations. Applicant's admissions are accepted as findings of fact. (Item 3)

Applicant is 24 years old. He has been employed by a DOD contractor since August 2022 and is applying for a security clearance for the first time. His highest level of education is a bachelor's degree. He is single and has no children. (Item 3)

The SOR alleges under Guideline H that Applicant used and purchased marijuana (THC) with varying frequency from approximately September 2017 to about September 2023 (SOR ¶ 1.a: Item 3, Section 23, at 35-369); from about September 2017 to about June 2021, he used Lysergic Acid Diethylamide (LSD) and psilocybin (mushrooms) on various occasions (SOR ¶ 1.b: Item 3; Item 4); from about April 2018 to about June 2021, he purchased LSD and mushrooms on various occasions (SOR ¶ 1.c: Item 3; Item 4); and from about October 2018 to about October 2021, he used cocaine on various occasions.(SOR ¶ 1.d: Item 3: Item 4)

Applicant listed his marijuana use on his November 2022 SCA in response to Section 23 - Illegal Use of Drugs or Drug Activity. He indicated he used marijuana from approximately 2017 to August 2022. He describes the nature of the use as "social and frequent." He indicated he intends to use marijuana in the future if it becomes legalized by the federal government and is removed from checks for employment. He also listed that he used hallucinogenics (LSD, and mushrooms) a handful of times between April 2018 and June 2021. He indicated that he intends to use hallucinogenics in the future. He further explained that he is not against using hallucinogenics throughout his life. He claims it helps his outlook on life and to think about things. He used cocaine socially on two occasions between June 2020 and October 2021. He does not intend to use cocaine in the future because he does not like it and had a bad experience when using the drug. (Item 3 at 35-36)

During his background investigation interview, on January 17, 2023, Applicant mentioned he first smoked marijuana when he was in college. He smoked marijuana on a daily basis. He quit when he had to take a drug test for his defense contractor employer. He said his marijuana use never affected his ability to go to school or to work. At one point, he had a medical marijuana card. He claims it helped with his sleep and eating habits. He used marijuana at home, in parks, and at friends' houses. His friends use marijuana. After submitting his security clearance application, he has used marijuana in

December 2022 and January 2023. (Item 3 at 9) The last time he used marijuana was in September 2023. He decided to stop using marijuana because he no longer got a benefit from it. (Item 3 at 23)

Between September 2017 and January 2022, he purchased marijuana on numerous occasions from dispensaries. He estimated he purchased marijuana every couple weeks spending around \$50. He told the background investigator that he intends to purchase marijuana again. He would stop purchasing and using marijuana if it affected his ability to keep his job. He claims he never used or purchased marijuana while possessing a security clearance. (Item 3 at 10)

Applicant told the background investigator that between April 2018 and June 2021, he purchased and used LSD and mushrooms on two occasions for each drug. He does not intend to purchase and use either illegal drug in the future. He did not possess a security clearance at the time he purchased and used them. The investigator asked him about his answer on the SCA where he stated that he intended to use hallucinogenics in the future. Applicant responded that he meant that he did not intend to use them in the near future. He answered that he might use them when he is 60. (Item 3 at 10)

In his Response to FORM, Applicant submitted a Statement of Intent to abstain from all drug involvement and substance misuse. He acknowledged that any future illegal drug involvement may be grounds for revocation of national security eligibility. He indicates he has been honest about his illegal drug use and has never used drugs while holding a sensitive position. (Response to FORM, February 8, 2024)

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.

DOD and Federal Government Policy on Marijuana Use

On October 25, 2014, the Director for National Intelligence, issued a memorandum titled, “Adherence to Federal Laws Prohibiting Marijuana Use” addressing concerns raised by the decriminalization of marijuana use in several states and the District of Columbia. The memorandum states that changes to state and local laws do not alter the existing National Security Adjudicative Guidelines. “An individual’s disregard for federal law pertaining the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations.”

On May 26, 2015, the Director of the United States Office of Personnel Management (OPM) issued a memorandum titled, “Federal Laws and Policies Prohibiting Marijuana Use.” The Director of OPM acknowledged that several jurisdictions have decriminalized the use of marijuana, allowing the use of marijuana for medicinal purposes and/or for limited recreational use but states that Federal law on marijuana remains unchanged. Marijuana is categorized as a controlled substance under Schedule I of the Controlled Substances Act. Thus, knowing or intentional marijuana possession is illegal, even if the individual has no intent to manufacture, distribute, or dispense marijuana.

