



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



In the matter of:)
)
) ISCR Case No. 23-01958
)
Applicant for Security Clearance)

Appearances

For Government: Patricia M. Lynch-Epps, Esq., Department Counsel
For Applicant: *Pro Se*

07/31/2024

Decision

BORGSTROM, Eric H., Administrative Judge

In anticipation of the clearance process, Applicant discontinued his infrequent use of marijuana. Once he fully understood the prohibitions of marijuana use by clearance holders, he committed to abstain from all drug involvement in the future. He has established a pattern of abstinence and has avoided the environment where marijuana had been used in the past. Applicant mitigated the drug involvement and substance misuse security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On October 19, 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). 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.

In Applicant's November 2, 2023 response to the SOR (Answer), he admitted SOR ¶¶ 1.a. and 1.b., and he denied any intent to use marijuana in the future (SOR ¶ 1.c.). He

attached a statement of intent to abstain from illegal drugs in the future. He requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge.

On December 20, 2023, the Government was ready to proceed to hearing. I was assigned this case on April 2, 2024. On April 9, 2024, DOHA issued a notice scheduling a hearing by video teleconference for April 30, 2024. The hearing proceeded as scheduled, The Government proffered two evidentiary exhibits, which I admitted as Government Exhibits (GE) 1 and 2 without objection. The Government also proffered a document for administrative notice of the Security Executive Agent's guidance concerning marijuana use, which I admitted as Administrative Notice (AN) I without objection. Applicant proffered three exhibits, which I admitted as Applicant Exhibits (AE) A through C without objection. At Applicant's request, I held the record open until May 30, 2024, to provide him an opportunity to supplement the evidentiary record. On May 7, 2024, he emailed three additional; exhibits, marked as AE D, E, and F. I admitted AE D through F and the email (AE G) into evidence without objection. DOHA received the hearing transcript (Tr.) on May 9, 2024. The evidentiary record closed on May 30, 2024.

Findings of Fact

Applicant is 52 years old. He earned an associate degree in 1997 and a bachelor's degree in 2002. He married in 2014, and he does not have any children. Since December 2018, he has been employed with a DOD contractor, currently as a systems engineer. This is his first application for a security clearance. (GE 1; Tr. 34-36)

On March 28, 2023, Applicant completed and submitted an Electronic Questionnaire for Investigations Processing (e-QIP). In his e-QIP, in his Answer, and at the hearing, he admitted that he used marijuana approximately once every two or three months between September 1989 and 1999. Between 1999 and 2013, he may have used marijuana once with friends on a camping trip. In about 2013, he used marijuana he received from a friend who had a medical marijuana card. (Tr. 40-43, 49-50, 52, 64-65, 75)

In about 2013, Applicant's now wife was diagnosed with a chronic health condition. Shortly thereafter she began ingesting marijuana or tetrahydrocannabinol (THC) in gummy form to relieve some of her symptoms. About once every two or three months; between 2013 and 2019, Applicant would partake of the THC gummies obtained or purchased by his wife. Between 2019 and February 2023, his use increased to once every two months. In February 2023, he discontinued his marijuana use in anticipation of applying for a security clearance. Around this time, Applicant and his wife purchased exercise equipment that helped relieve some of her symptoms, and she decreased the frequency of her THC gummy consumption. Prior to spring of 2023, Applicant's wife typically consumed a THC gummy about once every two weeks. He is unaware whether she continues to possess any THC gummies or when she last consumed one. (Tr. 43- 47, 53, 73, 78-79)

Applicant has never purchased marijuana or contributed money towards the purchase of marijuana. He has never tested positive for illegal drugs, and he has never used any illegal drugs besides marijuana. Applicant is unaware whether his wife has a

medical marijuana card or from where she acquires the THC gummies. (Tr. 41, 45, 52, 64-65, 70, 72)

In his March 2023 e-QIP, Applicant reported his marijuana use and that he intended to use marijuana in the future due to "[e]ffective use in pain and stress management." On May 17, 2023, Applicant was interviewed by an authorized investigator on behalf of the Office of Personnel Management (OPM). During the interview, he confirmed the timespan of his marijuana use and admitted that he typically consumed the THC gummies approximately once every two months for stress and pain management. As of the interview, he admitted that there was a "good" likelihood that he would use THC in the future. (GE 1, GE 2)

