



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



In the matter of:)
)
) ISCR Case No. 24-00252
)
)
Applicant for Security Clearance)

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: *Pro Se*

11/05/2024

Decision

BORGSTROM, Eric H., Administrative Judge

Applicant has abstained from any illegal drug involvement for 18 months and has adopted alternative techniques to aid his sleep. He mitigated the drug involvement and substance misuse security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On May 24, 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.

In Applicant's July 1, 2024 response to the SOR (Answer), he admitted, with explanation, both allegations, and he requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge.

On August 13, 2024, the Government was ready to proceed to hearing. I was assigned this case on August 19, 2024. On August 23, 2024, DOHA issued a Notice of Hearing, scheduling a hearing by video teleconference for September 16, 2024. 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 proffered two exhibits, which I admitted as Applicant Exhibits (AE) A and B without objection.

At Applicant's request, I held the record open until September 30, 2024, to provide him an opportunity to supplement the evidentiary record. Applicant timely submitted two performance reviews, which I admitted as AE C without objection. DOHA received the hearing transcript (Tr.) on September 24, 2024. The record closed on September 30, 2024.

Findings of Fact

Applicant is 36 years old. He graduated from high school in 2007, and he earned an associate degree in 2010. He has been married since September 2016, and he has a one-year-old child. Since July 2022, Applicant has been employed as a database manager for his current employer. Beginning in May 2023, his job responsibilities changed to support DOD contracts with the same employer. (GE 1; Tr. 20)

On June 19, 2023, 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 on multiple occasions between October 2002 and April 2023, with long periods of time without any marijuana use. He further reported that he had purchased marijuana from state-licensed dispensaries on about five occasions between October 2020 and February 2023. He admitted that he had cultivated marijuana, for his personal use, between October 2021 and October 2022. He added that he did not intend to use or cultivate marijuana in the future because he had prioritized his career. (GE 1)

On September 13, 2023, Applicant was interviewed by an authorized investigator on behalf of the Office of Personnel Management (OPM). During the interview, he confirmed the information about his marijuana use, purchase, and cultivation as reported in his e-QIP. In his April 25, 2024 response to DOHA interrogatories, Applicant adopted the summary of the OPM interview as an accurate reflection of his statements during the security interview. (GE 2)

At the hearing, Applicant provided greater detail about the frequency and span of his marijuana use, purchase, and cultivation. Between 2003 and late 2006, while in high school, he occasionally used marijuana. He did not use marijuana between late 2006 and 2020. Following his state's legalization of recreational marijuana use in 2016, Applicant resumed using marijuana between about October 2020 and April 2023, in the form of edibles or joints, several times a week. He understood, at the time of his use, that although marijuana use was permitted under state law it remained illegal under Federal law. In April 2023, Applicant decided to discontinue his marijuana use because he had just applied for a new position requiring a clearance and because he and his wife were

expecting their first child. He has also developed better habits - such as exercise, better diet, meditation, and reduced screen time - to improve his sleep, which had been the original reason for his marijuana use. (Tr. 23-31, 36-38, 44)

Between October 2020 and February 2023, Applicant purchased marijuana approximately five times, from state-licensed dispensaries. Between October 2021 and October 2022, he cultivated marijuana plants in his home for his personal use. Applicant carefully researched state law to ensure that his cultivation complied with the complicated and changing laws about marijuana cultivation. From his own plants, he would smoke the marijuana flower or render it into a butter for making edibles. In April 2023, he intentionally destroyed all the plants that were in his possession. On one occasion, Applicant sold some of his cultivated marijuana to a friend for \$50. He had been prepared to simply give it to the friend, but the friend insisted on paying him. (Tr. 23-31, 36-38, 44)

Applicant's wife has never used marijuana. To Applicant's knowledge, his father has cultivated and used marijuana for decades; however, Applicant's father no longer uses marijuana around Applicant, his wife, or their infant. Applicant's brother had previously used marijuana, but he has abstained from marijuana use for the past year while employed with a DOD contractor. Applicant participates in a softball league where some individuals may use marijuana after games, but Applicant avoids those environments. (Tr. 31-33, 41)

During the hearing, Applicant explained that his life has changed drastically in the last 18 months, with his new job responsibilities and his child. He spends most of his time with his wife and child, and the friends with whom he socializes do not use marijuana. Applicant truly enjoys and has excelled at his new position, and he has had no disciplinary actions with his current employer. Applicant does not use any THC derivatives or cannabidiol (CBD) products. During a pre-employment drug urinalysis in July 2022, he tested positive for marijuana. (Tr. 39-42)

Whole Person

Applicant's supervisor, who is aware of Applicant's past marijuana use, submitted a character-reference letter recommending him for clearance eligibility. His supervisor praised his professionalism, integrity, dedication, exemplary work ethic, and good judgment. Applicant submitted performance reviews for 2023 and 2024, wherein he met or exceeded all of his performance metrics. (AE A, AE C; Tr. 43)

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
- (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 admitted using marijuana several times a week between about October 2020 and April 2023. Between October 2021 and October 2022, he cultivated marijuana. Applicant's conduct violated Federal drug law. 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.

Prior to May 2023, Applicant never held a security clearance and did not work on DOD projects. Since then, he has abstained from any illegal drug involvement for 18 months and has adopted alternative techniques to aid his sleep. He made and has adhered to his decision to abstain from future marijuana use - both due to his new job responsibilities and clearance eligibility but also because he was becoming a parent. He avoids environments where marijuana may be used, and his father no longer uses in Applicant's presence. I have considered Applicant's statements in his e-QIP, in his Answer, and at hearing to be statements of intent to abstain from all drug involvement in the future. Applicant's knowing violation of Federal law - with his use and cultivation of marijuana - and the frequency of his marijuana use between October 2020 and April 2023 are aggravating factors in this case. Nonetheless, I am convinced that Applicant is committed to his changed lifestyle, circumstances, and job responsibilities, and his drug involvement is unlikely to recur. 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.

Applicant has thrived in his new employment and his changed lifestyle, as established by his reference letter, performance reviews, and testimony. He credibly

testified that he is committed to abstaining from all illegal drug involvement, as demonstrated by his pattern of abstinence over the last 18 months. I have no doubts as to his trustworthiness, reliability, and good judgment. He mitigated the drug involvement and substance misuse.

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.b.: 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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Eric H. Borgstrom
Administrative Judge