



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 21-00959
)	
Applicant for Security Clearance)	

Appearances

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

06/30/2022

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant has abstained from non-prescribed Adderall since June 2019 and cocaine since March 2020, but she intends to continue to use marijuana in the future, despite knowing that possession of marijuana remains illegal under federal law and contrary to security requirements. The drug involvement and substance misuse security concerns are not mitigated. Clearance eligibility is denied.

Statement of the Case

On June 8, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns 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 security clearance eligibility 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 July 7, 2021, Applicant answered the SOR allegations and requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. On November 17, 2021, the Government indicated it was ready to proceed to a hearing. On February 2, 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 security clearance for Applicant. I received the case assignment and file on February 11, 2022. After some coordination of schedules with the parties, on May 12, 2022, I scheduled an in-person hearing for June 6, 2022.

At the hearing, two Government exhibits (GE 1-2) were admitted into evidence without any objections, and Applicant testified, as reflected in a hearing transcript (Tr.) received on June 23, 2022.

I held the record open for two weeks after the hearing for Applicant to submit documents about her work performance and other matters. No documents were received by the June 20, 2022 deadline.

Findings of Fact

The SOR alleges under Guideline H that Applicant purchased and used marijuana with varying frequency from approximately June 2012 through at least April 2021 (SOR ¶ 1.a) and that on her February 7, 2020 Electronic Questionnaires for Investigations Processing (SF 86), during her March 20, 2020 personnel subject interview (PSI), and in her May 13, 2021 response to interrogatories, she expressed her intention to continue using marijuana (SOR ¶ 1.b). Additionally, under Guideline H, Applicant allegedly used Adderall without a prescription from about September 2012 through at least June 2019 (SOR ¶ 1.c), and cocaine with varying frequency from about March 2017 through at least March 2020 (SOR ¶ 1.d); and she expressed during her March 2020 PSI her intention to use cocaine in the future (SOR ¶ 1.e).

Applicant provided a detailed response to the SOR in which she admitted the use and purchases of marijuana, explaining that all of her purchases were made legally, and that she plans to continue “occasional recreational marijuana use.” She also admitted that she used Adderall without a prescription while she was a full-time engineering student; that she used cocaine infrequently for recreational purposes in the past; and that she had stated during her March 2020 PSI that she intended to use cocaine in the future. However, she explained that her life has changed since the COVID-19 pandemic and that she no longer plans to use cocaine in the future.

Applicant’s admissions to the drug use and purchases and to intending to continue using marijuana are accepted and incorporated in my factual findings. After considering the pleadings, exhibits, and transcript, I make the following additional findings of fact.

Applicant is a 26-year-old project engineer with a bachelor's degree earned in May 2019. (GE 1; Tr. 21.) She began pursuing a master's degree in January 2022 and maintains a grade point average of 3.85 on a 4.00 scale. (Tr. 15, 30.) She has never married and has no children. (GE 1.)

Applicant worked for her current employer, a defense contractor, as a co-op student for two semesters, from January 2017 to August 2017 and from January 2018 to August 2018, before becoming a full-time employee in July 2019. (GE 1.) Applicant seeks her first DOD security clearance. (GE 1; Tr. 21.) On February 7, 2020, she completed and certified as accurate an SF 86 on which she disclosed a history of marijuana, Adderall, and cocaine use and marijuana purchases. (GE 1.) The salient details follow.

Marijuana

Applicant began using marijuana around June 2012 during the summer following her sophomore year of high school. She used marijuana once or twice a month with a friend, who provided the marijuana that they smoked together in the friend's basement or backyard. After high school, Applicant attended a private college in her home state, which had not legalized marijuana use. Applicant used marijuana on a limited basis, about once or twice a month recreationally with three college friends, during her freshman and sophomore years of college. (Tr. 33.) In 2017, Applicant began to use marijuana illegally once or twice a week (GE 2), although she abstained from marijuana during the two co-op internships with her current employer. (Tr. 33.) She did not purchase marijuana in college. She obtained the drug from one of the friends and paid for dinner for him in exchange for the marijuana. (Tr. 23.)

After college, Applicant moved for her job to her current locale. She passed a pre-employment drug screen for her employer when she became a full-time employee. (Tr. 34.)

Since then, she has used marijuana in her residence while socializing with her sister or with two friends, and also to relax before bed. She used marijuana on average twice a week, although after she began graduate studies in January 2022, her involvement with marijuana declined to "a little less than once a week." She used marijuana "often as a replacement for alcohol," as she experiences worse side effects from alcohol. (Tr. 32, 35-36.) She purchased the marijuana she used from licensed cannabis dispensaries in an adjacent state. (GEs 1-2.) She testified that she would not be using marijuana currently if it was illegal to purchase it. (Tr. 23.)

On her February 2020 SF 86, Applicant estimated that she used marijuana to January 2020 "most likely" more than 50 times. She answered "Yes" with respect to whether she intended to use marijuana in the future, and added, "Recreational use may continue in social circumstances." Applicant also disclosed on her SF 86 that she purchased marijuana illegally one to two times a year between September 2017 and June 2019, when she was "too far away from a state [in] which this was legal." She denied any intention to purchase marijuana illegally in the future. (GE 1.)

On March 20, 2020, Applicant was interviewed telephonically by an authorized investigator for the Office of Personnel Management (OPM). During her PSI, Applicant admitted that she had continued to use marijuana to as recently as the weekend preceding her interview. She expressed an intention to continue to use marijuana and related that she had made no attempts to stop or reduce her drug use. (GE 2.)

On May 13, 2021, Applicant responded to DOHA interrogatories about her drug use. She reported that she had used marijuana over 100 times; that she had purchased the drug; and that she intends to continue to use the drug. She explained that she had purchased marijuana legally from dispensaries and then transported it to her home and that she currently had marijuana obtained from a dispensary as well as marijuana paraphernalia in her home. (GE 2.)

On July 7, 2021, in response to the SOR, Applicant admitted that she had used marijuana, but she also stated that she had not performed any work-related tasks while under the influence of the drug. She added that “all marijuana purchases were legal through the state where purchased.” She expressed an intention to continue occasional recreational marijuana use, and she was currently using the drug as a sleep aid. She did not consider her marijuana use to be detrimental to her life, work performance, or her ability to complete tasks that would be required of her if she is granted security clearance eligibility. She explained that marijuana has been legalized in the state where she resides and works, and that she would continue to use the drug responsibly. She stated that, if necessary, she could stop using marijuana “as [she had] done in the past.”

At her hearing, Applicant admitted that she continued to use marijuana to as recently as late May 2022, about seven days before her hearing (Tr. 17-18), and that she intends to use marijuana in the future. (Tr. 30.) She purchased the drug herself and used it alone in her residence. (Tr. 17-18.) Her rationale is that marijuana is legal in her state, and she has always purchased it legally from dispensaries in an adjacent state. (Tr. 15.)

Applicant is subject to random drug tests at work. (Tr. 34.) She had not used marijuana while working, and her marijuana use has not led to any involvement with law enforcement. While she knows that marijuana is an illegal drug under federal law (Tr. 16, 18), and she has realized since her March 2020 PSI that using marijuana is incompatible with holding a security clearance (Tr. 19), she does not believe that her character or trustworthiness should be judged based on “a measure that has been deemed appropriate by many lawmakers.” (Tr. 16, 20.) While Applicant is still friendly with the persons with whom she used marijuana recreationally in the past, she does not live near them and has had limited contact with them since the COVID pandemic started in 2020. (Tr. 25-27.) Applicant’s sister has been around Applicant when Applicant has used marijuana, but she does not use marijuana herself. (Tr. 33.)

Adderall

Applicant used Adderall without a prescription as a study aid from approximately September 2012 to 2015 one to five times a year and from 2015 through May 2019 once a

week. In high school, she obtained the drug from her sister. In college, she obtained the drug from the same friend who gave her marijuana, and she bought him coffee or dinner in exchange for the Adderall. (GE 2; Tr. 28-29.) Applicant estimates that she used Adderall more than 50 times total during high school and college. (GEs 1-2.) On her SF 86, during her PSI, in response to DOHA interrogatories, in response to the SOR, and at her hearing, Applicant denied any intention to use Adderall in the future. (GEs 1-2; Answer; Tr. 14.) She understands that she should not have used Adderall without a prescription to help her study. (Answer.)

Cocaine

Applicant used cocaine with her sister five times a year between March 2017 and March 2020. (GEs 1-2; Tr. 27.) She used cocaine before going out to bars when visiting her sister. She also used it in her residence when her sister visited her. Applicant did not purchase any of the cocaine that she used. (GE 2.)

On her February 2020 SF 86, Applicant denied any intention to use cocaine in the future, and stated, "No longer intend to use this drug, no longer going out in that way." (GE 1.) During her PSI, Applicant admitted that she had used cocaine during the previous weekend to stay awake and be more energetic. She stated that she had no plan to use cocaine in the future, but that she would use it if circumstances conducive to cocaine use arose. (GE 2.) When she responded to DOHA interrogatories in May 2021, Applicant denied any intention to use cocaine in the future. (GE 2.) In her July 2021 Answer to the SOR, Applicant explained her changed intention about future use of cocaine, as follows:

Since the COVID-19 pandemic my life has changed drastically, and I do not have plans to use this substance in the future. Additionally, I do not have any of this substance in my capacity or available to me. Lastly, I have not, and would never be under the influence while working, or performing any necessary tasks. (Answer.)

Applicant explained at her hearing that the pandemic impacted her lifestyle, including her activities and social associations. She had seen the friends listed on her SF 86 only one or two times since the COVID-related lockdown in March 2020. While she interacts with her sister regularly, to Applicant's knowledge, her sister has not purchased any illegal drugs in the last two years. (Tr. 15.)

Applicant takes her job responsibilities seriously. Her performance reviews have been positive. She indicated that she would not waiver in her commitment to her work if granted clearance eligibility. (Tr. 16.) However, she is not required to hold a clearance to keep her present job. (Tr. 20.) A clearance would provide her additional opportunities at work in the future. (Tr. 22.)

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, effective July 1, 2021, the possession and use of up to 1.5 ounces of marijuana became legal in the state where Applicant lives and works. Retail sales of marijuana are not yet legal in her state. On December 15, 2016, the state where Applicant has purchased marijuana since mid-2019 legalized the use, purchase, possession or manufacture of one ounce or less of marijuana by adults age 21 years or older. However, possession of cocaine and of Adderall without a prescription remains illegal in both states.

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. Cocaine and Adderall, as Schedule II drugs, have an accepted medical use, but they have a high potential for abuse and may lead to severe psychological or physical dependence. It is illegal to possess cocaine or Adderall when it is not medically authorized. Section 844 under Title 21 of the United States Code makes it unlawful for any person to knowingly or intentionally possess a controlled substance not obtained pursuant to a valid prescription.

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 eligibility 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 used marijuana from approximately June 2012 to at least late May 2022. She continued to use the drug on a weekly basis after going to work full time for a defense contractor, despite knowing that marijuana possession remains illegal under federal law and that her marijuana involvement could result in unfavorable adjudication of her security clearance eligibility. Additionally, she used Adderall without a prescription more than 50 times as a study aid in high school and college, and cocaine while socializing with her sister on fewer than 20 occasions between March 2017 and March 2020. 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,” also applies. Applicant’s possession of marijuana has been illegal under federal law during the entirety of her involvement over the past decade. She reported on her SF 86 that she purchased marijuana illegally once or twice a year before relocating to her current locale when she began purchasing marijuana legally from licensed dispensaries in a state nearby. The state in which she has resided since July 2019 legalized marijuana use and possession only a year ago. She did not directly purchase Adderall or cocaine, but in exchange for Adderall, she paid for some of her friend’s meals.

