DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 13-01393
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Stephanie C. Hess, Esquire, Department Counsel
For Applicant: *Pro se*

06/26/2014

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant purchased and used marijuana from September 2009 to May 2013. He used marijuana four to five times weekly until September 2012, when he reduced his use to occasional weekends. He tried cocaine once, in January 2013. Applicant has been candid with the Department of Defense about his illegal drug involvement, and he does not intend to use any illegal drugs, including marijuana, in the future. Yet, an unacceptable risk of relapse persists because he continues to socialize with a friend who uses marijuana in his presence. Clearance is denied.

Statement of the Case

On February 5, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H, Drug Involvement, and explaining why it was unable to find that it is clearly consistent with the national interest to grant him a security clearance. The DOD CAF took the action under Executive Order 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 adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

Applicant submitted an undated response to the SOR allegations, in which he requested a decision on the written record without a hearing. On April 18, 2014, Applicant requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. On May 6, 2014, Department Counsel provided discovery of the Government's potential exhibits to Applicant. On May 13, 2014, 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 May 15, 2014, I scheduled a hearing for June 3, 2014.

At the hearing, two Government exhibits (GEs 1-2) were admitted without objection. Applicant also testified, as reflected in a transcript (Tr.) received on June 11, 2014. I held the record open for two weeks after the hearing at the Government's request for Department Counsel to submit a report of subject interview, the accuracy of which was verified by Applicant in response to interrogatories (GE 2), but which was inadvertently omitted from GE 2. Applicant was advised that he could submit documentary evidence within the two weeks. He did not anticipate submitting any documents, although he indicated that could change.

On June 16, 2014, the Government submitted the report of subject interview. Applicant did not object to its admission, and the document was entered into evidence as GE 3. Applicant indicated on June 23, 2014, that he had no documents to submit. The record closed on June 23, 2014.

Summary of SOR Allegations

The SOR alleges under Guideline H that Applicant used marijuana regularly, four to five days per week, from about September 2008 to September 2012 (SOR 1.a), and thereafter on diverse occasions during weekends until May 2013 (SOR 1.b). In addition, Applicant is alleged to have purchased marijuana on diverse occasions from approximately September 2009 to May 2013 (SOR 1.c); to have used cocaine once, in January 2013 (SOR 1.d); and to continue to associate with friends who use marijuana (SOR 1.e).

In his answer to the SOR allegations, Applicant admitted the drug use, marijuana purchases, and association with known marijuana users as alleged. He explained that he used marijuana in college as a less harmful alternative to alcohol, even though his college had a policy against such drug use. He admitted that he made a bad decision when he used cocaine at a college party in early 2013. Applicant denied any intent to use cocaine or marijuana again. While he has friends who still use marijuana, he is not tempted to use the drug with them, and generally they refrain from using the drug around him because of his situation.

Findings of Fact

Applicant's admissions to the drug use and purchases, and to his association with known marijuana users, are accepted and incorporated as findings of fact. After considering the pleadings, exhibits, and transcript, I make the following additional findings of fact.

Applicant is a 25-year-old computer software developer. He started working for his defense contractor employer in June 2013, shortly after he returned home from college.[1] He seeks his first DOD security clearance. (GE 1.)

Applicant attended college from September 2007 to May 2013.[2] From September 2009 to May 2012, he smoked marijuana four to five days a week to relax. He initially tried the drug out of curiosity. He continued to smoke marijuana as an alternative to drinking alcohol because he considered the drug to be less harmful than alcohol. (GEs 1, 2; Tr. 26-27, 29, 31.) During his last year in college, from September 2012 to May 2013, Applicant smoked marijuana on occasional weekends. (GEs 1, 2; Tr. 29.)

Applicant held a co-op software engineering position with a company near the college from September 2009 to September 2010. From November 2010 to March 2012, he worked for the company on a contract basis. (GEs 1-3.) His abuse of marijuana led to no issues at school or at work (Tr. 31), although he apparently risked expulsion if caught because the university had a policy against illicit substance abuse. (Answer.)

Applicant purchased marijuana for his own use from other students on campus and some alumni once every couple of weeks between September 2009 and September 2012 and then once a month until May 2013. (GEs 1-3; Tr. 30.) He spent about $60 every two weeks for marijuana. (Tr. 31.) Applicant stopped using marijuana in May 2013, in order "to clean up [his] act, and get ready for professional, post-college life." He was concerned about the illegality of marijuana use under federal law. Money was also an issue in his decision to stop using marijuana. (GEs 1-3; Answer; Tr. 35.)

Applicant tried cocaine with a friend after a college party in January 2013. He had been drinking alcohol at the time. This friend had cocaine and kept insisting that he try it. (Tr. 33.) He did not purchase the drug. (GEs 2, 3.) Applicant attributes his use of cocaine to an unplanned, poor decision ("dumb experiment") while drinking that he does not intend to repeat. (GEs 2, 3; Answer; Tr. 27, 34.)

