



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



In the matter of:)	
)	
[Name Redacted])	ISCR Case No. 24-00373
)	
Applicant for Security Clearance)	

Appearances

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

12/11/2024

Decision

HOGAN, Erin C., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, drug involvement and substance misuse, and Guideline J, criminal conduct.

Statement of the Case

On April 2, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and J. The DCSA 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 (AG) implemented by the DOD on June 8, 2017.

On April 11, 2024, Applicant answered the SOR and elected to have his case decided by an administrative judge from the Defense Office of Hearings and Appeals (DOHA) on the written record in lieu of a hearing. Department Counsel submitted the

Government's File of Relevant Material (FORM) on June 4, 2024. The evidence included in the FORM is identified as Items 3-6. (Items 1 and 2 include pleadings and transmittal information.) The FORM was mailed to Applicant, who received it on July 30, 2024. Applicant was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He did not submit any additional evidence or object to the Government's evidence. The case was assigned to me on November 6, 2024.

Findings of Fact

In Applicant's answer, he admitted all of the SOR allegations. His admissions are adopted as 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 a 30-year-old employee of a DOD contractor who is applying for a security clearance. He has been employed with the DOD contractor since 2023. He holds a bachelor's degree and has no military service. He married in 2020 and has no children. He completed a security clearance application (SCA) on June 1, 2023. He previously completed an SCA on April 8, 2019. His current employer is subject to the provisions of the Federal Drug-Free Workplace Act (41 U.S.C § 81) and has a written drug and alcohol-free policy. (Item 3; Item 4; Item 5 at 18-20)

Drug Use and Criminal Conduct.

Under Guideline H, the SOR alleged Applicant: used marijuana with varying frequency from about April 2013 until at least March 2024 (SOR ¶ 1.a: Item 3 at 38; Item 4 at 32; Item 5 at 5, 9, 15); sold marijuana from about January 2015 to about March 2015 (SOR ¶ 1.b: Item 3 at 40; Item 4 at 83; Item 5 at 5, 11); used steroids from about December 2012 until at least March 2014 (SOR ¶ 1.c: Item 3 at 38; Item 4 at 31; Item 5 at 4, 10); used cocaine with varying frequency from about May 2022 to about May 2023 (SOR ¶ 1.d: Item 3 at 39; Item 5 at 10); used Ketamine with varying frequency from about June 2022 to about May 2023 (SOR ¶ 1.e: Item 3 at 39; Item 5 at 10); used Adderall with varying frequency from about May 2013 to about May 2018 (SOR ¶ 1.f: Item 3 at 41; Item 4 at 34; Item 5 at 5, 11); and used psilocybin (hallucinogenic mushrooms) with varying frequency from about July 2023 to at least March 2024 (SOR ¶ 1.g: Item 5 at 13, 15).

Additional SOR allegations include: Applicant used marijuana, cocaine, Ketamine, and psilocybin while holding a sensitive position and while possessing a security clearance (SOR ¶¶ 1.h-1.k: Item 6); and Applicant intends to continue using marijuana in the future. (SOR ¶ 1.l: Item 5 at 16). The allegations in SOR ¶¶ 1.b – 1.g were cross-alleged as criminal conduct under Guideline J. (SOR ¶ 2.a)

On his first security clearance SCA, dated April 8, 2018, Applicant listed his illegal drug use in response to Section 23 - Illegal Use of Drugs or Drug Activity. His illegal drug use includes using steroids from December 2012 to March 2014, and using

marijuana (THC) from April 2013 to June 2018. He noted that he was a daily marijuana user while in college. After graduating he began to use it less frequently. He finally stopped using marijuana in June 2018. He estimated he used marijuana approximately 1,000 times. He is willing to stop using marijuana for his career with a defense contractor that requires maintaining a security clearance. During college, he sold marijuana over a two-month period from January 2015 to March 2015. He initially thought it was a good way to make money in college, but quit because he was terrified the entire time he was selling marijuana. He also indicated that he had no intent to use marijuana or steroids in the future. (Item 4 at 31-33) Applicant was approved for a DOD security clearance on September 5, 2019. (Item 6 at 1)

On June 1, 2023, Applicant submitted an additional SCA. It appears this was related to an upgrade of his security clearance. In response to Section 23 – Illegal Drugs or Drug Activity, he listed the previous steroid use and also listed he used marijuana from April 2013 to May 2023. He holds a medical marijuana card from the state where he resides. His most recent use was the weekend before he completed the SCA. He indicated he was a daily user. He also listed that he used cocaine from May 2022 to May 2023. He claims he only used it on one occasion with friends while at a music show. He used Ketamine between June 2022 and May 2023 on one occasion with friends while at a music show. He admits to using marijuana, cocaine, and Ketamine while he possessed a security clearance. He plans to continue using his medical marijuana card to purchase and use marijuana. He claims that he was granted a medical exception from his employer to be allowed to use medical marijuana. Regarding future cocaine or ketamine use, he does not intend to use again if required to maintain his security clearance. (Item 3 at 38-41; Item 5 at 13)

During Applicant's background investigation interview in October 2023, Applicant said his medical marijuana card was issued on June 20, 2022. He uses marijuana to treat ADHD and a sleeping disorder. He uses marijuana on a daily basis, He purchases marijuana on a weekly basis from marijuana dispensary that is licensed in the state where he resides. Before he obtained a medical marijuana card, he purchased marijuana from his friends. He does not feel comfortable listing the names of the people who sold/provided him marijuana. During the interview, he also confirmed his cocaine, Ketamine, steroid, and Adderall use. (Item 5 at 9-11)

