



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



In the matter of:)
)
) ISCR Case No. 23-00607
)
)
Applicant for Security Clearance)

Appearances

For Government: John C. Lynch, Esq., Department Counsel
For Applicant: *Pro Se*

01/12/2024

Decision

BORGSTROM, Eric H., Administrative Judge:

Applicant illegally used marijuana from October 2019 until late May 2023, and he repeatedly expressed his intent to continue to use marijuana. He has only recently ceased his marijuana use and expressed his intent to abstain from marijuana use in the future. Applicant's candor does not overcome the concerns raised by his repeated violation of Federal and state drug laws. He did not mitigate the drug involvement and substance misuse security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On June 12, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (CAS) issued a Statement of Reasons (SOR) to Applicant detailing a security concern under Guideline H (drug involvement and substance misuse). 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 June 26, 2023 response to the SOR, he admitted the lone allegation and stated that he would immediately discontinue his marijuana use. He requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. (Answer)

On September 1, 2023, the Government was ready to proceed to hearing. I was assigned this case on November 3, 2023. On November 13, 2023, DOHA issued a Notice of Hearing, scheduling a hearing by video teleconference for November 29, 2023. The hearing proceeded as scheduled. The Government proffered two exhibits, which I admitted as Government Exhibits (GE) 1 and 2 without objection. Applicant testified and did not proffer any documentary evidence. At Applicant's request, I held the record open until December 20, 2023, for him to supplement the evidentiary record. DOHA received the hearing transcript (Tr.) on December 13, 2023. Applicant confirmed that he had no further submissions, and the record closed on December 20, 2023.

Findings of Fact

Applicant is 31 years old. He graduated from high school in 2011 and earned an associate's degree in September 2018. He was married in June 2015 and has been separated since March 2022. Since June 2022, he has been employed full time as an associate software developer with a DOD contractor. He has not been granted a security clearance or had access to classified information. (GE 1; Tr. 22, 24-26)

On July 11, 2022, Applicant certified and submitted an Electronic Questionnaire for Investigations Processing (e-QIP). Under Section 23 - Illegal Use of Drugs or Drug Activity, he reported that he had used marijuana between October 2019 and June 2022. He detailed that he had smoked marijuana approximately four times between October 2019 and October 2021 and approximately daily from October 2021 to March 2022. Since March 2022, he had used marijuana about twice a month. He responded "NO" to the query about whether he intended to use marijuana in the future, and he stated, "I don't believe it is appropriate for one with security clearance to engage in the use of drugs." (GE 1)

On November 17, 2022, Applicant was interviewed by an investigator on behalf of the Office of Personnel Management (OPM). Applicant confirmed his marijuana use between October 2019 and March 2022 as detailed in his e-QIP. He reported that he had illegally purchased marijuana prior to 2021, when state law permitted the purchase and recreational use of marijuana; however, he did not recall from whom he had purchased marijuana prior to its legalization. At the time of the OPM interview, he used marijuana four times a week. He expressed his intent to use marijuana in the future, but that he would stop using when granted a security clearance. His most recent marijuana use, at that time, was November 16, 2022. He explained that he used marijuana by himself and did not socialize with individuals who used illegal drugs. (GE 2)

On May 22, 2023, Applicant responded to interrogatories regarding his marijuana use. He adopted the summary of the November 2022 OPM interview detailed above

without any revisions or corrections. He reported that he had used marijuana approximately four times a week from July 11, 2022 to May 21, 2023. He had purchased marijuana from state-licensed dispensaries during that timeframe, and he continued to possess marijuana for his personal use. (GE 2)

In Applicant's June 2023 Answer, he admitted that he had used and purchased marijuana with varying frequency from October 2019 until at least May 2023. He explained that he had been uncertain about the legality of his marijuana use, and he would discontinue his use immediately. (Answer)

At the hearing, Applicant admitted that he last used marijuana on May 21, 2023, and last purchased marijuana in May 2023 from a state-licensed dispensary. After receiving the DOHA interrogatories, he had spoken with his employer's human resources manager, who explained to Applicant that he needed to immediately cease using marijuana to obtain a security clearance. Applicant stopped using marijuana that same day and gave away his remaining marijuana to a friend. (Tr. 31-37)

