



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



In the matter of:)
)
 REDACTED) ADP Case No. 19-01889
)
 Applicant for Public Trust Position)

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: *Pro se*

01/31/2020

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used marijuana from October 2012 through at least July 2019. Her use and purchase of marijuana since October 2016 was with a medical marijuana card. She intends to continue to use marijuana daily to treat her medical conditions as long as she has a medical marijuana card. Her drug use violates federal law and is contrary to Department of Defense (DOD) policy. Eligibility for a public trust position is denied.

Statement of the Case

On July 26, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing trustworthiness 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 eligibility for a public trust position 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 August 6, 2019, Applicant responded to the SOR allegations and requested a decision based on the written record in lieu of a hearing. On October 28, 2019, the Government submitted a File of Relevant Material (FORM), including documents identified as Items 1 through 9. Items 6 through 9 consist of memoranda concerning the federal government's position regarding the use of marijuana, including for medical purposes. In the FORM, the Government amended Item 1, the SOR, to correct Applicant's first name in conformity with the evidence, including Applicant's Answer (Item 2) and security clearance application (SCA) (Item 3). The Government forwarded a copy of the FORM to Applicant on October 30, 2019, and instructed her that any response was due within 30 days of receipt. Applicant received the FORM on November 13, 2019. No response to the FORM was received by the December 13, 2019 deadline. On January 15, 2020, the case was assigned to me to determine whether it is clearly consistent with national security to grant or continue a public trust position for Applicant.

Summary of SOR Allegations

The SOR alleges under Guideline H that Applicant used medical cannabis with varying frequency from about October 2012 to July 2019 (SOR ¶ 1.a); that she was arrested in December 2015 and charged with possession of drug paraphernalia and possession of 2.5 to 10 grams of cannabis (SOR ¶ 1.b); that she purchased medical cannabis from about October 2012 to October 2018 (SOR ¶ 1.c); and that she intends to continue to use medical cannabis in the future (SOR ¶ 1.d). (Item 1.) When Applicant answered the SOR allegations, she admitted the use and possession of medical cannabis as alleged and that she intends to continue to use medical cannabis in the future. She stated in response to SOR ¶ 1.d, "I deny, was only charged with possession." (Item 2.)

Findings of Fact

After considering the FORM, which includes an October 25, 2014 pronouncement from the then Director of National Intelligence that marijuana use remains unlawful under federal law, and that changes to state laws regarding the use of marijuana do not alter existing National Security Adjudicative Guidelines (Item 9), I make the following findings of fact:

Applicant is 29 years old and divorced after a marriage of less than six months. A high school graduate, Applicant attended college for two semesters before dropping out in November 2009. Applicant then worked at a nursing home, initially as a dishwasher and then as a certified nursing assistant until August 2012, when she enlisted in the United States military. Applicant injured herself and could not complete basic training. She was discharged for medical reasons in October 2012. (Items 3-4.)

Applicant worked as a certified nursing assistant at a different nursing facility from October 2012 to July 2014 when she was fired over a disagreement with the center's

director, apparently involving the use of bedding supplies on the midnight shift. For the next two years, she was employed in customer service for a hotel. From July 2016 to March 2018, Applicant was an assistant manager at a pizza restaurant. After a short stint as a hotel housekeeper, Applicant started working in June 2018 as a unit coordinator for a defense contractor providing services for the Defense Health Agency. (Item 3.)

On October 18, 2018, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) for eligibility for a public trust position. Applicant responded affirmatively to a police record inquiry concerning whether she had ever been charged with an offense involving alcohol or drugs. She disclosed that she had been charged with misdemeanor possession of cannabis (2.5 to 10 grams) in December 2015, and fined for the offense in approximately October 2016. (Item 3.)

In response to an inquiry on her October 2018 SF 86 concerning whether she had illegally used any drugs or controlled substances in the last seven years, Applicant indicated that she used "THC" (tetrahydrocannabinol) from October 2012 to October 2018 and stated, "I have a medical cannabis card." She answered "Yes" to whether she intends to use THC in the future and explained, "I have [an] eligible medical condition that allows me." (Item 3.) Applicant obtained a medical marijuana card in October 2016 that legally authorized her to use and possess up to 2.5 ounces of cannabis until October 2019. (Items 4-5.)

On January 16, 2019, Applicant was interviewed under oath by an authorized investigator for the Office of Personnel Management (OPM). Applicant disclosed that she first tried marijuana when she was discharged from the military for medical reasons. She stated that disillusionment from being denied a military career, and because of peer pressure, she accepted an offer of a "joint" from a friend while they were out walking in October 2012. She admitted that she used marijuana recreationally approximately 20 times with her now former spouse between 2012 and 2016. The marijuana was obtained from a dealer, whose name Applicant could not recall. Applicant stated that after obtaining her medical marijuana card in October 2016, she acquired her marijuana at a dispensary. She described her current use as approximately half of a marijuana cigarette every evening before bed. She denied any intention to use marijuana or other drug recreationally in the future, but expressed that she would continue to use marijuana as long as she has a valid marijuana card. Applicant explained that if her marijuana card is not renewed on its expiration in October 2019, she would pursue conventional methods to treat her medical conditions. About her December 2015 arrest, Applicant reportedly recollected that she had smoked a marijuana cigarette about two hours before being stopped for a license plate violation; that she was charged with cannabis possession and drug paraphernalia possession; that the paraphernalia possession charge was dismissed; and that she was placed on 12 months of supervision and paid fine and court costs of between \$750 and \$1,500 for the drug possession. (Item 4.)

