



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



In the matter of:)
)
 REDACTED) ISCR Case No. 21-02111
)
 Applicant for Security Clearance)

Appearances

For Government: Rhett E. Petcher, Esq., Department Counsel
For Applicant: *Pro se*

09/15/2022

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant has purchased and used marijuana since August 2019, including after he applied for a Department of Defense (DOD) security clearance in April 2021. He 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 September 28, 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, and Guideline E, personal conduct. 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 him. 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 October 8, 2021, Applicant answered the SOR allegations and requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. On March 16, 2022, the Government indicated it was ready to proceed to a hearing. On April 11, 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 April 18, 2022. After some coordination of schedules with the parties, on July 7, 2022, I scheduled an in-person hearing for August 18, 2022.

At the hearing, convened as scheduled, Department Counsel appeared via video teleconference while Applicant appeared in person. Before the presentation of any evidence, the Government withdrew the Guideline E allegation. Two Government exhibits (GE 1-2) were admitted into evidence without any objections. A March 16, 2022 letter from a DOHA Department Counsel, forwarding copies of then-proposed GEs 1-2 to Applicant, was received but not marked for the record as Applicant confirmed he received the exhibits. Applicant testified, as reflected in a hearing transcript (Tr.) received by DOHA on August 26, 2022.

Findings of Fact

The amended SOR alleges under Guideline H that Applicant used (SOR ¶ 1.a) and purchased (SOR ¶ 1.b) marijuana with varying frequency from August 2019 to present, including after he completed an Electronic Questionnaires for Investigations Processing (hereafter SF 86) on April 12, 2021 (SOR ¶ 1.c), and he intends to continue to use marijuana in the future (SOR ¶ 1.d). When Applicant responded to the SOR, he admitted the allegations and stated that his uses and purchases were legal under state law. He explained that he used marijuana recreationally, during non-working hours, and his drug involvement was candidly disclosed.

Applicant's admissions to using and purchasing marijuana, including since completing his SF 86, 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 39-year-old principal technical-support engineer with a bachelor's degree earned in May 2005. (GE 1; Tr. XX.) He has never married and has no children. (GE 1; Tr. 15.)

Applicant worked as an implementation engineer after college from May 2005 to January 2013, when he was laid off by his then employer during a reduction in force. (GE 1.) He held a DOD secret clearance from about 2007 to 2012. (Tr. 13.) He then worked part time as a software support developer until January 2014. He did not need a clearance

in that position so his clearance eligibility lapsed. (Tr. 16.) In March 2014, he began working for his current employer, a defense contractor. (GE 1; Tr.15.)

Needing a security clearance for a new project with his employer, Applicant completed an SF 86 on April 12, 2021. (GE 1; Tr. 13.) In response to an SF 86 inquiry concerning any illegal drug use in the last seven years, Applicant reported that he engaged in recreational marijuana use between August 2019 and April 2021. He described the frequency of his use as “[d]aily partial smoking of a marijuana joint outside/after the work day.” He responded “Yes” as to his intent regarding future use of the drug and explained that adult recreational use is legal in his state. Applicant answered “No” to an SF 86 inquiry into any illegal drug activity, including any involvement in the illegal purchase of a drug or controlled substance in the last seven years. (GE 1.)

On July 20, 2021, Applicant had a personal subject interview (PSI) with an authorized investigator for the Office of Personnel Management (OPM). Applicant explained that he began using marijuana in August 2019, when it became legal to do so in his state, and that he continued to use it daily since then. He used the drug to relax after work either alone in his residence or with friends at social gatherings in the friends’ homes. He stated that he planned to continue to use it, even if granted a security clearance, as he did not want to alter his lifestyle and especially because it is legal in his state. When advised that use of marijuana was not allowed while having access to sensitive or classified information on a federal contract, Applicant stated that he would still continue to use marijuana, as he had been candid about his use on his SF 86 and during his PSI. Applicant reported that he had purchased marijuana three to five times, spending about \$100 per occasion, from legal dispensaries in his state since August 2019. He added that he has been gifted some marijuana from a friend who grows the drug and “has so much of it.” He accepted the drug from his friend only since his state legalized the possession and use of marijuana. (GE 2.)

