



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



In the matter of:)
)
 [Name Redacted]) ISCR Case No. 18-01697
)
 Applicant for Security Clearance)

Appearances

For Government: Raashid S. Williams, Esq., Department Counsel
For Applicant: *Pro se*

03/29/2019

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used marijuana from approximately July 2000 to at least February 2018. He denies any intention to use marijuana in the future, although as recently as December 2017, he was unable to commit to abstention. More time is needed for Applicant to establish that his drug involvement and substance misuse will not reoccur. Clearance is denied.

Statement of the Case

On August 31, 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 him. 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 September 26, 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). On December 20, 2018, Department Counsel for the Government prepared a File of Relevant Material (FORM), consisting of four exhibits (Items 1-4). DOHA forwarded a copy of the FORM to Applicant on December 21, 2018, and instructed him 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 January 7, 2019. No response was received by the February 6, 2019 due date. On March 12, 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 March 14, 2019.

Findings of Fact

The SOR alleges under Guideline H that Applicant used marijuana with varying frequency from July 2000 to at least February 2018 (SOR ¶ 1.a), and that he indicated during a December 20, 2017 interview with an authorized investigator for the Office of Personnel Management (OPM) that there was a likelihood that his illegal drug use would reoccur (SOR ¶ 1.b). (Item 1.) In his Answer to the SOR, Applicant admitted that he had used marijuana from 2000 to 2018, but he had “no intent to repeat [his] transgressions.” He explained that his marijuana use ceased in February 2018, and that he wants to be a good role model for his son born in August 2018. Applicant also admitted that he had indicated in December 2017 that his drug use was likely to reoccur, but he reiterated that he would not use any illegal drugs. (Item 2.)

After considering the FORM, which includes Applicant’s Answer to the SOR (Item 2), I make the following findings of fact:

Applicant is a 32-year-old high school graduate with two semesters of college. He attended college from September 2005 to January 2006 and from September 2008 to January 2009. He has yet to earn a degree. He has worked for his defense-contractor employer since September 2008. In April 2014, Applicant began cohabiting with his spouse in her home. They married in June 2015, and they had a son in August 2018. (Items 2-3.)

On August 9, 2017, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86.) In response to an inquiry concerning the illegal use of a drug or controlled substance in the last seven years, Applicant indicated that he used marijuana for the first time in college in September 2005. He gave an estimated date of July 2017 for his most recent use and explained that he had attended a comedy show with his family and his cousin gave him “infused drinks.” Applicant denied any intention of future illegal drug use, and added, “I plan on starting a family with my wife. My kid needs the best of me.” Applicant denied any involvement in other illegal drug activity in the last seven years, including any purchase. (Item 3.)

On December 20, 2017, Applicant was interviewed by an OPM investigator, in part about his drug use. He described himself as a social smoker. He reportedly indicated that he first used marijuana at age “10” and most recently in July 2017 at the comedy show, when he had drinks infused with marijuana. He explained that he used marijuana once to twice year except when he was in college, when he used marijuana twice a month at fraternity events. He denied ever purchasing marijuana. He admitted that there was a likelihood that he would use marijuana in the future. Applicant volunteered that he had received an email two months before his interview in which he was informed of declination of an interim clearance for him. He indicated that he was given a list of possible reasons for the denial but not a specific reason. (Item 4.)

Applicant was interviewed by another OPM investigator on February 14, 2018. He indicated that he was a former marijuana smoker. He denied any use of marijuana since May or June 2017 and any chance of future use. (Item 4.)

DOHA sent Applicant interrogatories concerning his illegal drug use. In his response dated July 24, 2018, Applicant indicated that he used cannabis from July 2000 to February 2018 once a year. He admitted that he had used marijuana after applying for a security clearance and stated, “The last big party before I have my son, wanted to go out for my last hooray before parenthood.” He cited the upcoming birth of his son in August 2018 as the precipitant in his decision to stop using marijuana because he needs to set an example for his son. Applicant explained that his wife could verify his abstention. In the interrogatories, Applicant was given an opportunity to review the summary of his December 20, 2017 interview. He adopted it without any changes. (Item 4.) It is unclear whether his use of marijuana in February 2018 occurred before his February 14, 2018 interview.

When he responded to the SOR on September 26, 2018, Applicant indicated that his son was born in mid-August 2018. He denied any use of marijuana since February 2018 and asserted that raising his son has become his “number one goal.” (Item 2.)

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.

There is conflicting evidence about when he used marijuana. He told an OPM investigator that he first used marijuana at age 10. In response to DOHA interrogatories, he indicated that he used marijuana starting in July 2000. He would have been 13 years old at

that time. The evidence establishes that he used marijuana for at least 18 years before stopping in 2018. He used the drug socially, once or twice a year except for a two-year time span starting in September 2005, when he used marijuana twice a month. Disqualifying condition AG ¶ 25(a), “any substance misuse,” applies. AG ¶ 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” applies only in that Applicant had physical possession of the drug on the occasions that he used it. There is no evidence that he ever purchased marijuana or ever engaged in the other activities covered under AG ¶ 25(c). AG ¶ 25(g), “expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse,” is established because Applicant stated during his December 2017 subject interview that there was a likelihood that his drug use would reoccur, and he used marijuana in at least February 2018.

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.” Excepting the two years in the mid-2000s, when his marijuana use increased to twice a month after he joined a fraternity, his drug use was infrequent; once or twice during the course of a year. However, given he used marijuana over some 18 years to as recently as February 2018, it cannot reasonably be said that his drug involvement happened so long ago or was “so infrequent” to trigger AG ¶ 26(a) in mitigation.

AG ¶ 26(b) has some applicability because Applicant acknowledges his drug involvement, and there is no evidence that he currently 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 his marijuana involvement is some evidence of good character. Even so, it does not entitle him to a favorable security determination or negate the security significance raised by his illegal use of marijuana, especially after he applied for a security clearance. Applicant told an OPM investigator in December 2017 that he would likely use marijuana in the future. He was interviewed by another OPM investigator on February 14, 2018. At that time, he denied any use of marijuana since May 2017 or

June 2017. He told the investigator that there was no chance of him using marijuana in the future. However, he used marijuana in February 2018 at a party. His explanation is that he “wanted to go out for [his] last hooray before parenthood.” That use of marijuana, after he had indicated that he would not use marijuana in the future, raises doubt about his ability to commit to his stated intention to abstain.¹ Applicant’s present abstinence of one year as of the close of the evidentiary record is very short in comparison to the 18 years over which he used marijuana. Little is known about the circumstances of much of his marijuana use other than it was while socializing. He continued to use the drug after he was no longer in the college environment. He provided no corroborating evidence from others attesting to his change to a drug-free lifestyle after the birth of his son, which would include avoiding friends and social functions that might be conducive to marijuana use. Applicant has yet to establish a sufficient pattern of abstinence to 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 security clearance by considering the totality of his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(d).² 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 seeking security clearance eligibility to comply with the Federal drug laws 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 him eligibility for a security clearance.

¹ It is unclear whether Applicant’s February 2018 marijuana use occurred before or after his February 14, 2018 interview. If before, then he concealed that drug use during his interview because he told the OPM investigator that he had not used any marijuana since May or June 2017.

² 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 eligibility for a security clearance for Applicant. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge