



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



In the matter of:)	
)	
REDACTED)	ADP Case No. 21-02242
)	
Applicant for Public Trust Position)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

06/27/2022

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant has abstained from marijuana since November 2020, but it was only after she received the Statement of Reasons (SOR) that she expressed an intention to avoid future marijuana use. She has not fully mitigated the drug involvement security concerns raised by her use of marijuana over some 22 years. Eligibility for a public trust position is denied.

Statement of the Case

On February 4, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a Statement of Reasons (SOR) to Applicant, detailing a trustworthiness concern under Guideline H, drug involvement and substance misuse. The DCSA CAF explained in the SOR why it was unable to find it clearly consistent with the national interest to grant or continue a position of public trust for her. The DCSA CAF took the action 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 National Security Adjudicative

Guidelines (AG) effective June 8, 2017, applicable to all adjudications for national security eligibility or eligibility to hold a sensitive position.

On March 5, 2022, Applicant responded to the SOR allegation and requested a decision based on the written record by a Defense Office of Hearings and Appeals (DOHA) administrative judge. On March 23, 2022, Department Counsel submitted a File of Relevant Material (FORM), consisting of documents identified as Items 1 through 5 and a statement of the Government's position. The Government forwarded the FORM to Applicant on March 31, 2022, and advised her that she had 30 days from receipt of the FORM to submit any material in response. Applicant received the FORM on April 8, 2022. No response to the FORM was received by the May 8, 2022 deadline. On June 15, 2022, the case was assigned to me to determine whether it is clearly consistent with the interests of national security to grant or continue a public trust position for Applicant. I received the case assignment and file on June 20, 2022.

Findings of Fact

The SOR alleges under Guideline H that Applicant used marijuana on various occasions between at least August 1998 and November 2020 (SOR ¶ 1.a). (Item 1.) When Applicant responded to the allegation, she admitted that she had used marijuana on various occasions in the past, but also stated that she no longer used marijuana and did not intend to use the drug in the future. (Item 3.) After considering the FORM, which includes the pleadings as Items 1 and 3, I make the following findings of fact:

Applicant is 36 years old, married, and the mother of two children ages 6 and 8. She has a bachelor's degree earned in August 2007. She has been working as a manager for her current employer since March 2015. (Item 4.)

On November 25, 2020, Applicant completed and certified as accurate a Questionnaire for National Security Positions (SF 86) for a public trust position. In response to an SF 86 inquiry into whether she had illegally used any drugs or controlled substances in the last seven years, Applicant disclosed that she had occasionally used "THC" (tetrahydrocannabinol) for medicinal and recreational purposes between August 1988 [sic] and November 2020. She answered "Yes" to whether she intends to use the drug in the future. (Item 4.)

On January 11, 2021, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). She corrected the date to August 1998 for her first use of marijuana, and admitted that she used marijuana on a quarterly basis from August 1998 to November 2020. She reported that she uses marijuana for stress and anxiety relief alone in her home; that she obtains the marijuana that she used at no cost from a friend, whom she did not identify; and that she continues to associate with persons who use marijuana. She explained that if marijuana was made legal for medicinal use, she would use the drug again. She also indicated that her spouse, her sister, and two of the references she listed on her SF 86 are aware of her marijuana use. (Item 5.) The report of her subject interview does not mention the circumstances under which Applicant obtained

and used marijuana in previous years, such as when she was in high school and college. Nor does it mention whether her spouse has ever used marijuana.

Applicant was re-interviewed by the OPM investigator by telephone on January 14, 2021. She clarified that she is open to using marijuana in the future at her previous frequency if it became legal for recreational use. She stated that marijuana had been legalized for medicinal purposes in her state but that she did not use it for medical reasons because she had not obtained the documentation authorizing medical marijuana use. She asserted that she made a conscious decision to stop using marijuana solely because of its illegality. (Item 5.)

In November 2021, Applicant was given the opportunity by DOHA to review the reports of her subject interviews. She made no changes apart from updating the information about her supervisor. (Item 5.) When Applicant answered the SOR on March 5, 2022, she stated that she did not intend to use marijuana in the future because she “know[s] better, and [is] willing and able to comply with laws, rules and regulations in order to further establish [her] reliability and trustworthiness.” (Item 3.)

Applicant was advised in the FORM of the Government’s position that her “purported abstinence for the past year and a half” was not sufficient to mitigate the concerns raised by her illegal marijuana use over an extended period. She did not respond to the FORM. Available information does not indicate whether Applicant continues to associate with persons known to her to use marijuana, including the friend who provided her the marijuana that she was using as of November 2020. Applicant provided no corroboration for her assertions that she no longer uses marijuana.

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.

In addition to the above matters, I note that, effective May 17, 2016, the use of medical marijuana became legal in the state where Applicant lives and works. Under that law, marijuana can only be dispensed to a patient certified for medical marijuana use and possessing a valid identification card for medical marijuana. Recreational use of marijuana remains illegal in her state. Moreover, 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.

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 determinations.

Moreover, on December 21, 2021, the current 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. The DNI also made clear that products that contain more than 0.3 percent of THC remain illegal to use under federal law and policy.

Applicant's use of marijuana on about a quarterly basis from August 1998 to November 2020 establishes disqualifying condition AG ¶ 25(a), "any substance misuse." AG ¶ 25(c), "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," applies in that Applicant possessed marijuana illegally. She obtained the marijuana that she used alone in her home in recent years at no cost from a friend. AG ¶ 25(g), "expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse," warrants some discussion. As of her November 2020 SF 86, her marijuana use was current, and she intended to continue using marijuana in the future. When interviewed by the OPM investigator in January 2021, Applicant expressed that she would consider using marijuana again if it became legal for recreational purposes. She now denies any intention to use marijuana in the future. While AG ¶ 25(g) no longer applies, there are other relevant considerations, such as the duration and circumstances of her drug involvement.

Applicant bears the burden of establishing that matters in mitigation apply to her illegal marijuana possession and use. 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.

Given that Applicant used marijuana over two decades, including in recent years to relieve symptoms of anxiety and stress, AG ¶ 26(a) cannot reasonably apply. Assuming that she used marijuana quarterly, she would have used marijuana approximately 85 times since August 1998. Her marijuana use started when she was only 13 years old and continued throughout high school and college; after she married and had children; and while she held her current employment. Even these significant changes in her personal circumstances did not bring about a cessation of her marijuana use.

There is no evidence that Applicant has used marijuana since she completed her SF 86 for a public trust position. While her present 18 to 19 months of abstinence weighs in her favor, it is only one consideration in assessing the risk of recurrence. As of her January 2021 interviews with the OPM investigator, she was still associating with known marijuana users and contemplating future marijuana use if it became legal. She now asserts that she “know[s] better” than to continue to use marijuana illegally, but her decades-long disregard of both federal and state laws that prohibit the recreational possession and use of marijuana raises considerable doubt about her trustworthiness and reliability. Moreover, not enough is known about her current activities or associates to reasonably assess the risk of recurrence. It is unclear whether she has disassociated herself from her drug-using friends; whether her spouse uses marijuana; or whether she continues to experience the stress and anxiety that led her to use marijuana alone in her home in recent years. Even if I accept her SOR response as the statement of intent to abstain required under AG ¶ 26(b)(3), neither AG ¶ 26(b)(1) nor AG ¶ 26(b)(2) was shown to apply. The evidence of record is insufficient to mitigate the drug involvement and substance misuse trustworthiness 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). They 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

