



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



In the matter of:)
)
 REDACTED) ISCR Case No. 19-01325
)
 Applicant for Security Clearance)

Appearances

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

10/25/2019

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used marijuana from June 2010 to at least September 2019; LSD and hallucinogenic mushrooms from January 2014 to March 2017; and prescription stimulants not prescribed for him from January 2016 to April 2017. Applicant has yet to establish that his marijuana use will not recur. Clearance is denied.

Statement of the Case

On June 26, 2019, 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 July 12, 2019, Applicant responded to the SOR allegations and requested a decision based on the written record in lieu of a hearing. On August 1, 2019, the Government requested a hearing under ¶ E3.1.8 of the Directive. On August 7, 2019, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On August 28, 2019, I scheduled a hearing for September 26, 2019.

At the hearing held as scheduled, two Government exhibits (GEs 1-2) were admitted in evidence without any objections. Applicant testified, as reflected in a transcript (Tr.) received on October 15, 2019. I held the record open until October 11, 2019, for Applicant to submit character references from some of his co-workers and other documentation. No documents were received by the deadline.

Findings of Fact

The SOR alleges under Guideline H that Applicant used marijuana with varying frequency from about June 2010 to at least November 2018 (SOR ¶ 1.a); that he used LSD and hallucinogenic mushrooms with varying frequency from about January 2014 to at least March 2017 (SOR ¶ 1.b); and that he used the prescription medications Adderall, Ritalin, and Modafinil, which had not been prescribed for him, from about January 2016 to at least April 2017 (SOR ¶ 1.c). When Applicant responded to the SOR allegations, he admitted that he used the drugs as alleged. He explained that he used marijuana for its medicinal benefits, including to relieve his anxiety and pain. Applicant denied any use of LSD and hallucinogenic mushrooms since March 2017 and any abuse of non-prescribed prescription drugs since April 2017. He expressed in writing an intention to abstain from all drug involvement and substance misuse with an acknowledgement that any future drug involvement be grounds for revocation of national security eligibility. After considering the pleadings, exhibits, and transcripts, I make the following findings of fact.

Applicant is a 25-year-old data scientist. He earned his bachelor's degree in May 2016 and his master's degree in May 2017. He has been employed by a defense contractor since June 2017. (GE 1.) He has never held a DOD security clearance. (Tr. 17-19.) Applicant understands that he does not need a clearance to keep his job, but a clearance would allow him to apply his skill-set to some classified programs at work. (Tr. 21-22.)

Applicant began using marijuana in June 2010 after his freshman year of high school. He used marijuana approximately once every two months in high school and during his first year of college. From the fall of 2013 to 2015, during his sophomore and junior years of college, he used marijuana once a week. He used marijuana daily from sometime in 2015 through April 2017. Applicant used marijuana to decompress from academic stress. He used marijuana at parties, with friends, and with housemates. He also used the drug by himself. Applicant purchased marijuana on occasion, no more frequently than once

a month, from 2014 to 2017. He bought marijuana from persons he did not know and also from and through friends. (GEs 1-2.)

Applicant used hallucinogenic mushrooms approximately three times and LSD about five times between January 2014 and March 2017. He also used, without a prescription, Adderall or Ritalin no more than 20 times total and Modafinil one time between January 2016 and April 2017. He obtained the stimulants from friends. (GE 1.)

After graduate school, Applicant stopped using illegal drugs, as it turns out temporarily, thinking that it was time to be “clear headed” for employment. In June 2017, he began working for his current employer. He completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) on June 29, 2017. In response to an inquiry into whether he had illegally used any drug or controlled substance in the last seven years, Applicant reported that he engaged in recreational marijuana use with “scattered” frequency from June 2010 to 2015 and then daily through April 2017. He also disclosed his use of LSD and hallucinogenic mushrooms between January 2014 and March 2017 “[r]ecreationally, motivated by studying the brain and once going to a music festival, highly irregular.” Applicant denied any intention to use marijuana in the future, stating, “I intend to keep a clear head throughout my professional adult life.” He also denied any intention of future involvement with LSD or hallucinogenic mushrooms, stating, “My reasons for use carry no more weight moving forward, rendering these drugs irrelevant and undesirable in my life moving forward.” In answer to an inquiry concerning any illegal drug purchases in the last seven years, Applicant reported that he had bought marijuana no more than once a month between January 2014 and February 2017, explaining that “recreational use of marijuana required occasional purchase.” In response to an SF 86 question about any intentional misuse of a prescription drug in the last seven years, Applicant listed his use of Adderall, Ritalin, and Modafinil, which he obtained from friends. (GE 1.)

