



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



In the matter of:)	
)	
)	ISCR Case No. 23-02447
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Kent, Department Counsel
For Applicant: Chris Snowden, Esq.

07/17/2024

Decision

BENSON, Pamela C., Administrative Judge:

Applicant used marijuana, to include Tetrahydrocannabinol (THC), on multiple occasions from about 2007 to November 2023. He did not present sufficient evidence to rebut or mitigate the drug involvement security concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On December 1, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse) and Guideline J (criminal conduct). The CAS acted under 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.

In Applicant's January 25, 2024 response to the SOR (Answer), he admitted SOR ¶ 1.b., he denied SOR ¶¶ 1.a., and 1.d., and he admitted and denied, in part, SOR ¶ 1.c. The Government withdrew the single SOR allegation (SOR ¶ 2.a.) and paragraph 2 (Guideline J). Applicant provided some explanation in mitigation, and he included

documentary evidence in support of mitigation or extenuation. The 12 documents were marked as Applicant's Exhibit (AE) A through L. He initially requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge, but on February 21, 2024, Applicant decided he would rather have a decision issued by a DOHA administrative judge based upon the written record. (Item 3)

On February 27, 2024, Department Counsel submitted a file of relevant material (FORM) and provided a complete copy to Applicant. Department Counsel's FORM includes Government exhibits labeled as "Items" 1 through 5, to include Applicant's Answer and attached documents (Item 2). On March 7, 2024, Applicant received the FORM and its attachments. He had 30 days from receipt to respond to the FORM, but he did not submit any information. All proffered exhibits were admitted into evidence without objection. The case was assigned to me on June 25, 2024.

Findings of Fact

Applicant is 31 years old. In 2015 he graduated from college with a bachelor's degree. Since December 2022 he has been employed by a DOD contractor providing engineer services. He has never married, and he does not have any children. (Item 4)

On February 1, 2023, Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP). In Section 23 – Illegal Use of Drugs or Drug Activity, he responded to the following query as follows:

a. In the last 7 years, have you illegally used any drugs or controlled substances? Use of a drug or controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any drug or controlled substance. **Yes, THC (such as marijuana, weed, pot, hashish, etc.) Weed is legal for recreational use here in [state]. I buy from the dispensary near my house to help me get to sleep at night. 10/2009 to 1/2023 (Estimated) I consume a 2.5 mg THC/CBD mixed edible before bed to ease anxiety and help me fall/stay asleep. I used to have a medical prescription card for this up until recently when recreational status was legalized. I will continue to use it as a sleep aid as it is cheaper and more effective than any of the other products I've tried, both over the counter and prescribed. I struggle immensely with insomnia and this is the only product I've used which actually allows me to sleep for 7 hours without feeling extremely groggy the next morning. I only ever use it in my own home, and only consume it 1-2 hours before bed. I took (hallucinogenic) mushrooms once in July 2019 while visiting a national park during a camping/hiking trip with friends.**

Applicant also noted in the February 2023 e-QIP that he intended to use marijuana in the future. (Item 4)

On May 23 and 26, 2023, Applicant was interviewed by a DOD authorized investigator during his background investigation. Applicant admitted to the investigator that he began using marijuana in late 2007, with varying periods of use and non-use over the years. The last time he consumed marijuana was the night before his background interview when he took a marijuana gummy before going to bed. He reported that he rarely smokes marijuana for recreation anymore, but he does on occasion smoke marijuana at birthday parties and other celebrations. He was prescribed a medical marijuana card in 2015. Since 2021, when the recreational use of marijuana was legalized in his state, his use of marijuana increased to nightly. He takes THC edibles to treat his chronic insomnia. He purchases marijuana from the dispensary, spending about \$25 every two weeks. He intends to use and purchase marijuana in the future. He is aware that marijuana use is illegal under federal law despite it being legal in his state. He intends to make future changes by asking his doctor for another sleep aid that is federally legal to retain his employment. (Item 5; AE C, D, E)

Applicant responded to DOHA interrogatories on November 20, 2023. He listed on a drug chart that he first used marijuana in late 2007, and his last use of marijuana was November 10, 2023. He reported that he uses marijuana three to four times a month, and only at night when he is unable to fall asleep. He stated that he will continue using marijuana occasionally “for the sleep benefits it provides.” He also certified that the investigator’s summaries of his May 2023 background interviews were accurate as reported. (Item 5)

After Applicant received the December 2023 SOR, he hired counsel and provided documentation with his Answer. He then claimed that he had ceased using THC in November 2023, which contradicted his stated future intent reported on his February 2023 e-QIP, during his May 2023 background interviews, and in his November 2023 interrogatory response. The Answer also provided other contradictory information in that it stated Applicant was unaware that marijuana use for medicinal purposes is not permitted for federal contractors or those with security clearances. Applicant provided a signed statement of intent to abstain from all drug involvement and substance misuse. A January 2024 drug test was submitted that showed he did not have THC in his system. (Answer; AE A, B)

Applicant submitted a letter of recommendation with his Answer. His general manager at a gym reported that he has worked with Applicant since October 2020. He disclosed that Applicant was initially hired as desk staff and has demonstrated exemplary customer service, even during the most difficult situations. He is considered an extremely trustworthy staff member, and he possesses great character and work ethic. His general manager highly recommends Applicant for any future employment positions. (AE G)

Applicant also submitted five “R.I.S.E.” (recognizing, inspiring, sharing, engaging) awards provided by his employer in 2023. He was recognized for his outstanding service and dedication. (AE L)

Policies

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 to be 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, 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 national security eligibility will be resolved in favor of the national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to sensitive 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H: Drug Involvement and Substance Misuse

The security concern for drug involvement is set out in AG ¶ 24:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following three are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, 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 convincingly commit to discontinue such misuse.

Applicant used and purchased marijuana for many years, and his use continued to November 2023 despite his acknowledgment that his use, purchase, and possession of marijuana violated federal drug laws. He stated that he intended to continue marijuana use on his February 2023 e-QIP, during his May 2023 background interview(s), and in his November 2023 response to interrogatories. AG ¶¶ 25(a), 25(c), and 25(g) apply.

Conditions that could mitigate the drug involvement security concerns are provided 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 or misuse is grounds for revocation of national security eligibility; and
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant bears the burdens of production and persuasion in mitigation. The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *[Department of the Navy v. Egan, 484 U.S. 518, 528 (1988)]*, *supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b). (ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013))

Applicant has been candid with the DOD about his history of marijuana use and one-time use of hallucinogenic mushrooms. I find that his one-time use of mushrooms in 2019 and his stated intent not to use them in the future is now mitigated by time. He filled out an e-QIP in February 2023 to obtain a DOD security clearance. He reported his use of marijuana, and during his May 2023 interviews, he admitted that his marijuana use, although legal in his state, was illegal under federal law at all times. He continued to use marijuana, and he stated in his November 2023 interrogatory response that he intended to use marijuana in the future on an occasional basis "for the sleep benefits it provides." He only stated an unequivocal intent to cease his marijuana use, despite his knowledge of its illegality under federal law, and its inconsistency with access to classified information, after he received the SOR. His illegal drug use was recent and regular, and the facts do not support a finding of circumstances where future marijuana use is unlikely to recur. More time is needed for him to demonstrate a commitment and pattern of

abstinence. Applicant did not mitigate the drug involvement and substance misuse security concerns.

Whole-Person Concept

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

The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. Notwithstanding Applicant's good work ethic and the five awards he received from his employer in 2023, the record contains no evidence to document a pattern of abstinence, and no evidence of disassociation from any marijuana-using associates. Finally, his disavowal of future use occurred under circumstances entitled to little weight. Without more time and a pattern of abstinence, I cannot conclude Applicant is unlikely to abuse illegal drugs in the future. He did not mitigate the drug involvement and substance misuse security concerns.

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., and 1.d.:	Against Applicant
Subparagraph 1.b.:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, I conclude that it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge