



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

In the matter of:)
)
 [Name Redacted]) ISCR Case No. 18-00622
)
 Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

03/05/2019

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used and purchased marijuana in early 2014 after her state legalized recreational use of minor amounts of the drug by adults. After being granted an interim Secret clearance and after stating that she did not intend to use marijuana in the future, she turned to marijuana in 2017 to cope with anxiety and depression after breaking up with her fiancé. She has not used any marijuana since May 2017, but her marijuana use in contravention of the federal drug laws and security requirements raises doubts about her reform. Clearance is denied.

Statement of the Case

On June 20, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H, drug involvement and substance misuse. The SOR explained why the DOD CAF was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for her. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security*

Clearance Review Program (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DOD on June 8, 2017.

On July 6, 2018, Applicant responded to the SOR allegations and requested a decision based on the written record by an administrative judge from the Defense Office of Hearings and Appeals (DOHA). Department Counsel for the Government prepared an undated File of Relevant Material (FORM), consisting of five exhibits (Items 1-5) and six documents (Items 6-11) for administrative notice. DOHA forwarded a copy of the FORM to Applicant on October 17, 2018, and instructed her to file any objections to the information or to supply additional information in response to the FORM within 30 days of receipt. Applicant received the FORM on October 25, 2018. No response was received by November 24, 2018. On January 30, 2019, the case was assigned to me to determine whether it is clearly consistent with national security to grant or continue a security clearance for Applicant. I received the case assignment on February 4, 2019.

Administrative Notice

In the FORM, Department Counsel requested administrative notice of the federal government's official policy with regard to the use of marijuana, which remains a Schedule I controlled drug, as set forth in Items 6 through 11 of the FORM. Applicant submitted no comment or objection. Accordingly, memoranda from the U.S. Department of Justice's Deputy Attorney General (Items 6-9), the Director of National Intelligence (Item 10), and the Director of the Office of Personnel Management (OPM) (Item 11), were reviewed and administrative notice was taken of the fact that marijuana use remains illegal under federal law and prohibited by federal policy.

Findings of Fact

The SOR alleges under Guideline H that Applicant purchased and used marijuana with varying frequency from approximately January 2014 through May 2017 (SOR ¶ 1.a) and that Applicant continued to use and purchase marijuana after she had been granted a DOD interim secret clearance in October 2016 (SOR ¶ 1.b). (Item 1.) In her Answer to the SOR, Applicant admitted that she purchased and used marijuana between the dates of January 2014 and May 2017, but only during two discrete periods: in January 2014, when she experimented with the drug occasionally after it became legal in her state, and in May 2017 to cope with several life stressors, including the breakup with her then fiancé, the flooding of her apartment, and an impending layoff. Applicant admitted to a lapse of judgment in using marijuana while she held an interim clearance, but asked that the fact that she self-reported the information be considered in mitigation.

After considering the FORM, which includes Applicant's Answer to the SOR (Item 3), I make the following findings of fact:

Applicant is 34 years old and unmarried. She has an associate's degree in criminal justice awarded in May 2009 and additional college credits earned between January 2011 and August 2012. She has been employed as a security analyst with a defense contractor since June 2016, and in October 2016, she was granted an interim Secret security clearance. (Items 3-5.)

Applicant worked as a fraud agent in the online payment sector from February 2008 to September 2013. She left the job voluntarily to move to her current state of residence. From November 2013 to April 2015, she worked as a project manager for a start-up company involved in service delivery management. After recreational use of marijuana became legal in the state,¹ Applicant purchased marijuana from a state-licensed dispensary, and she used the drug "through the month" of January 2014 into February 2014. (Items 3-5.) Her stated reason for using the drug was that it became legal to do so. (Item 4.)

From April 2015 to June 2016, Applicant was employed as an investigator for a financial investment company. She left for a higher-paying position with her current employer in June 2016. On August 23, 2016, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions² (SF 86) on which she responded affirmatively to an inquiry concerning whether she had illegally used any drugs or controlled substances in the last seven years. She disclosed that she purchased and smoked marijuana from January 2014 to February 2014 after marijuana use became legal in her state. She responded "No" to whether she intended to use marijuana in the future, and stated, "I do not intend to use this drug in the future as the decision to purchase and smoke marijuana was only related to the passing of the law making it legal." (Item 4.)