In his October 3, 2023 response to DOHA interrogatories, Applicant verified the summary of the OPM interview without any corrections or additions; however, in attached documentation, he noted that he last used "marijuana (THC)" in February 2023. He admitted that he intended to use marijuana in the future, though he had no plans to do so. He added that he anticipated changes to the illegality of THC under Federal law. He explained that he decided to abstain from marijuana use in March 2023, and this decision was reinforced during his OPM interview. He admitted that his wife continued to use THC gummies in their shared home to manage the symptoms for her chronic condition. (GE 2)

With his November 2023 Answer to the SOR, Applicant submitted a statement of intent to abstain from all drug involvement and substance misuse in the future. (AE C)

At the hearing, Applicant explained that, in about 2018 or 2019, he was prescribed pain medication. He disliked the side effects of the pain medication and partook of his wife's THC gummies as an alternative to the prescribed medication. He provided a letter from his primary care physician (PCP) that confirmed that he is being treated for a medical condition with prescription medication and physical therapy. Applicant also testified that his statements about future marijuana use were speculative and before he fully understood that marijuana use was prohibited by clearance holders. He explained that as of the May 2023 OPM interview, he had some understanding of its prohibition, but it did not fully understand that marijuana use was prohibited until he received the SOR. Since discontinuing his marijuana use, he has used over-the-counter and prescription medications for pain relief, and he no longer has issues with stress. Previously, he had felt stress due to a job change. He admitted that the primary motivation for discontinuing his infrequent marijuana use was his clearance eligibility. (AE E; Tr. 54, 58-59, 63, 68-70, 81, 89)

Whole Person

Applicant submitted his performance evaluations from 2018 through 2023. He was rated as "Met Expectations" or "Proficient" for all metrics during this timeframe. Applicant's supervisor, who is unaware of Applicant's marijuana use, submitted a character-reference letter praising Applicant as an "excellent contributor" and detail-oriented. (AE D, AE F)

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. In this case, the following disqualifying conditions potentially apply:

(a) any substance misuse; 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. (AN I)

Applicant admitted using marijuana on various occasions between September 1989 and February 2023, and he repeatedly expressed his intent to use marijuana in the future. AG ¶¶ 25(a) 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.

Within the mitigation analysis, among other things, I considered four elements - span, frequency, recency, and continued association. First, although Applicant's marijuana spanned 1989 to 2023, he explained that there was over a decade when he did not use marijuana at all. Second, beginning in 2013 or 2014, Applicant ingested THC gummies with his wife approximately four to six times a year. Between 2019 and February 2023, he consumed THC gummies approximately six times a year. Applicant's marijuana use was infrequent.

In February 2023, Applicant decided to discontinue his use of THC gummies in anticipation of the clearance process. There is no evidence of any drug involvement by Applicant in over 14 months. I have considered his expressed intent to use marijuana in his e-QIP, during his interview, and in his response to the DOHA interrogatories. Applicant credibly explained that his expressed intent was speculative and anticipated continued changes in Federal and state drug laws. He had no specific plans or intent to use illegal drugs. Furthermore, he explained that he did not fully understand the prohibitions against clearance holders using marijuana until he received and reviewed the SOR and Directive in October 2023. He provided a signed statement of intent to abstain from all drug involvement and credibly confirmed his commitment to abstain.

Applicant testified that he believed that his wife's use of THC gummies has decreased since spring of 2023, and he had no knowledge as to whether she continues to use THC gummies and from where she acquires the gummies. Although he continues to reside and associate with his wife, he has separated himself from any of her gummy consumption. In effect, now that he has a better understanding of the prohibition against marijuana use under Federal law, he avoids the environment where he had used marijuana in the past. Applicant has established that his marijuana use is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, or good judgment. He has demonstrated a pattern of abstinence, provided a signed statement of intent to abstain, and avoided the environment where he had used gummies in the past. AG ¶¶ 26(a) and 26(b) apply. Applicant 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.

In anticipation of the clearance process, Applicant discontinued his infrequent use of marijuana. Once he fully understood the prohibitions of marijuana use by clearance holders, he committed to abstain from all drug involvement in the future. He has established a pattern of abstinence and has avoided the environment where marijuana had been used in the past. I found Applicant's testimony and his commitment to abstaining from illegal drugs to be credible. Applicant mitigated 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:	FOR APPLICANT
Subparagraphs 1.a.-1.c.:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, I conclude that it is clearly consistent with the interests of national security to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Eric H. Borgstrom
Administrative Judge