



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



In the matter of:)
)
) ISCR Case No. 23-01712
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro Se*

02/20/2024

Decision

BORGSTROM, Eric H., Administrative Judge

Applicant illegally used marijuana from April 2021 until May 2023. His candor does not overcome the concerns raised by his repeated and recent violations 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 October 10, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing a security concern 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 implemented by the DOD on June 8, 2017.

In his undated response to the SOR (Answer), Applicant admitted the lone allegation without explanation. He requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge.

On November 30, 2023, the Government was ready to proceed to hearing. I was assigned this case on December 20, 2023. On January 5, 2024, DOHA issued a Notice of Hearing, scheduling a hearing by video teleconference for January 24, 2024. The hearing proceeded as scheduled. The Government proffered two exhibits, which I admitted as Government Exhibits (GE) 1 and 2 without objection. Applicant and one witness testified. Applicant did not proffer any documentary evidence. At Applicant's request, I held the record open until February 7, 2024, for him to supplement the evidentiary record. DOHA received the hearing transcript (Tr.) on February 1, 2024. On February 2, 2024, Applicant submitted two post-hearing exhibits, which I admitted as Applicant Exhibits (AE) A and B without objection. The record closed on February 2, 2024.

Findings of Fact

Applicant is 21 years old. He has attended college since August 2020, and he anticipates earning a bachelor's degree in May 2024. He is not married, and he does not have any children. From May to August 2023, Applicant participated in a summer internship with a DOD contractor. From December 2023 to January 2024, he participated in a winter internship with the same DOD contractor, his sponsor. This is his first application for a security clearance. (GE 1; Tr. 24-25, 30-31, 33)

On March 14, 2023, Applicant completed and submitted an Electronic Questionnaire for Investigations Processing (e-QIP). Under Section 23 - Illegal Use of Drugs or Drug Activity, he disclosed that he used marijuana "a few times a week for the last 2 years." He specified the timeframe of his marijuana use as April 2021 to February 2023. He further stated, "I understand marijuana is federally illegal and do not intend [sic] to use it in the future." (GE 1)

On May 9, 2023, Applicant was interviewed by an authorized investigator on behalf of the Office of Personnel Management (OPM). During the interview, he admitted that he used marijuana a few times a week from April 2021 until February 2023. He then quit for about a month because he anticipated a pre-internship drug test. When no drug test was scheduled, he resumed using marijuana weekly in April 2023. He had not been subjected to a drug test as of the interview. (GE 2)

During the interview, Applicant volunteered that he had illegally purchased marijuana about once every two to three weeks from a friend in his fraternity. He acknowledged that his use of marijuana after his e-QIP representation was poor judgment. He maintained that he last used marijuana a week prior to the interview. He professed an intent not to use marijuana in the future. In his October 4, 2023 response to DOHA interrogatories, Applicant confirmed the accuracy of the OPM summary of the May 9, 2023 interview. (GE 2)

At the hearing, Applicant confirmed the accuracy of the information he reported about his marijuana use as detailed in his e-QIP and during his May 2023 OPM interview. He reiterated he last used marijuana in May 2023. He acknowledged that he used marijuana with knowledge that his use violated Federal and state drug laws. In August 2023, he moved into a new residence, where he resides with seven roommates from his fraternity. Two of his seven roommates use marijuana, at times in his presence, despite

his efforts to avoid being in the presence of his roommates when they use marijuana. He also continues to associate with other friends with whom he has used marijuana in the past. (Tr. 32-37, 43, 47-49)

At the hearing, Applicant acknowledged his poor judgment to use marijuana after he expressed his intent to abstain from future use in his e-QIP. He is aware that his sponsor prohibits all illegal drug use. He professed that he has matured both personally and professionally since the spring of 2023. He reaffirmed that he remains committed to abstaining from using marijuana and other illegal drugs. (Tr. 46)

Whole Person Evidence

A close family friend testified on Applicant's behalf. She has held a security clearance for over 30 years and is also employed by the Applicant's sponsor. When she supervised Applicant during his winter internship, she found him to be an excellent communicator and very professional. She described him as diligent, thoughtful, smart, capable, and honorable. She was generally aware of Applicant's marijuana use. She advised him of the likelihood of a pre-internship drug test in about March 2023. (Tr. 22-28)

Applicant submitted performance appraisals for his summer 2023 internship and his winter 2023-2024 internship. A supervisor for Applicant's summer internship praised him as "an outstanding role model for other interns." He also described him as trustworthy, polite, of great integrity, responsible, and a self-starter. His supervisor for Applicant's winter internship lauded his competence, work performance, and high level of professionalism. (AE A, AE B)

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); and

- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

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 knowingly and repeatedly violated Federal and state drug laws by possessing and using marijuana from April 2021 to May 2023. AG ¶¶ 25(a) and 25(c) 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 frequently possessed, used, and purchased of marijuana for a period spanning over two years, knowingly violating Federal and state drug laws. The fact that he used marijuana after acknowledging its illegality and expressing his intent to abstain from future use is an aggravating factor. 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 has not used marijuana since May 2023, and he has expressed his intent to abstain from marijuana in the future. AG ¶ 26(b)(3) applies. However, he continues to reside and associate with individuals who use marijuana. He remains in a similar environment to the one where he exercised poor judgment and resumed his marijuana use after submitting professing an intent to abstain. I have considered Applicant's intent to avoid circumstances where others are using illegal drugs and his professed maturity since May 2023. Notwithstanding the positive steps Applicant has taken, he has not demonstrated a sufficient pattern of abstinence nor a significant change in circumstances to avoid further drug involvement given the frequency and recency of his involvement with marijuana. He 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 excelled at his two internships. His witness praised his trustworthiness and integrity. Applicant honestly disclosed his frequent marijuana use; however, this honesty does not overcome the security concerns arising from his frequent and recent involvement with marijuana. In the future, with the passage of time, continued abstinence and changed circumstances, he may be able to mitigate these security concerns.

Formal Findings