¹ Effective December 2012, the state legalized the recreational use of marijuana for persons 21 years or older. Possession, using, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana is not considered unlawful. Retail establishments for the sale of marijuana have been operating since January 2014. Selling, distributing, or transferring marijuana to individuals under age 21, and driving under the influence of marijuana remain illegal. Under Section 18-18-406 of the pertinent state statutes, possession of more than 12 ounces of marijuana or more than three ounces of marijuana concentrate is a level 4 drug felony. Possession of more than six ounces but less than 12 ounces of marijuana or not more than three ounces of marijuana concentrate is a level 1 drug misdemeanor. Possession of more than two ounces but not more than six ounces of marijuana is a level 2 drug misdemeanor. Possession of not more than two ounces of marijuana is a drug petty offense punishable by a fine of not more than \$100. Open and public display, consumption, or use of two ounces or less of marijuana is a drug petty offense punishable by a fine of up to \$100 and up to 24 hours of community service. There is an exception from criminal prosecution under § 18-1-711 for any person who suffers or reports an emergency drug overdose event. Transferring or dispensing not more than two ounces of marijuana from one person to another for no consideration is considered a drug petty offense and not a sale. However, it is unlawful (a level 1 drug misdemeanor) for a person to transfer marijuana at no cost if the transfer is related in any way to remuneration for a product or service.

² The SF 86 in the FORM (Item 4) is missing pages 30 and 31 involving section 22 inquiries concerning police record information. There are no SOR allegations pertaining to a police record.

Applicant turned to marijuana in 2017, perhaps as early as January 2017,³ to cope with anxiety and depression after breaking up with her fiancé. She purchased marijuana from a legal dispensary and used the drug approximately twice a week for about five weeks from April 2017 to May 2017. (Items 3, 5.)

On September 22, 2017, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Regarding any illegal use of drugs in the last seven years, Applicant reportedly disclosed that she used marijuana throughout the month of January 2014; randomly since then; and about twice a week between April 2017 and May 2017. She attributed her 2014 use of marijuana to its legalization and her recent use to coping with anxiety after breaking up with her now former fiancé. She bought the marijuana for her personal use from a dispensary and smoked it alone at home. She expressed her belief that she had matured since then. She denied any intention to use marijuana again because she has acquired better coping skills like yoga and meditation and because she did not want to jeopardize her current employment with a defense contractor. (Item 5.)

On March 26, 2018, DOHA sent interrogatories to Applicant. She indicated in response on May 5, 2018, that she was in the process of being weaned from an anti-depressant medication under the care of her physician. Asked to list any involvement with non-prescribed drugs since January 1, 2014, Applicant reported that she used marijuana about ten times from April 2017 to May 2017 and that she had purchased the marijuana from a licensed dispensary. Applicant indicated that she had stopped using illegal drugs in May 2017; that she has no unused drugs or paraphernalia in her possession; and that she does not associate with any persons who use illegal drugs or frequent places where she has reason to believe drugs are being used or are used in her presence. Applicant was provided a copy of the report of her interview with the OPM investigator. She made no corrections to the information reported about her marijuana use and purchases. (Item 5.)

On June 20, 2018, the DOD CAF issued an SOR to Applicant because of her marijuana use and purchases, including after she had been granted an interim Secret clearance in October 2016. In response to the SOR, Applicant indicated on July 6, 2018, that she had purchased and used marijuana, but only during two discrete periods, those being during the month of January 2014 when she experimented with the drug occasionally, and then in May 2017 after she had been granted an interim clearance. About her more recent involvement, she stated in part:

There were a number of life events leading up to May 2017 including the loss of my fiancé, an apartment flood that ruined the majority of my belongings, and an impending layoff at my job due to an acquisition.⁴ My mental health

³ After discussing the reason for Applicant's use in 2017, the OPM investigator reported, "Subject started using marijuana in this case from 01/2017 to 04/2017." Applicant was given an opportunity to review the summary of her interview, and she did not address that statement. (Item 5.)

⁴ Regarding any acquisition, it is noted that Applicant submitted a handwritten response on stationery of a security company other than that named on her SF 86, although DOHA sent the SOR to her through the company named on her SF 86.

took a hit during this time and I became very depressed. I was having trouble functioning during the day and was unable to sleep at night. I purchased and used marijuana at this time (approximately 10 times).

She attributed her 2017 use of marijuana to “an unfortunate lapse in judgment and an attempt to sleep after having not properly done so for some time. She asked that her full disclosure of her marijuana use on her SF 86 and during her OPM interview be considered as evidence of her good character. She also added that she also self-reported that the OPM investigator has used the information from her SF 86 to contact her and ask her out, and she complied with all inquiries in that regard. (Answer.)