On June 10, 2013, Applicant completed and certified to the accuracy of an Electronics Questionnaire for Investigations Processing (e-QIP) for a security clearance

[1] Applicant responded "No" on his security clearance application to whether he earned his degree. (GE 1.) At his hearing, he was asked if he stopped using marijuana around graduation, to which he responded "correct." (Tr. 33.) Applicant was not asked directly whether he earned his degree.

[2] Applicant testified that he had a lax attitude in college about the use of marijuana because the state where he attended college had decriminalized it "to an extent." (Tr. 35-36.)

with his current employer. Applicant responded affirmatively to whether he had used any illegal drugs in the last seven years, and he listed THC (marijuana) use between September 2009 and May 2013: "Used recreationally, 4-5 days per week until Sept. 2012-May 2013. Use was cut down to 2-3 times per week at most." Applicant responded "No" to whether he intended to use the drug in the future, but then added: "It is still illegal. If the push towards legality makes it fully in my lifetime, I may use it again, but otherwise I do not plan to." Applicant disclosed his purchase of marijuana in the last seven years for "stress relief, pleasure, less physical pain than drinking on weekends," between September 2009 and May 2013. As for the frequency of this drug activity, Applicant stated:

> Purchase for personal use once every couple of weeks until Sept. 2012-May 2013. During this period I purchased sparingly, once a month and used it sparingly. This also includes periods of stopping completely in the 3½ year span. (GE 1.)

On July 31, 2013, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM), partially about his drug abuse. Applicant candidly disclosed his marijuana abuse, his purchase of the drug for recreational use, and his one-time use of cocaine in college. Applicant indicated that he had no intent of using marijuana in the future as long as it is illegal. He denied any intent whatsoever to abuse cocaine in the future. (GE 3.)

In response to DOD CAF interrogatories about his drug involvement, Applicant indicated on November 13, 2013, that he smoked marijuana four to five days a week from September 2009 to September 2012. Thereafter, he smoked the drug on occasional weeks until May 2013. Concerning his future intentions, Applicant stated, "Have not used since May, do not plan on smoking pot in the future as long as it is a federal offense." Applicant also disclosed his one-time use of cocaine in early January 2013 at a college party. He denied any intent to use cocaine in the future. Applicant asserted that he stopped using illegal drugs just before he left college in May [2013] because "[he was] no longer a college student, to further [his] career it was a necessary step. Also lost interest." Applicant admitted that a couple of times a week, he socializes with friends who he knows smoke marijuana. Applicant submitted the following in response to information that might assist the DOD CAF in determining his security clearance eligibility:

> I never had any issues with marijuana. I just used it recreationally as a part of my college life, much in the way others drink too often. The cocaine was a one-off mistake at a party. I do not care to use anything like that again, or make illicit substances a part of my life in general. (GE 2.)

As of early June 2014, Applicant had not relapsed into any marijuana use. He has never had any counseling or treatment for marijuana use, but he also does not believe that he was ever addicted to marijuana. (Tr. 32-33.)

Applicant has been in the presence of others while they were smoking marijuana on several occasions since May 2013. In the summer of 2013, he attended a party at a

friend's home where other attendees were using the drug. In April 2014, he returned to his college area for a visit. He stayed with a friend who smoked marijuana. About a couple times a month, to include as recently as early May 2014, Applicant has been in the presence of his next-door neighbor, a longtime friend, while the friend was smoking marijuana. Applicant and this neighbor socialize together three or four times a week. Applicant's friend has not pressured him to smoke marijuana, even though they smoked marijuana together in the past. About a year ago, Applicant told his friend that he could not smoke marijuana "because [he has] to move forward in the government process and it's not something that [he] can do." While Applicant tries not to put himself in situations where marijuana is likely to be used, he cannot promise that he will not find himself in a similar situation in the future. Applicant has not told his friend not to smoke marijuana around him ("I really don't want to encroach on what he wants to do in his own house."). Applicant is invited over to play video games, and his friend is usually already under the influence. Applicant has other friends from high school with whom he socializes once a week to once every two weeks. To Applicant's knowledge, these friends do not use marijuana. (Tr. 36-45.)

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(c), 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 access to classified information will be resolved in favor of 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 as to potential, rather than actual, risk of compromise of classified information. Section 7 of Executive Order 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

The security concern for drug involvement is set out in AG ¶ 24:

> Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

Under AG ¶ 24(a), drugs are defined as "mood and behavior altering substances," and include:

> (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens),[3] and
>
> (2) inhalants and other similar substances.

Under AG ¶ 24(b), drug abuse is defined as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." Disqualifying condition AG ¶ 25(a), "any drug abuse," applies because Applicant abused marijuana four to five times a week from September 2009 to September 2012 and on occasional weekends thereafter until May 2013, when he left college. He also used cocaine once with a friend after a college party in January 2013. AG ¶ 25(c), "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," is established in that Applicant purchased marijuana for his personal consumption throughout the duration of his involvement. He spent $60 every two weeks during his period of regular abuse between September 2009 and September 2012.

[3]Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substance and cocaine is a Schedule II controlled substance.

Mitigating condition 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," applies to his one-time abuse of cocaine in January 2013. Albeit relatively recent, it was infrequent and unplanned. However, AG ¶ 26(a) cannot reasonably apply to his marijuana use and purchase. He abused the drug as a substitute for alcohol, on a regular basis for three years, and he stopped only one year ago. Applicant smoked the drug knowing that he could have been forced to withdraw from the college had he been caught using it. He purchased the drug for his personal use from September 2009 to May 2013.

On his June 2013 e-QIP, during his July 2013 interview, and when he answered the SOR allegations, Applicant unequivocally denied any intent to use cocaine in the future. He denied any intent to use marijuana in the future as long as it is a federal offense to do so. At his hearing, he explained that the illegality of marijuana use under federal law was of primary concern in his decision to cease his involvement with the drug. Under mitigating condition AG ¶ 26(b), "a demonstrated intent not to abuse any drugs in the future" may be shown by the following:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence;

(4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's candor about his illegal drug abuse and purchase leads me to accept as credible his assertions of no future intent to use cocaine under any circumstances, and of no intent to use marijuana for as long as it remains illegal under federal law. While Applicant did not present an affirmative statement acknowledging his understanding that any clearance would be revoked for any illegal drug involvement, he understands that any illegal drug involvement is incompatible with his defense contractor employment. The illegality of marijuana use under federal law was a major factor in Applicant's decision to stop using the drug. He informed his next-door neighbor that he no longer uses marijuana because of his defense contractor employment and his application for a security clearance. There is a basis to apply AG ¶ 26(b)(4).

AG ¶ 26(b)(2) is partially implicated in that Applicant is no longer in the college environment where his drug abuse occurred. However, as recently as April 2014, Applicant was hosted by a friend near the college who smoked marijuana during Applicant's visit. Of more immediate concern, Applicant plays video games or otherwise socializes with his next-door neighbor, often in the neighbor's home, three or four times a week. A couple times a month, to include as recently as early May 2014, this longtime friend smoked marijuana in Applicant's presence. About a year ago, Applicant informed this friend that he cannot use marijuana because of his clearance application. This friend has not pressured

Applicant to smoke marijuana with him, and Applicant testified that his friend usually does not bring out marijuana because his friend is "already under the influence" when Applicant visits. (Tr. 44.) Even so, there is no evidence to suggest that this friend is likely to discontinue smoking marijuana around Applicant.

Applicant has not told his friend to avoid smoking the drug in his presence because he does not want to encroach on what his friend does in his own home. Applicant may well be in no position to influence his friend. Yet, Applicant has control over his own decisions. He risks his abstinence by remaining in the presence of close friends when they smoke marijuana, even if only occasionally. AG ¶ 26(b)(1) does not apply.

The Directive does not define what constitutes "an appropriate period of abstinence" under AG ¶ 26(b)(3). Applicant has not used any cocaine since January 2013. Although his abuse of cocaine was relatively recent, 1.5 years of abstinence is long enough to guarantee against recurrence, especially where there is no evidence that any of his friends abuse cocaine. Applicant's involvement with marijuana is contrasted by the regularity of his abuse and purchase over some three years. Applicant denies that he developed a psychological or physical dependency on the drug. Nonetheless, he relied on it heavily for recreation and as a stress reliever in college. He stopped using it, not because he did not like its effects, but because of his employment and the federal laws prohibiting the use. Applicant's commitment to abstain from marijuana has been tested over the past year, and he has not relapsed, despite occasions when friends were smoking around him. However, a lengthier abstinence is warranted to guarantee against recurrence in light of the regularity of his marijuana abuse in college and his continuing friendships with persons who smoke marijuana. The security concerns raised by his marijuana use and purchase are not fully 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 listed at AG ¶ 2(a).[4] In making the overall commonsense determination required under AG ¶ 2(c), I have to consider Applicant's poor judgment in abusing marijuana and cocaine. Alcohol played a significant part in Applicant's abuse of cocaine, and he regrets his "poor decision" to use cocaine. Applicant's marijuana abuse is partially explained by his youth and immaturity.

[4]The factors under AG ¶ 2(a) 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.

Yet, he continues to display questionable judgment when he fails to remove himself from social situations conducive to relapse.

Applicant's candor about his illegal drug use and purchase weighs in his favor. The Government would not have known about his relationship with his next-door neighbor but for Applicant's candid testimony. Perhaps at some future date, Applicant may be able to demonstrate convincingly that his marijuana use is safely behind him. Security clearance decisions are not intended as punishment for past wrongdoing. At the same time, once a security concern arises, there is a strong presumption against the grant or continuation of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). For the reasons discussed under Guideline H, *supra*, it would be premature to grant Applicant 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant

Conclusion

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

Elizabeth M. Matchinski
Administrative Judge