In response to DOHA drug interrogatories, Applicant disclosed on September 7, 2021, that he used marijuana daily from August 2019 to September 2021, and that he intended to continue using marijuana. He admitted that he associates with persons who use marijuana or frequents places where marijuana is used and added, “when visiting some friends’ houses, (once a week or less) [and] concerts (3-4 times a year).” He stated that he does not use any other illegal substance under federal law and would not do so. He responded affirmatively regarding any purchases, and stated that he purchased cannabis occasionally from state “recreational/adult-use facilities spending around \$100.” He did not recall the specific date of his last purchase other than that it was in 2021. Applicant expressed his intention to continue to use cannabis in accord with state law; to purchase it occasionally from licensed retailers; and to receive gifts of the drug, and added, “There would be no purchase, sale, or use of any other drugs.” (GE 2.)

At his hearing, Applicant explained that he was first introduced to marijuana while socializing with a friend who is in a reggae band. (Tr. 20.) He continues to “enjoy cannabis in a very small way, off work, never during work hours.” (Tr. 13.) His use of marijuana occurred only in states where adult recreational use is legal. (Tr. 17.) He understands that

marijuana use and possession is illegal under federal law. When asked why he decided to use marijuana knowing of its illegality under federal law, Applicant responded that, “at the time, [he] had really no other reason not to.” It was decriminalized and then also legalized. (Tr. 17-18.) He intends to continue to use marijuana, knowing that it remains the DOD’s position that marijuana use is incompatible with holding a security clearance. (Tr. 19-21.) He does not believe that his off-duty use of cannabis adversely affects his ability to handle sensitive or classified information. (Tr. 14.) He asserted that he would never use marijuana at work and not while working with classified information. (Tr. 14, 21-22.) He does not perceive his drug use as compromising his trustworthiness and ability to safeguard sensitive information. (Tr. 22.) His manager is aware that he uses marijuana. The manager told him it would be in his best interest to stop using marijuana but did not tell him that he would be required to cease his marijuana use to obtain a clearance. (Tr. 22-23.)

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 on December 15, 2016, the state where Applicant lives and works legalized the use, purchase, possession, or manufacture of one ounce or less of marijuana by adults age 21 years or older. However, 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. 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 has used marijuana primarily daily to relax after work since August 2019. He candidly acknowledged that he intends to continue using marijuana, despite knowing that it could result in denial of a security clearance and that it remains illegal under federal law. He has purchased marijuana on occasion from legal retailers in his state since August 2019. The following disqualifying conditions under AG ¶ 25 apply:

- (a) any substance misuse;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant bears the burden of establishing that matters in mitigation apply with respect to his drug activity that is illegal under federal law. 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 has not established any 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. There is no evidence that his off-duty use of marijuana has adversely affected his work. Yet, given the daily frequency of his use and his intention to continue using marijuana in the future, the statutory prohibition regarding unlawful users of a controlled substance applies. The legality of his marijuana use under state law does not alter existing federal law prohibiting the possession of marijuana. Applicant's candor about his marijuana involvement does not justify his ongoing disregard of federal laws concerning the use and possession of dangerous controlled substances. It is not enough in mitigation that he will avoid using marijuana in any work capacity or before reporting for work. None of the mitigating conditions are established with regard to his marijuana uses and purchases.

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). 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. Marijuana use is part of Applicant's daily routine. He continued to use and purchase marijuana while a full-time defense-contractor employee and after he applied for a DOD security clearance. He is unwilling to cease using and possessing marijuana, despite knowing of the DOD's security 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, concerns persist about Applicant's judgment, reliability, and trustworthiness.

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
Paragraph 2, Guideline E:	WITHDRAWN
Subparagraph 2.a:	Withdrawn

Conclusion

In light of all of the circumstances, it is not clearly consistent with the interests of national security to grant eligibility for a security clearance for Applicant. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge