



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



In the matter of:)
(Redacted)) ISCR Case No. 15-07454
Applicant for Security Clearance)

Appearances

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

04/27/2017

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used marijuana with varying frequency from May 2001 to June 2006. His use diminished after college to less than twice a year. He has not used any marijuana since January 2015 and does not intend to use any illegal drug in the future. Clearance is granted.

Statement of the Case

On May 11, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing a security concern 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 security clearance eligibility. The DOD CAF took the action under Executive Order 10865 (EO), *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6 (Directive), *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on September 1, 2006.

Applicant responded to the SOR allegations on June 15, 2016, and he requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. On August 19, 2016, 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 August 22, 2016, I scheduled a hearing for September 26, 2016.

I convened the hearing as scheduled. Two Government exhibits (GEs 1-2) and 14 Applicant exhibits (AEs A-N) were admitted into evidence without objection. A letter forwarding discovery of the Government's potential exhibits to the Applicant on August 10, 2016, was marked as a hearing exhibit (HE 1) for the record but was not admitted as an evidentiary exhibit. Applicant, his cohabitant girlfriend, and his mother testified, as reflected in a transcript (Tr.) received on October 5, 2016.

Findings of Fact

The SOR alleges that Applicant used marijuana with varying frequency from May 2001 to January 2015 (SOR ¶ 1.a). Applicant submitted a detailed response (Answer) in which he detailed the frequency of his marijuana use and denied any intention of future illegal drug involvement. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 32-year-old electrical engineer, who has worked since June 2015 for a nonprofit company that operates federally-funded research and development centers. (GE 1; Tr. 45-46.) Applicant was awarded a bachelor of science, *magna cum laude*, in mathematics in August 2006, and a master of science in electrical engineering with a high grade point average in August 2016. (AE B.) He seeks his first DOD security clearance. (GE 1.)

At the end of his junior year in high school in May 2001, Applicant began using marijuana. He used the drug with a hometown friend (friend X) once or twice a month, except during track and cross-country seasons, when he abstained. (GEs 1, 2; Tr. 49-50.) His friend provided the marijuana at no cost to him. (Tr. 49.) Applicant knew that his state has not legalized the recreational use of marijuana. (Tr. 68.)

In August 2002, Applicant began attending his state university. He used marijuana approximately once a month, except when he competed in track for the university. In December 2003, he ceased his involvement in college sports. He used marijuana less than once a month with one of two friends at school, including friend Y, or with friend X during school breaks. (Tr. 50-53.) Applicant finished his classwork in June 2006, but he was not awarded his bachelor's degree until August 2006 because he missed a deadline for submission of some paperwork. (GEs 1, 2; Answer.)

In October 2006, Applicant moved away from his hometown for a job as a fund accountant with a bank. (GE 1.) He did not use marijuana in his new area because he did not know anyone who had access to the drug. (Tr. 54.) Applicant did not find his position intellectually stimulating, so he decided to pursue a career in actuarial science. (Tr. 17.) He

passed an actuarial exam and applied for several entry-level positions in the field. When he received no responses, he left his job at the bank and took a position as a research assistant with his mother's employer, a state-operated research hospital, in June 2007. (GE 1; Tr. 17-18.) Friend Y was a graduate student at the university. Applicant used marijuana thereafter with friend Y a couple times a year, usually in friend Y's apartment. He also used marijuana with a roommate in 2009 and one time in 2011 with a friend after playing Ultimate Frisbee. (Tr. 55-56.) After 2011, Applicant used marijuana four times. He used it once each in July 2012 and July 2013. (Answer.) In July or August 2013, Applicant began dating his girlfriend, who does not approve of illegal drugs. (AE I; Tr. 23, 72-74.)

Applicant proved to be a talented researcher with outstanding qualitative and practical skills. (AEs J, K.) His supervisors trusted him, and he gained respect in his department. (AE N.) In approximately April 2014, Applicant learned that he was going to be laid off from his job because of a loss of federal funding. Shortly thereafter, Applicant was visiting friend Y, who had recently lost his father. At friend Y's request, they smoked marijuana together. Applicant felt pressured to use marijuana because of the circumstances, although he claims that he "tried to avoid significant intoxication." (Tr. 23, 58.) Applicant informed his girlfriend about his marijuana use with friend Y and also that he had used marijuana "maybe a couple of times a year" in the past. (Tr. 76.) She was upset and expressed her displeasure at what she considered to be immature and illegal behavior. She also advised him that drug use was against her beliefs and her future goal of starting a family. (Tr. 72-74.) He promised her that he would not use marijuana again. (Tr. 77.) In May 2014, Applicant and his girlfriend began a cohabitant relationship. (AE I; Tr. 73.) He avoided socializing with friend Y because he no longer felt comfortable maintaining their friendship. (Answer; Tr. 24.)