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 intends to continue to use marijuana. AG ¶ 25(g) no longer applies with respect to cocaine. She had no plan to use cocaine again as of her March 2020 PSI, but she also stated at that time that she would use cocaine if the circumstances warranted. However, in her July 2021 response to DOHA interrogatories, she denied any intention to use cocaine in the future. She has since reiterated in her Answer to the SOR and at her hearing that she does not intend to use any cocaine in the future. Her candid disclosures of her illegal drug involvement, including her admission to intending to continue using marijuana, lead me to accept as credible her denial of any intention to use cocaine in the future.

Applicant bears the burden of establishing that matters in mitigation apply of her illegal drug activity. 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.

AG ¶ 26(a) cannot reasonably apply, given the recency and frequency of Applicant's drug involvement. Her marijuana use has been regular and is ongoing. While she last used Adderall around May 2019, she used the drug without a prescription more than 50 times. She used cocaine fewer than 20 times, but most recently in March 2020 after she completed her SF 86.

AG ¶ 26(b) applies to her Adderall use, which she has not used since college. She began pursuing her master's degree in January 2022, and so is currently in an academic environment, which raises the risk of recurrence somewhat. However, she testified credibly that she understands it was wrong of her to have used Adderall without a prescription, and she has repeatedly denied any intention to use it in the future. Regarding Applicant's cocaine use, it is more difficult to find that she has disassociated herself from drug-using associates and contacts because she used the drug with her sister, who provided the drug. As recently as March 2020, Applicant admitted that she would use cocaine in the future if circumstances were conducive to her using cocaine. She asserted in July 2021 that the COVID pandemic had changed her attitude in that she no longer intends to use cocaine in the future. She did not elaborate in that regard, although bar closures and the social isolation of the pandemic may have left her without the opportunity to use cocaine. Her sister is apparently no longer involved with cocaine, which significantly minimizes the risk of Applicant using cocaine in the future. Applicant has persuaded me that she is not likely to jeopardize her job with a defense contractor by using cocaine again. AG ¶ 26(b) also applies to her cocaine use.

Applicant has not established any significant abstinence from marijuana use. Appendix B of the AGs provides that an individual who is an unlawful user of a controlled substance or is an addict is statutorily prohibited from holding a security clearance. There is no evidence that Applicant is an addict as she has control over her marijuana use, and she has not let her marijuana use adversely affect her work. Yet, given the once to twice weekly frequency of her use and her intention to continue using marijuana in the future, the statutory prohibition regarding unlawful users of a controlled substance applies. The legality of her marijuana use under state law does not alter existing federal law prohibiting the possession of marijuana. Applicant asserts that alcohol affects her more adversely than

does marijuana. Even so, it does not justify her ongoing disregard of federal laws concerning the use and possession of dangerous controlled substances. It is not enough in mitigation that she will avoid using marijuana in any work capacity or before reporting for work. None of the mitigating conditions are established with regard to her marijuana use and purchase.

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 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.

The Government must be assured that those persons granted access to classified information can be counted on to fulfill their responsibilities consistent with laws, regulations, and policies, including federal drug laws and security clearance requirements. Applicant's drug use was not confined to high school and college. She continued to use cocaine and marijuana after becoming a full-time defense-contractor employee and is unwilling to cease using and possessing marijuana, despite knowing of the DOD's concerns and the federal prohibition. 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). For the reasons previously discussed, I am unable to find at this time that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance 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.b:	Against Applicant
Subparagraphs 1.c-1.e:	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