On November 16, 2018, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Applicant admitted that he had used marijuana with current and previous college roommates. He volunteered that he had used marijuana on average once a day from November 2017 to November 3, 2018, with his latest use occurring at a party. He denied that he ever used marijuana at the workplace, but admitted that he had used marijuana in December 2017 and again in September 2018 while teleworking, in order to alleviate pain so he could get his work done. (Tr. 24.) He admitted that his current employer was not aware of his marijuana use. Applicant likened his marijuana use to having a drink. He expressed no intention to seek out marijuana in the future, but he could not rule out recurrence. He asserted that he would be prepared to abstain from marijuana if necessary for his clearance. As for his attitude toward marijuana, Applicant explained that he had always used it for social, creative, or calming purposes, and he did not think it was a big deal. He considered himself a “casual user” of marijuana. He denied any other illegal drug use since 2017 and any interest in using hallucinogens or non-prescribed stimulants in the future. (GE 2.)

On June 26, 2019, the DOD CAF issued a SOR to Applicant because of his drug involvement and substance misuse. When he responded to the SOR on July 12, 2019,

Applicant explained that his marijuana use was for its medicinal benefits, primarily to relieve anxiety and pain. He considered his use of the drug “innocuous” but regretful in that it cast doubt on his ability to perform his job and be trusted with classified information. He expressed in writing his intention to abstain from all drug involvement and substance misuse in the future, acknowledging that any future involvement would be grounds for revocation of national security eligibility. He denied any use of hallucinogenic drugs or misuse of prescription drugs since 2017.

At his September 26, 2019 hearing, Applicant reiterated that there had been no recurrence of involvement with LSD or hallucinogenic mushrooms since March 2017 or any misuse of prescription stimulants since April 2017. He asserted that such abuse would not recur. (Tr. 16-17.) He volunteered that, believing he would not be granted a security clearance because of his marijuana use, he continued to use marijuana since November 2018 “every other day perhaps,” including two to three times per week since July 12, 2019. (Tr. 18-19, 26-27.) Most of that use was self-initiated and purchased by him to relieve medical issues. He also used marijuana recreationally with his friends five or six times. (Tr. 31-32.) His most recent use of marijuana occurred at a party in mid-September 2019. (Tr. 24-25.) When asked to explain why he used marijuana after he had expressed in writing that he would not use marijuana in the future, he responded, “Like I said, use of marijuana has never affected my ability to perform my job, and I know that from experience.” (Tr. 23.) He cited the relief that marijuana brings him in terms of mitigating his anxiety, depression, and pain; described himself as “a guy who occasionally likes to smoke marijuana with his friends,” but he also asserted a willingness and ability to stop using marijuana if it would prevent him from being granted a security clearance. (Tr. 18-20.) Applicant testified that he would very much like to contribute to the classified components of some of the programs in which he is involved (Tr. 22), and that he does not need marijuana in his life. He expressed confidence that he would never use marijuana again “subject to the possibility of getting a security clearance.” (Tr. 28.) He expressed a willingness to undergo drug tests to prove abstinence. (Tr. 29, 35.)

Applicant has not had any drug counseling nor has he sought any medical treatment for those issues that he self-medicates with marijuana (Tr. 25), although he acknowledged that he should seek treatment for his anxiety and depression. (Tr. 31.) He does not suffer from chronic pain, but has occasional discomfort that he treats with marijuana rather than over-the-counter analgesics because the relief is more effective and immediate. (Tr. 25-26.) Recreational use of marijuana has been decriminalized in his state, and he testified that his use of marijuana has been consistent with state law. (Tr. 18-19.) He is aware that marijuana remains illegal under federal law. (Tr. 33-34.) He does not have a medical marijuana card. (Tr. 26.) Applicant has three housemates who use marijuana. One of these housemates is a college friend with whom Applicant has used marijuana. (GE 2; Tr. 30.) There have been some occasions since July 2019 where Applicant was offered marijuana, including by one of his housemates, and he declined. (Tr. 37.) No one at Applicant’s work is aware of his marijuana use. (Tr. 36.)

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.

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state laws (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

Applicant has used marijuana with varying frequency since June 2010. After going to work for his employer and completing an SF 86 in June 2017 on which he indicated that he did not intend to use marijuana in the future, Applicant used marijuana daily from November 2017 to November 2018 and then every other day until July 2019, when he indicated in writing his "intention to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility." He continued to use marijuana two to three times per week to at least mid-September 2019. Additionally, while in college and graduate school, Applicant used LSD five times and hallucinogenic mushrooms three times between January 2014 and March 2017. He also abused controlled stimulants (Ritalin, Adderall, and Monafinil) without a prescription approximately 21 times total from January 2016 to April 2017. Applicant obtained the hallucinogens and stimulants illegally from friends. He purchased marijuana illegally from friends and strangers. The SOR does not specifically allege that Applicant purchased illegal drugs or used marijuana after he stated he would not use it again, but I cannot ignore the circumstances of his marijuana use when evaluating its security significance. 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(g), "expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such use," are established.

AG ¶ 26(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," has little applicability in mitigation. Applicant's involvement with illegal hallucinogens was infrequent and recreational, but it cannot be viewed in isolation from his other drug involvement and substance misuse. His abuse of prescription stimulants approximately 21 times over a 16-month time span was certainly recurrent. Applicant's regular use of marijuana for the past nine years, not only while socializing but also to alleviate anxiety, depression, and occasional pain, continues to cast serious doubt about his judgment, reliability, and trustworthiness.

AG ¶ 26(b) provides for mitigation when an individual acknowledges his or her drug involvement and has no intention of future drug activity:

(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.

AG ¶ 26(b) applies in mitigation of Applicant's involvement with LSD and hallucinogenic mushrooms, and his illegal use of prescription stimulants. He has repeatedly disavowed any intention to use these substances in the future, and his present abstinence of 2.5 years is consistent with that intention to abstain. There is no evidence that he has sought out these controlled substances since college.

However, with respect to his marijuana use, Applicant has not established the disassociation from drug-using associates, the change in circumstances, a sustained period of abstinence, or the demonstrated intention to forego any future drug involvement. Applicant abstained from marijuana for only a few months after he indicated on his SF 86 that he intended "to keep a clear head throughout [his] professional life." After executing a statement of intention to abstain from marijuana for security clearance eligibility, he continued to use marijuana two to three times a week, knowing as he did so that he was violating federal law and that the DOD was concerned about his drug use. His present willingness to abstain from marijuana if necessary for a security clearance and to submit to drug testing to prove abstinence is not enough in reform, given the conditional nature of his

willingness to abstain; his failure to abide by similar statements in the past; his choice of marijuana over legal, alternative means to deal with mental health issues and occasional pain; and his continued friendships with marijuana users.

The “Bond Amendment,” which is codified at 50 U.S.C. §§ 3343, prohibits the grant or renewal of national security eligibility to an individual who is currently an unlawful user of a “controlled substance” as that term is defined in 21 U.S.C. § 802 and referenced in AG ¶ 24. Under Appendix B of the National Security Adjudicative Guidelines, the Bond Amendment applies to DOHA proceedings. Applicant continued to use marijuana to within little more than a week before his September 2019 hearing. He now promises that, “subject to the possibility of getting a security clearance, [he] would never use marijuana again.” Applicant may not be statutorily disqualified from being granted security clearance eligibility under the circumstances, but he has failed to clearly and convincingly commit to discontinue his marijuana use. The drug involvement and substance misuse security concerns raised by his years of marijuana use are not adequately mitigated.

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 in 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.

In making the overall commonsense determination required under AG ¶ 2(c), I note that Applicant is the sole source of information about his illegal drug use. To the extent that he has cooperated with the investigation and adjudication process, it is an important consideration in his favor. He candidly disclosed during his September 2019 hearing that he continued to use marijuana two to three times a week after being placed on notice in the SOR of the security concerns raised by his illegal drug involvement and substance misuse. However, 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 considerable doubt in that regard.

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
Subparagraphs 1.b-1.c:	For 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