In his response to Interrogatories, Applicant listed the various controlled substances that he used since his October 2023 background investigation interview. He mentioned that he used marijuana on a daily basis. He purchased marijuana during that timeframe. He is aware that marijuana remains illegal under federal law. Despite being aware of this, he intends to continue to use marijuana in the future. From July 2023 to March 2024, he used psilocybin (magic mushrooms; Applicant refers to them as "medicinal mushrooms") on four occasions. He used them while on a camping trip, at concerts, and at home. He obtained the mushrooms from a friend whom he does not wish to identify. His wife is aware of his mushroom use. (Item 5 at 13,15 - 16)

On April 28, 2023, Applicant's employer published a policy that prohibits employees from using, possessing, or distributing illegal drugs in the workplace. The prohibition on illegal drugs include marijuana, even in states or localities where the use of marijuana is legal. This prohibition exists because marijuana is illegal under U.S. federal law; it is prohibited for people who hold a U.S. government clearance, and the successful completion of a drug test is required by some of the employer's clients before working on client projects. (Item 5 at 18)

The policy also states:

Where marijuana has been prescribed by a licensed, medical professional for medicinal use, [Applicant's Employer] personnel must contact the Accommodations Team for the purpose of seeking a possible workplace accommodation (see the Equal Employment Opportunity and Affirmative Action Policy for more details. Id.

Applicant claims that he received a medical marijuana accommodation from his employer. He did not provide any documentation verifying this assertion. (Item 5 at 13)

Applicant's illegal drug involvement is also cross-alleged under the Criminal Conduct concern.

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 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 careful weighing 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.

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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that 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).

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, Director of National Intelligence (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.*” 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)

Analysis

Guideline H, Drug Involvement and Substance Abuse

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Two that are potentially applicable in this case include:

- (a) any substance misuse;
- (c) illegal possession of a controlled substance, including cultivation, processing , manufacture, purchase, sale, or distribution, or possession of drug paraphernalia;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly or and convincingly commit to discontinue such misuse.

Applicant used marijuana, steroids, cocaine, Ketamine, Adderall and psilocybin during the dates alleged. AG ¶ 25(a) applies to SOR ¶¶ 1.a, 1.c -1.g. Applicant illegally used marijuana, steroids, cocaine, Ketamine, Adderall and psilocybin at various times between 2012 and March 2024. AG ¶ 25(b) applies with regard to Applicant's purchase

and possession of marijuana from April 2013 to March 2024 and his sale of marijuana from January 2015 to March 2015. It also applies to SOR ¶¶ 1.c -1.g because Applicant possessed the illegal drugs at the time he consumed them.

AG ¶ 25(f) applies because Applicant continued to engage in illegal drug use after being granted access to classified information in August 2019. Specifically, he illegally used marijuana from August 2019 to at least March 2024; he illegally used cocaine from May 2022 to May 2023; he illegally used Ketamine from June 2022 to May 2023; he illegally used psilocybin from July 2023 to March 2024. While he claims that he was granted a medical marijuana exemption from his employer, he did not provide any documentation proving this assertion. In the unlikely event that his DOD contractor employer granted him a medical marijuana exemption, his use of marijuana remains illegal under Federal law and is not compatible with holding a security clearance.

AG ¶ 25(g) applies because Applicant intends to use marijuana in the future. While medical marijuana is legal in the state where he resides, he is aware that it remains illegal under federal law. He is also aware that marijuana use is not compatible with working for a DOD contractor or holding a security clearance. He still intends to use marijuana despite these policies.

AG ¶ 26 provides conditions that could mitigate security concerns. Two potentially apply in this case:

(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.

AG ¶ 26(a) does not apply because Applicant continues to use marijuana on daily basis. His use of cocaine, Ketamine, and psilocybin are also fairly recent ranging from May 2022 to March 2024. His decision to keep using controlled substances after

being granted a security clearance and hired by a DOD contractor raise questions about his reliability, trustworthiness, and judgment. He clearly does not take seriously the standards required of those who are entrusted with access to classified information.

AG ¶ 26(b) does not apply because Applicant uses marijuana on a daily basis and intends to do so in the future. Having purchased cocaine, Ketamine, and psilocybin from friends within the past two years (May 2022 to March 2024), he has not disassociated from drug-using associates and contacts. He did not provide a signed statement of intent declaring that he intends to abstain from all drug involvement and substance misuse.

Security concerns under Guideline H are not mitigated.

Guideline J, Criminal Conduct

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and

Applicant's illegal use of marijuana, steroids, cocaine, Ketamine, Adderall, and psilocybin support the application of AG ¶ 31(b).

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

For the same reasons stated above under Guideline H, AG ¶¶ 32(a) and 32(d) do not apply. Applicant's illegal drug use is recent, and he intends to continue using marijuana in the future even though it is illegal under federal law and incompatible with holding a security clearance. The security concerns under Guideline J are not mitigated.

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 the 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. Applicant provided insufficient evidence to mitigate the alleged security concerns.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. He failed to mitigate the security concerns under Guidelines H and J.

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: Subparagraphs 1.a – 1.I:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline J: Subparagraph 2.a:	AGAINST APPLICANT Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Erin C. Hogan
Administrative Judge