On December 21, 2021, the Director of National Intelligence signed the memorandum, *Security Executive Agent 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*. It emphasizes that federal law remains unchanged with respect to the illegal use, possession, production and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the “whole-person concept” stated under SEAD 4, to determine whether the applicant’s behavior raises a security concern that has not been mitigated.

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 use from September 2017 to at least September 2023. He admits to using marijuana on a daily basis during his college years. He mentions that he had a medical marijuana card at some point. He purchased marijuana on numerous occasions from a dispensary in the state where he resides. Medical marijuana is legal in the state where he resides. The use of marijuana remains illegal under federal law. He initially indicated his intent to use marijuana in the future unless it affected his employment. He stopped using marijuana before he took a drug test for his employer. Upon being hired in August 2022, he initially abstained from marijuana use, but admitted during his background investigation interview that he used marijuana in December 2022 and September 2023. AG ¶¶ 25(a), 25(c), and 25(g) apply.

While Applicant's use of marijuana is legal in the state where he resides, it remains illegal under Federal law. On October 25, 2014, 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.

AG ¶¶ 25(a) and 25(c) also apply to Applicant's use and purchase of LSD and hallucinogenic mushrooms between 2017 and 2021 and his use of cocaine between October 2018 and October 2021.

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 pertaining to Applicant's use and purchase of marijuana. (SOR ¶ 1.a) His last use of marijuana occurred in September 2023, only seven months ago. While he reduced his marijuana usage, he used marijuana on three occasions after he submitted his November 2022 SCA. Before he submitted his SCA, he admits to using marijuana on a daily basis during his college years. His initial equivocations about using marijuana during the security clearance investigation and his continued use of marijuana after applying for a security clearance indicate Applicant did not take the security clearance and standards and processes seriously. Not enough time has passed to conclude Applicant's marijuana use is behind him. He still socializes with friends who use marijuana. While he provided a signed Statement of Intent to abstain from illegal drug use, it is not given much weight considering his decision to continue using marijuana after submitting his security clearance application.

Neither mitigating condition applies pertaining to Applicant's use and purchase of LSD and mushrooms during college. (SOR ¶¶ 1.b and 1.c) He clearly stated on his SCA that he intended to use LSD and mushrooms in the future. During his background investigation interview, he stated that he meant he would not use them in the near future

but possibly when he was 60. I find his expressed intent of future use on his security clearance application to be more credible. While his last use was apparently in June 2021, I am not convinced he will not use LSD or mushrooms in the future. His Statement of Intent to abstain from illegal drug use is given less weight considering his express intention to use LSD and mushrooms in the future on his SCA.

AG ¶ 26(a) applies with respect to Applicant's use and purchase of cocaine during his college years. He only used cocaine on a few occasions. The last use occurred in 2021. Several years have passed since his past use, indicating that it is unlikely he will use this illegal drug in the future.

Questions about Applicant's judgment remain. He continued to use marijuana on several occasions after submitting a security clearance application in November 2022. He mentioned that he was willing to cease or reduce his marijuana use if it affected his employment. While his use of marijuana was legal in the state where he resides, he should have realized that there may be issues with his use of marijuana throughout the security clearance process as well as his employment as a DOD contractor. In fact, he stopped using marijuana for a while in order to pass an employer-directed drug test before he was hired. While he mentioned in his Response to the FORM that he intended to cease marijuana use, his statement of intent is given less weight based on his use of marijuana on several occasions after being hired by a defense contractor and after submitting his security clearance application. Concerns about future use of LSD and mushrooms remain because of Applicant's expressed intent to use them in the future on his SCA. Even if he stopped using marijuana, LSD and mushrooms, not enough time has passed to persuasively demonstrate he has the fortitude to stop using them over the long term. 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.

I considered that Applicant has been an employee with a DOD contractor since August 2022. I considered he provided full disclosure about his illegal drug use on his SCA. While his marijuana use was legal under state law, it remains illegal under federal law and raises security concerns. Applicant's failure to realize his marijuana use was an issue during the security clearance process and his continued marijuana use after submitting a security clearance application raise questions about his judgment and reliability. Questions about his judgment are also raised because of his expressed intent to use LSD and mushrooms in the future on his November 2022 security clearance application. Concerns under Drug Involvement and Substance Misuse 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
Subparagraph 1.a – 1.c:	Against Applicant
Subparagraph 1.d:	For 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