At the hearing, Applicant clarified that, prior to his state permitting recreational marijuana use in 2021, he had been given marijuana by friends or associates. He has only purchased from state-licensed dispensaries. Applicant further clarified that he had not understood that his marijuana use was prohibited under Federal law until his May 2023 conversation with his human resources manager, but he had been aware that his marijuana use prior to 2021 was illegal because he was aware such use violated state drug laws at that time. Notwithstanding his uncertainty about Federal and state drug laws, Applicant had believed that marijuana use was prohibited for clearance holders since at least his e-QIP filing. Applicant never questioned his supervisor or his facility security officer about whether his marijuana use was permitted, and he confirmed his prior statements of future marijuana use were contingent upon not possessing a security clearance at the time. (Tr. 37-45, 49-51)

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 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 clearly and convincingly commit to discontinue such misuse.

Marijuana is a Schedule I controlled substance under Federal law pursuant to Title 21, Section 812 of the United States Code. Schedule I drugs are those which have a high potential for abuse; have no currently accepted medical use in treatment in the United States; and lack accepted safety for use of the drug under medical supervision. Section 844 under Title 21 of the United States Code makes it unlawful for any person to knowingly or intentionally possess a controlled substance not obtained pursuant to a valid prescription.

On October 25, 2014, the then Director of National Intelligence (DNI) issued guidance that changes to laws by some states and the District of Columbia to legalize or decriminalize the recreational use of marijuana do not alter existing federal law or the National Security Adjudicative Guidelines, and that an individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security eligibility determinations.

On December 21, 2021, the DNI issued clarifying guidance concerning marijuana, noting that prior recreational use of marijuana by an individual may be relevant to security adjudications, but is not determinative in the whole-person evaluation. Relevant factors in mitigation include the frequency of use and whether the individual can demonstrate that future use is unlikely to recur.

Applicant's possession and use of marijuana from October 2019 to late May 2023 violated Federal drug laws. His purchase of marijuana on several occasions between 2021 and May 2023 also violated Federal laws. He repeatedly expressed his intent to use marijuana in the future. His expressed intent to discontinue his marijuana use was contingent upon his active possession of a security clearance. 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.

Applicant's illegal use and purchase of marijuana spanned over three and a half years. His ignorance or uncertainty about whether marijuana was prohibited under Federal law does not excuse his conduct. See ISCR Case No. 19-00540 at 3 (App. Bd. Dec. 13, 2019)(citing *Rhode Island v. Massachusetts*, 45 U.S. 591, 613 (1846)). Moreover, he continued to use marijuana after he submitted his e-QIP and participated in his security interview, despite some awareness that marijuana use was prohibited by clearance holders. See ISCR Case No. 19-00540 at 3 ("An applicant's use of illegal drugs after having completed a security clearance application or after otherwise having been placed on the incompatibility of drug abuse and clearance eligibility raises questions about his or her judgment, reliability, and willingness to comply with laws, rules, and regulations."). Applicant quit using marijuana and expressed his intent to abstain from future marijuana use only after his clearance eligibility was in jeopardy. Notwithstanding his statement of intent to abstain from all drug involvement, he has not established a pattern of abstinence sufficient to overcome his frequent marijuana use between October 2021 and late May 2023. Given the recency and frequency of Applicant's marijuana use, despite some awareness that his marijuana use was illegal or reflected poor judgment, doubts remain as to his judgment and ability to adhere to rules and regulations. Applicant has not mitigated 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 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. I have incorporated my comments under Guideline H and the factors in AG ¶ 2(d) in this whole-person analysis.

Applicant honestly disclosed his longtime marijuana use and his intent to continue such use. This honesty does not overcome the security concerns arising from his drug involvement and substance misuse. In the future, with the passage of time and an established pattern of abstinence, he may sufficiently mitigate those security concerns. At present, Applicant did not mitigate the drug involvement 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
Subparagraph 1.a.:	Against 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 Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Eric H. Borgstrom
Administrative Judge