In August 2014, Applicant began his graduate studies. He decided to quit using marijuana because he wanted to "turn a new page in life" and get more serious about his life, education, and career. In November 2014, Applicant saw friend Y at the wedding for a mutual friend. (Answer.) There is no evidence that marijuana was present on that occasion.

In January 2015, Applicant used marijuana while on a ski trip to Colorado with two friends, both licensed medical professionals. (GEs 1, 2; Answer; Tr. 24-25.) One of these friends, who had never used marijuana because of its illegality, proposed that they use some marijuana because it was legal in the state. Applicant knew that marijuana use was illegal under federal law, but it was also his understanding that states could regulate marijuana within their own borders. He and his friends were confused about state legalizations, in part because the federal government had not legally challenged state actions to legalize or decriminalize recreational use, and they thought it was legal to use marijuana in Colorado under a similar regime to legal alcohol. (Tr. 25, 61-62.) He did not believe his girlfriend would be upset with him because it was legal where he used it. He and his friends bought the marijuana from a local shop. (Tr. 62.) Applicant informed his girlfriend about his marijuana use in Colorado on his return from the ski trip. She was very upset and extremely disappointed in him. (AE I; Tr. 72.) They had a long discussion about his drug use, and he promised that he could not use marijuana again. (AE I.) Applicant

regrets his use of marijuana in January 2015, which he considers a “lapse of judgment.” (Answer.) He has not used marijuana since then and intends no future use. (Tr. 63.)

After his ski trip, Applicant resumed his graduate studies and began working part time as a teaching assistant grading papers. (GE 1; Tr. 25.) The work did not pay well, and he had to use savings to cover his living expenses. (Tr. 25.) Applicant’s brother, who works for Applicant’s employer, encouraged Applicant to apply for employment with the company. Applicant knew that the job required a security clearance, but he did not realize that his past use of marijuana would be a problem for security clearance eligibility. A friend, who had stopped using marijuana in 2010, had obtained a security clearance and told him that he would be fine provided he was honest about his drug use. (Tr. 26.) In April 2015, Applicant accepted an offer of employment. (GE 2.)

In April 2015, Applicant saw friend Y at a birthday party for a mutual friend. Friend Y offered Applicant some marijuana. Applicant declined and told friend Y that he had obtained a job with his current employer and would not be using marijuana again. Applicant testified that friend Y accepted his explanation. (Tr. 24.)

On May 3, 2015, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86). Applicant responded affirmatively to an inquiry concerning any illegal use of a drug or controlled substance in the last seven years. He disclosed that he used marijuana between May 2001 and January 2015, on average once month in high school and college and on average less than twice a year thereafter. He indicated that his most recent use was in Colorado where it is legal. Applicant denied any intention to use marijuana in the future, stating:

I do not intend to use this drug per the conditions of the security clearance I am applying for. I do not believe I will have any temptation to use this drug in the future because I find the drug only mildly enjoyable, and definitely not enjoyable enough to risk my career or the security of the United States. (GE 1.)

In early June 2015, Applicant started his current employment. He is aware that his employer has a zero-tolerance policy with respect to drug abuse. (Tr. 47-48.) Applicant moved for his job, but he and his girlfriend continued to live together on the weekends. He continued to pursue his graduate degree, commuting approximately 66 miles one way for his remaining classes. (GE 2.)

On August 7, 2015, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Applicant indicated that he began using marijuana in high school because of peer pressure and that he continued to use the drug through college. He reported using the drug until January 2015 because he did not have an incentive to stop, but that in January 2015, he realized that he would have to leave marijuana behind if he was to achieve his employment goals. He used marijuana at parties when the drug was provided and available. Applicant did not provide the names of the persons involved in his marijuana use or the locations of his use apart from that his last

use was in Colorado, where it is legal. Applicant reported that he had no intention of any future marijuana use and that he no longer associated with anyone who uses marijuana. (GE 2.)

On August 30, 2016, Applicant was evaluated by his physician. He exhibited no signs or symptoms of cannabis use disorder or any clinical indications that would warrant substance abuse treatment. (AE L.) A urinalysis submitted on August 18, 2016, was negative for all substances tested, including THC. (AE M.) On September 25, 2016, Applicant executed, in the presence of his girlfriend, a declaration of intention “to never consume, possess, purchase or sell marijuana or any other illegal drugs again, with automatic revocation of any security clearance [he holds] for any violation.” (AE A.)

Applicant’s mother first learned that Applicant had used marijuana in the past when it became an issue for his security clearance. She was disappointed to learn that he had used marijuana, but she believes Applicant has not used the drug since January 2015. He expressed his embarrassment and regret for his immature behavior and his intention to refrain from marijuana in the future. (AE N; Tr. 85-89.) Applicant’s mother has observed Applicant’s girlfriend to be a good influence on her son. (AE N.)

Applicant’s girlfriend, who works as an emergency medical technician (Tr. 29), has not known Applicant to use any marijuana since January 2015. (Tr. 75.) She has made it known to him that she does not tolerate any illegal drug use and that she views smoking marijuana as irresponsible behavior. (AE I; Tr. 72-75.) Applicant and his girlfriend’s mutual friends do not use any illegal drugs. (Tr. 81.)

Applicant lost touch with friend X in 2008 or 2009. (Tr. 22, 52.) He has not seen friend Y since April 2015. (Tr. 24, 64.) Applicant still associates with the two friends with whom he went skiing in January 2015. (Tr. 62, 66.) Applicant last saw them in September 2015. (Tr. 69.) He informed both of them that he had stopped using marijuana because it was illegal under federal law and contrary to the requirements for security clearance eligibility. According to Applicant, his friends were supportive of his decision. (Tr. 25.) Applicant believes that neither of these friends uses illegal drugs, given that they would lose their medical licenses for illegal drug involvement. (Tr. 69.) They realize that their use of marijuana in Colorado was inappropriate, immature, and illegal under federal law. (Tr. 68-69.)

Applicant does not have a record of irresponsible behavior in other aspects of his life. He has a very good credit score (AE D) and an excellent work record. He is endorsed for security clearance eligibility by his direct supervisor (AE G) and by a lead engineer on his team (AE E). Applicant’s supervisor, who is a department manager and project leader, has no hesitation recommending Applicant for a security clearance. After working closely with Applicant on several modeling efforts for an outside customer, he has found it “abundantly clear” that Applicant possesses the judgment to protect the company’s intellectual property as well as their client’s interests. (AE G.) The lead engineer is unaware of the particular concerns of the DOD, but he knows that an SOR was issued to Applicant. Applicant quickly grasped new concepts and made solid contributions despite his work

being limited to unclassified matters. He has seen no reason to question Applicant's trustworthiness. (AE E.) In April 2016, Applicant was given an out-of-cycle wage increase because of his excellent work performance. (AE C.)

Applicant's brother believes Applicant will be a responsible steward of the nation's secrets. He has never known Applicant to have financial issues or to be other than reliable. While Applicant has made some choices in the past that may raise concerns about Applicant's judgment, he believes that Applicant understands that seeking a security clearance has changed his circumstances and that Applicant can be counted on to make different decisions going forward. (AE F.)

A close friend of Applicant's since college, who also works for Applicant's employer, recently obtained a DOD secret clearance. He opined that Applicant possesses good character and is capable of handling the duties and responsibilities of a secret clearance. (AE H.)

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 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

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),¹ 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 used marijuana between May 2001 and January 2015, on average once a month in high school and college and once or twice yearly more recently. Applicant used the drug when it was offered to him by others, and there is no evidence that his friends asked him to contribute to its cost. However, he purchased the drug in Colorado in January 2015, albeit from a legal source. AG ¶ 25(c), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” has some applicability, but there is no evidence that he possessed marijuana other than when he used it.

¹Schedules 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.

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,” cannot reasonably apply. Applicant used marijuana only four times after 2011, but he used the drug approximately monthly in high school and college. When viewed as a whole, his marijuana involvement was not “so infrequent.” Moreover, his use of marijuana on the ski trip in January 2015 occurred within six months of his security clearance application. It was too recent to be mitigated because of the passage of time.

Applicant denies that he used any marijuana after the ski trip in January 2015 and that he has any intention to use marijuana or any other illegal drug in the future. 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; or
- (4) a signed statement of intent with automatic revocation of clearance for any violation.

Concerning AG ¶ 26(b)(1), Applicant’s uncontroverted testimony is that he does not associate with anyone who currently uses illegal drugs. He lost contact with high school friend X in 2008 or 2009. He has seen friend Y since they last used marijuana together in May 2014, but their contact has been limited to a friend’s wedding in November 2014 and a birthday party in April 2015. Friend Y was apparently still using marijuana because he offered some to Applicant at the birthday party, but Applicant declined the offer and informed friend Y that can no longer use marijuana. Applicant testified credibly that he no longer socializes with friend Y on an ongoing basis. There is no evidence that Applicant has had any contact since 2009 with his then roommate with whom he had also used marijuana or since 2011 with the person with whom he played Ultimate Frisbee. Applicant acknowledges that he continues to associate with the two friends with whom he used marijuana in Colorado in January 2015. However, to his knowledge, both friends do not currently use marijuana and do not intend to use the drug in the future. They have a significant motivation in remaining abstinent, given they could lose their medical licenses. AG ¶ 26(b)(1) applies in that Applicant is not acting to maintain relationships with known illegal drug users.

AG ¶ 26(b)(2) is established in that Applicant is no longer in the school environments where most of his marijuana use occurred. Applicant has been in a cohabitant relationship with his girlfriend since May 2014, and she does not use illegal drugs. She has made clear to Applicant that she disapproves of his marijuana use and will not tolerate any illegal drug involvement in their home. Applicant’s girlfriend has reportedly had a positive influence on him. Even so, despite her expressed disapproval of his

marijuana involvement in May 2014 and his promise to her that he would not use the drug again, Applicant was not dissuaded from using marijuana with his two friends in January 2015. Applicant mistakenly believed that his girlfriend would not be upset with him because recreational marijuana was legal in the state. He learned otherwise when he returned and informed her about his marijuana use. His present home environment and his employment with a company with a zero tolerance for illegal drug use are seen as deterrents to any future illegal drug involvement by Applicant.

As for AG ¶ 26(b)(3), Applicant's present abstinence of some 21 months as of his hearing in late September 2016 is comparatively brief in relation to the 14 years over which he used marijuana, even considering the decline in the frequency of his marijuana use to once or twice a year during the last five years. However, his efforts to avoid situations conducive to illegal drug use, his responsible financial behavior, and his commitment to his work, reflect increased maturity and soundness of judgment. Applicant has expressed regret about his past marijuana use, and he has executed the statement of intent required under AG ¶ 26(b)(4). Applicant understands that any future drug abuse would be incompatible with his security clearance obligations. His record of exemplary work performance does not alone mitigate his history of marijuana use, but he is not likely to jeopardize his job and career by using any illegal drug in the future. I am persuaded that Applicant can be counted on to abstain from any illegal drug involvement in the future. The drug involvement concerns are 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).² In making the overall commonsense determination required under AG ¶ 2(c), I have to consider Applicant's very poor judgment in abusing marijuana. He knew it was illegal under federal law and also in his home state, where most of his use occurred. It is particularly troubling that he did not put his marijuana use behind him after college. Applicant's self-report of his marijuana use weighs in his favor under the whole-person evaluation. His professionalism, dedication, and reliability at work have earned him the respect and trust of his co-workers, who have no hesitation in recommending him for security clearance eligibility. While his years of marijuana use are not condoned, it also appears that Applicant has put his drug use behind him.

²The 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.

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). At the same time, security clearance decisions are not intended as punishment for past wrongdoing, but rather involve an assessment of future risk that one may not properly handle or safeguard classified information. For the reasons discussed under Guideline H, *supra*, it is clearly consistent with the national interest to grant Applicant security clearance eligibility.

Formal Finding

Formal finding for or against Applicant on the allegation set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, is:

Paragraph 1, Guideline H: FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

In light of all of the circumstances, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Elizabeth M. Matchinski
Administrative Judge