The guidance provided by various U.S. government entities makes it clear that no state can authorize violations of federal law, existing suitability criteria, or Executive Branch policies. Federal agencies are prohibited from granting or renewing a security clearance to an unlawful user of a controlled substance or an addict. Executive Order 12564 mandates a drug-free federal workplace. An individual’s disregard of federal law pertaining to marijuana remains relevant to the suitability determination. From a prosecutorial standpoint priorities of the Department of Justice are to prevent the following: distribution of marijuana to minors; revenue from marijuana sales from going to criminal enterprises, gangs, and cartels; diversion of marijuana from states where it is legal under state law to other states; use of state-authorized marijuana as a cover for trafficking of other illegal drugs; use of firearms and other violence in cultivation and distribution of marijuana; drugged-driving associated with marijuana use; growth of marijuana on public lands; and possession or use of marijuana on federal property. Jurisdictions that had implemented regulations for marijuana activity are expected to provide the resources and demonstrate the willingness to enforce their laws and regulations in a manner that does not undermine federal enforcement priorities. (Items 6-11.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overall 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. 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 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 classified 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 classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Section 7 of EO 10865 provides that 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 concerns about drug involvement and substance misuse are set forth 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.

Applicant took the occasion of her state’s legalization of recreational use of minor amounts of marijuana to use marijuana for about a month from January 2014 to February 2014. Despite reportedly no use or purchase of marijuana for the next few years, she turned to marijuana to cope with anxiety and depression after she broke up with her then fiancé in 2017. She admits that she purchased marijuana and that she used marijuana about ten times in the privacy of her own home between April 2017 and May 2017, after

she had been granted an interim Secret clearance. The OPM investigator reported that she “started using marijuana in this case from 01/2017 to 04/2017.” She may have used marijuana in 2017 before April of that year, but even if not, the evidence establishes disqualifying conditions AG ¶ 25(a), “any substance misuse (see above definition),” AG ¶ 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” and AG ¶ 25(f), “any illegal drug use while granted access to classified information or holding a sensitive position.”

The Government’s case for AG ¶ 25(g), “expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such use,” is also established because Applicant used marijuana after she had indicated on her August 2016 SF 86 that she had no intention to use marijuana in the future. Her resumption of marijuana use in 2017 is concrete action that belies a clear and convincing commitment to discontinue drug use.

AG ¶ 26(a) provides for mitigation when the drug involvement and substance misuse “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.” Although Applicant’s use and purchases of marijuana can reasonably be characterized as infrequent, her involvement after she completed her SF 86 and was granted an interim Secret clearance casts doubt on her reliability, trustworthiness, and good judgment with respect to whether she can be counted on to abide by federal laws and security requirements. AG ¶ 26(a) has only minimal applicability.

AG ¶ 26(b) has some applicability because she acknowledges her drug involvement, and there is no evidence that she associates with drug-using associates and contacts. AG ¶ 26(b) provides:

(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 self-reporting of her marijuana involvement is some evidence of good character. Even so, it does not entitle her to a favorable security determination or negate the security significance raised by her use of marijuana, especially while she was in a sensitive position. She claimed on her SF 86 that she had no intention to use marijuana in the future because her decision to use and purchase the drug in 2014 was solely related to

the state's legalization. Her August 2016 SF 86 denial of any future intention to use marijuana was under the advisement of Title 18, Section 1001, of the United States Code, which makes punishable as a felony offense any false statement. Assuming she did not then intend any future marijuana use, she was on notice that future marijuana use was incompatible with a security clearance. She attributes her marijuana purchase and use in 2017 to stressful life circumstances, none of which justifies her conduct in violation of federal law and the trust imposed in her by the Government when it granted her an interim Secret clearance. She has apparently found healthier ways to address her depression and anxiety through yoga and anti-depressant medication, but it is troubling that she turned to marijuana first. Before each of the 10 times or so that she used marijuana, she had an opportunity to consider whether her conduct was a problem for her security clearance eligibility. Her present abstinence of less than two years is not sufficient to guarantee against recurrence, given she used marijuana in 2017 after three years of no illegal drug involvement. The information of record is insufficient to overcome 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 security clearance by considering the totality of her conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(d).⁵ In making the overall commonsense determination required under AG ¶ 2(c), I have only the FORM, which shows Applicant cooperated with the investigation and adjudication process. While this is an important consideration, it is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). The Government must be able to rely on those persons granted security clearance eligibility to fulfill their responsibilities consistent with laws, regulations, and policies, and without regard to their personal interests. For the reasons discussed, Applicant has raised enough doubt in that regard to where I am unable to conclude that it is clearly consistent with the national interest to grant or continue her eligibility for a security clearance.

⁵ The factors under AG ¶ 2(d) are as follows:

- (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.

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

Subparagraphs 1.a-1.b: Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge