



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



In the matter of:)
)
) ISCR Case No. 23-02798
)
Applicant for Security Clearance)

Appearances

For Government: Alison P. O’Connell, Esq., Department Counsel
For Applicant: Sean D. Rogers, Esq.

07/10/2024

Decision

BORGSTROM, Eric H., Administrative Judge

Applicant did not mitigate the drug involvement and substance misuse security concerns arising from his use of marijuana while possessing a security clearance and holding a sensitive position. Eligibility for access to classified information is denied.

Statement of the Case

On January 29, 2024, 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 implemented by the DOD on June 8, 2017.

Applicant's February 5, 2024 response to the SOR (Answer) was prepared without the assistance of legal counsel. In his Answer, Applicant admitted, without explanation or further information, both SOR allegations. He requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge.

On March 12, 2024, the Government was ready to proceed to hearing. I was assigned this case on April 2, 2024. On April 10, 2024, DOHA issued a Notice of Hearing, scheduling a hearing by video teleconference for May 8, 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 three witnesses testified. Applicant proffered five exhibits, which I admitted as Applicant Exhibits (AE) A through E without objection. The evidentiary record closed on May 8, 2024. DOHA received the hearing transcript (Tr.) on May 20, 2024.

Findings of Fact

Applicant is 31 years old. He earned a bachelor's degree in December 2015. He married in April 2023, and does not have any children. (GE 1; AE A; Tr. 19-20, 38)

On February 24, 2016, Applicant completed and submitted an Electronic Questionnaire for Investigations Processing (e-QIP). Under Section 23 - Illegal Use of Drugs or Drugs Activity, he reported that he first used marijuana in February 2008 and most recently used marijuana in October 2015. He stated:

I used to smoke marijuana in high school and a little in college. I have not smoked since October of 2015 and do not plan to smoke anymore. I probably smoked around 50 individual times throughout high school and less than 30 individual times through college. I'm not exactly sure how many but if I had to put a number on it, it would be around those ranges.

He admitted that he illegally purchased marijuana on multiple occasions between March 2008 and August 2014. He also reported that he used psilocybin mushrooms twice and LSD twice between June 2010 and June 2011 that he used cocaine once in June 2015. He added that he did not intend to use marijuana, mushrooms, LSD, or cocaine in the future. (GE 2; Tr. 23, 39, 47-48)

From February 2016 to September 2017, Applicant was employed as a project management analyst for a DOD contractor. He was unemployed from September 2017 to April 2019. From April 2019 to January 2023, he was employed full time as a project control analyst for a DOD contractor. He was fired in January 2023 for a "decline in work production." Since January 2023, he has been employed full time as a program control analyst for a different DOD contractor. (GE 1; AE A; Tr. 21, 26-28)

On April 3, 2023, Applicant submitted a second e-QIP and provided updated information about his past drug use. Under Section 23 - Illegal Use of Drugs or Drug Activity, he reported that he ingested marijuana edibles in December 2021 and April 2022, while he possessed a security clearance. Under Section 25 - Investigations and Clearance Record, he listed that he had been previously investigated for a clearance, but that he didn't know whether a clearance was granted.

On March 28, 2024, Applicant submitted a statement of intent to abstain from all drug involvement and substance misuse. On April 13, 2024, Applicant participated in a hair-follicle drug screening. He tested negative for all illegal substances, including

amphetamines, cannabinoids, cocaine, opiates, and PCP. On April 16, 2024, Applicant participated in a substance abuse evaluation conducted by licensed counselor. The counselor concluded that Applicant did not meet any of the 11 criteria for a substance use disorder and did not recommend any formal counseling or treatment. (AE C-E)

At the hearing, Applicant confirmed his prior illegal drug use as delineated in his two e-QIPs. He testified that he and his now wife traveled out of state to State A in December 2021 with another couple. Because recreational marijuana was permitted under State A laws, the other couple purchased marijuana and provided some to Applicant and his now wife. In April 2022, he traveled from his state of residence (State B) to an adjacent state (State C), which also permitted recreational marijuana use under State C laws. He purchased about four to five marijuana gummies and returned to State B, where recreational marijuana remained illegal. He consumed one gummy in April 2022, and he disposed of the remaining gummies. When questioned why he purchased and used marijuana in April 2022, he responded, "I hadn't really done anything in a few years. I found out that it was legal in [State C]. I thought that was kind of cool and I went over there and bought some." (Tr. 30-40, 44-45, 56).

At the hearing, Applicant testified that he was granted a secret clearance by the end of 2016. Although he did not initially have access to classified information, after his clearance was granted he had access to a classified database and worked at a military installation. Applicant has been aware that his clearance was active at all three employments with DOD contractors. His position between April 2019 and January 2023 involved work with an air traffic control system. He does not view classified information in his current employment, but he reviews sensitive for official use only (FOUO) information. (Tr. 22-25, 28, 39-42, 50-52)

At the hearing, Applicant provided conflicting statements as to his understanding whether marijuana use was permitted under Federal law, state law, and DOD policies for clearance holders. He initially testified that, since his first position with a DOD contractor, he was aware that marijuana use was prohibited by DOD clearance holders. He later claimed that he believed his marijuana use was permitted because it was legal under state laws. He testified, "I thought it was a legal thing to do." Later in the hearing, he testified that he believed that he was permitted to use marijuana under State B laws because it had been decriminalized. Although he listed his marijuana use on his 2023 e-QIP under "Illegal Use of Drugs," he claimed he did not believe his marijuana in 2021 and 2022 had been illegal or prohibited by DOD policies. Despite believing that marijuana use was permitted, he believed he was subject to random drug testing by his employer. He also believed he could transport the marijuana from State C to State B by car if under a certain quantity, yet he and his friends believed it was illegal to fly from State A to State B with marijuana gummies. I did not find Applicant's testimony, that he genuinely believed DOD clearance holders were permitted to use marijuana, to be credible. (Tr. 33, 41, 44 - 45, 55, 57,61,65, 84-85)

Although Applicant stated his intent to abstain from all illegal drug use, he continues to socialize with individuals with whom he used illegal drugs in the past. He socialized with the couple with whom he used marijuana in December 2021 about two weeks prior to the hearing. (Tr. 40, 59)

Whole Person

Applicant's former supervisor, landlord, and friend testified as to his character and work performance. Applicant's former supervisor at his current employer, who continues to have regular contact with Applicant, considers Applicant to be extremely professional and well respected in the workplace. Applicant's landlord noted his character and described him as his best tenant ever. Applicant's friend, with whom Applicant had used marijuana in December 2021, attested to Applicant's character and reliability. (Tr. 79, 90-93, 100-102)

Applicant submitted a 2023 performance review, wherein he met or exceeded expectations in all metrics. His rater stated that Applicant grew in the past year and sought greater communication from Applicant going forward. (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. In this case, the following disqualifying conditions potentially apply:

- (a) any substance misuse;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

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 admitted using marijuana in December 2021 and April 2022 while he possessed a security clearance and held a sensitive position (SOR ¶ 1.a.). The Security Executive Agent Directive (SEAD) 4 ¶ D.8. defines a "sensitive position" as:

Any position within or in support of an agency in which the occupant could bring about, by virtue of the nature of the position, a material adverse effect on the national security regardless of whether the occupant had access to classified information, and regardless of whether the occupant is an employee, military service member, or contractor.

See ISCR Case No. 22-01661 at 4 (App. Bd. Sep. 21, 2023). As defined by the SEAD 4, Applicant's marijuana use occurred while he had regular access to classified information and while holding a "sensitive position." The record evidence established that Applicant's job responsibilities involved sensitive information and related to air traffic control systems. In his Answer, Applicant admitted that he used marijuana while holding a sensitive position. In April 2022, Applicant purchased marijuana in violation of Federal drug laws (SOR ¶ 1.b.). AG ¶¶ 25(a), 25(c), and 25(f) 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, I considered four elements. First, I considered the entirety of Applicant's drug involvement on balance with his two years of abstinence. Between February 2008 and October 2015, Applicant's regular use of marijuana and his experimentation with cocaine, mushrooms, and LSD, reveal the significance and frequency of Applicant's drug involvement. In his February 2016 e-QIP, he stated that he did not intend to use any illegal drugs in the future; however, at the hearing, when questioned about his conduct, he responded, "I thought that was kind of cool and I went over there and bought some."

Second, I considered the aggravating circumstance of Applicant's marijuana use in December 2021 and April 2022. Applicant was an employee of a DOD contractor, and he had worked for DOD contractors dating back to 2016. He knew that he had a security clearance and that he was working in a sensitive position.

Third, as to the likelihood of recurrence, Applicant used marijuana in December 2021 and April 2022 after not having used for six years. He was excited because he thought it was "cool." He signed a statement of intent to abstain from illegal drugs in the future; however, he made and broke a similar averment in his 2016 e-QIP. Furthermore, he continues to regularly associate with individuals with whom he had used marijuana in the past.

Fourth, a major consideration in this case is Applicant's notice that his marijuana use was prohibited by Federal drug laws and DOD policies. The DOHA Appeal Board has held that "applicants who use marijuana after having been placed on notice of the security significance of such conduct may be lacking in the judgment and reliability expected of those with access to classified information." ISCR Case No. 20-01772 at 3 (App. Bd. Sep. 14, 2021). Here, Applicant made several inconsistent statements as to his understanding of drug laws and DOD policies. On both e-QIPs, he listed his marijuana use as "illegal drug activity." He initially testified that DOD policies prohibited clearance holders from using marijuana; however, he later reasoned that a clearance holder could still use marijuana if permitted by state law. He believed he could purchase and transport marijuana from State C to State B in April 2022; however, he could not possess marijuana in State A and fly with it back to State B in December 2021. He unequivocally believed that he was subject to random drug testing by his employer. Taken in its entirety, I conclude that Applicant was on notice that DOD clearance holders were prohibited from using marijuana. Applicant's marijuana use while holding a clearance and working in a sensitive position, even if he was unaware of a specific policy prohibiting such use, raises concerns about his judgment and reliability.

All of these factors lead me to conclude that Applicant did not and does not grasp the seriousness of his lapses of judgment to use marijuana while possessing a security clearance and working in a sensitive position. Notwithstanding the passage of time since his last use of marijuana, doubts remain about Applicant's judgment and reliability. There is insufficient evidence to conclude that Applicant will continue to abstain from marijuana given his prior statements in his 2016 e-QIP and his relapse. He 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 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's former supervisor, friend, and landlord praised his work performance and character. Notwithstanding this favorable evidence, Applicant has not overcome the concerns raised by his marijuana use while possessing a security clearance and in a sensitive position. Doubts remain as to his judgment and reliability. With a more established pattern of abstinence, he may mitigate the security concerns arising from his illegal drug use while possessing a security clearance.

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
Subparagraph 1.b.:	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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Eric H. Borgstrom
Administrative Judge