On July 10, 2019, Applicant responded to interrogatories from DOHA. In response to a drug-use inquiry, Applicant indicated that she used marijuana between October 2012 and July 9, 2019, that she uses it "everyday," and that she intends to continue to use it

“medically.” She denied any association with persons who use illegal drugs, any involvement in illegal purchase or sale of drugs, and any counseling or treatment to abstain from the use of drugs. She denied making any lifestyle changes conducive to abstinence and explained, “I currently have a medical cannabis card, no changes as far as continued use for medical purposes.” Applicant again expressed an intention to continue to use marijuana as long as she has a medical marijuana card. (Item 4.)

With the interrogatories, Applicant was provided for her review a summary of her January 2019 interview with the OPM investigator. Applicant indicated the summary was inaccurate in some aspects. She denied any report or inference that she had purchased marijuana illegally and, about her arrest, she stated that she was “charged with paraphernalia,” and that the possession charge was dismissed. She added the following:

I was charged before I had my medical card, but was using marijuana for medical purposes before any charge. I currently still have my medical card and plan to renew it as of October 2019. (Item 4.)

With her receipt of the FORM on November 13, 2019, Applicant was informed of the DOD’s policies and Department of Justice (DOJ)’s prosecutorial guidance regarding the use of marijuana for recreational or medicinal purposes, including the following:

- While some states have decriminalized or legalized limited recreational use or have authorized the use of marijuana for specific medical conditions, marijuana is a Schedule I controlled drug under federal law (no accepted medical use) and remains illegal.
- Executive Order 12564 mandates a drug-free workplace and drug-free federal workforce.
- An individual’s disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains relevant in adjudicating his or her eligibility for occupying a sensitive national security position, notwithstanding DOJ guidance that it is an inefficient use of limited federal resources to prosecute individuals who comply with existing state laws providing for the medical use of marijuana.
- Federal agencies are statutorily prohibited from granting or renewing national security eligibility for any covered individual who is an unlawful user of a controlled substance or is an addict. (Items 6-9.)

Applicant did not submit any information in response to the FORM. Based on her stated intention to continue to use marijuana while she had a medical marijuana card, it is likely (although not conclusively established) that she continued to use and purchase marijuana to at least October 2019. The record before me is silent as to whether she renewed her medical marijuana card in October 2019.

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” The standard that must be met for assignment to sensitive duties is that, based on all available information, the person’s loyalty, reliability, and trustworthiness are such that assigning the person to sensitive duties is clearly consistent with national security. The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 14, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made.

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the adjudicative guidelines. 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 “an examination of a sufficient period and a careful weighing 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. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

The 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 that the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of sensitive information. See Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H: Drug Involvement and Substance Misuse

The trustworthiness 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 started using marijuana recreationally in October 2012. She used the drug about 20 times before she obtained a medical marijuana card in October 2016. Even if she used marijuana for medical reasons before she obtained her medical marijuana card, it does not alter the fact that her use between October 2012 and October 2016 was illegal under federal and state law. She continued to use marijuana after being arrested for possession of cannabis and drug paraphernalia in December 2015. She used and purchased marijuana from a dispensary with a medical marijuana card from October 2016 through at least July 2019, in violation of federal law. Disqualifying conditions AG ¶¶ 25(a), "any substance misuse (see above definition)," and 25(c), "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;" apply. Moreover, Applicant admitted in July 2019 that she intends to continue to use medical marijuana in the future with a medical marijuana card and to renew her medical marijuana card scheduled to expire in October 2019. AG ¶ 25(g), "expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to continue such misuse," also applies.

Applicant bears the burden of establishing that matters in mitigation apply. AG ¶ 26 provides for mitigation as follows:

(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 an individual's current reliability, trustworthiness, or good judgment;

(b) the individual acknowledges his or 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 illegal drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of the mitigating conditions apply. Applicant used marijuana about 20 times over four years before obtaining her medical marijuana card in October 2016. Her marijuana use became daily and continued to at least July 2019. Applicant may not have known as of her January 2019 subject interview, or as of her July 2019 response to interrogatories, that her legal use of medical marijuana under state law is illegal under federal law and prohibited by DOD policy. She maintained in January 2019 that she would not use marijuana if her medical marijuana card is not renewed and that she would, in that case, pursue conventional methods to treat her medical conditions. She indicated in July 2019 that she would continue using marijuana as long as she had a medical marijuana card. As of her receipt of the FORM in November 2019, Applicant could not longer reasonably believe that using marijuana is somehow permitted by the DOD if one has a state-issued medical marijuana card. She was placed on notice that state law does not alter existing federal law, DOD policy, or security guidelines regarding marijuana's illegality. She chose not to respond to the FORM. There is no evidence that she has ceased using marijuana, or of lifestyle changes sufficient to rule out the risk of future marijuana use. The drug involvement and substance misuse trustworthiness concerns are not mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of her 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.

Applicant requested a decision on the written record, so it was incumbent on her to provide sufficient information about her circumstances to show that she has put her drug involvement and substance misuse behind her, and she failed to do so. Whether or not she renewed her medical marijuana card in October 2019, her recent marijuana possession and use in violation of federal law casts serious doubts about her good judgment, trustworthiness, and reliability. After applying the disqualifying and mitigating conditions to

the evidence presented, I conclude that it is not clearly consistent with national security to grant Applicant eligibility for access to sensitive information at this time.

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.d:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Elizabeth M. Matchinski
Administrative Judge