



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-04386

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: *Pro se*

01/28/2016

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant did not mitigate security concerns regarding his use of illegal drugs. Eligibility for access to classified information is denied.

History of the Case

On January 21, 2015, the Department of Defense (DOD) Consolidated Adjudication Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AGs) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on February 16, 2015, and elected to have his case decided on the basis of the written record. Applicant received the Government's File of Relevant Material (FORM) on October 8, 2015, and did not respond to the FORM. The case was assigned to me on December 1, 2015.

Procedural Issues

Department Counsel requested administrative notice be taken of facts covering U.S. policy concerns regarding marijuana. Department Counsel attached the following U.S. publications: *Adherence to Federal Laws Prohibiting Marijuana Use*, Memorandum from the Director of National Intelligence (October 2014); *Guidance Regarding Marijuana Enforcement*, U.S. Department of Justice (August 29, 2013).

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 (App. Bd. April 12, 2007). Administrative notice is appropriate for noticing facts or government reports that are well known. See *Stein*, Administrative Law, Sec. 25.01 (Bender & Co. 2006).

For good cause shown, administrative notice was granted with respect to the above-named memoranda addressing the prohibited use of marijuana under federal law. Administrative notice was extended to the documents themselves, consistent with the provisions of Rule 201 of Fed. R. Evid. This notice did not foreclose Applicant from challenging the accuracy and reliability of the information contained in the memoranda covering marijuana use.

Summary of Pleadings

Under Guideline H, Applicant allegedly used marijuana with varying frequency between January 2007 and June 2013; (b) purchased marijuana with varying frequency between June 2010 and June 2013; (c) cultivated, sold, and distributed marijuana with varying frequency between 2011 and May 2013; (d) used codeine without prescription between 2011 and May 2013; (e) used Adderol without prescription between January 2010 and June 2013; (f) used LSD with varying frequency between January 2010 and June 2011; (g) used Ecstasy one time in June 2013; (h) used psilocybin mushrooms with varying frequency between January 2010 and June 2011; and (i) used Ketamine one time in June 2010. Allegations made under Guideline H are incorporated under Guideline J.

In his response to the SOR, Applicant admitted the allegations in the SOR with explanations. He claimed he admitted the allegations in an effort to demonstrate complete honesty with the hope of establishing trustworthiness. He claimed that his admissions guarantee that the discretions of his past cannot be held against him in the future. He claimed, too, that his use of these substances covered in the SOR occurred in safe settings and were never associated with other criminal activities or personal addiction. And he claimed he was immature and did not think of the consequences later in life.

Findings of Fact

Applicant is a 26-year-old composite fabricator for a defense contractor who seeks a security security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant never married and has no children. (Item 4) He attended college classes between August 2008 and March 2010, but claims no degree or diploma. (Item 4) Between September 2011 and September 2012. He attended a trade school and earned a certification. (Item 4) He claimed no military service. (Item 4) Applicant has worked for his current employer since September 2013. Previously, he was employed as an intern for a non-profit organization (between September 2012 and September 2013). (Item 4)

Drug use history

Applicant was introduced to marijuana in high school and used the drug with varying frequency between January 2007 and June 2013. (Item 1) He satisfied his marijuana needs with purchases. From time to time, he helped a friend in cultivating marijuana between June 2010 and June 2013. (Items 1 and 5) He credited marijuana with providing a calming effect on him.

Applicant used marijuana with varying frequency between January 2007 and June 2013 with friends at homes and parties. (Item 5) He used it for relaxation, relief of back pain, and for sleep aid. (Item 5) He estimates using the substance every other day on average before tapering off in 2012 and 2013. He attributed his use of illegal drugs to minor needs, his interest in exploration, and immaturity. (Item 1) He claimed he could return to regular use of the substance were it to be legalized, or if he did not need a security clearance.

Between June 2010 and June 2013, Applicant experimented with other drugs of choice. He admitted to using non-prescribed codeine between 2011 and May 2013 and non-prescribed Adderol between January and June 2013. He admitted, too, in his Answer and summary of interview with an agent of the Office of Personnel Management (OPM) to using LSD with varying frequency between January 2010 and June 2011; Ecstasy once in June 2013; psilocybin mushrooms with varying frequency between January 2010 and June 2011; and Ketamine once in June 2010. (Items 2 and 5)

Applicant was also involved in the production and sale of THC products. He supported the care givers in his home state in their efforts to develop an extraction of medical marijuana for soaps and balms. He purchased marijuana from his care givers from time for himself and close friends. (Item 5) Infrequently, he sold small amounts (no more than a pound in the aggregate) of marijuana to a small group. (Item 1, at 44 and Item 5) He sold it in 2010 for a short while to help pay a few bills. He provided his

support of the medical marijuana industry, characterizing it as a “valuable endeavor.” (Item 1, at 45) Since 2013, he has neither used, purchased, nor marketed marijuana products out of concern for keeping his security clearance.

Applicant no longer associates with anyone who uses illegal drugs. (Item 5, at 2-3) His family and friends are aware of his past use and involvement in illegal drugs. (Item 5, at 3) He has never associated with other criminal activities or personal addiction. (Item 2)

Federal laws covering the enforcement of marijuana use

In a memorandum of October 2014, the Director of National Intelligence (DNI) issued guidance, making it clear that no state can authorize violations of federal law. *See Adherence to Federal Laws Prohibiting Marijuana Use, supra*. Under federal law, marijuana is identified as a Schedule 1 controlled drug. Noted, too, in the DNI’s memorandum, Executive Order 12564 mandates a drug-free workplace and drug-free federal workforce. (Id.)

Guidance to federal prosecutors regarding marijuana enforcement in the states was issued in August 2013 by the Deputy Attorney General (DAG) and reaffirmed the Justice Department’s enforcement priorities in addressing state laws that legalize marijuana for cultivation and distribution for medicinal use. *See Guidance Regarding Marijuana Enforcement, supra*, at 3. Under current Justice Department (DOJ) guidance, prosecutors are counseled to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the marijuana operation is demonstrably in compliance with a strong and effective state regulatory system. (Id.)

Most importantly, neither the DOJ guidance nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the Controlled Substance Act (CSA). The guidance stresses that even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action.

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified information. These guidelines include “[c]onditions that could raise a security concern and may be disqualifying” (disqualifying conditions), if any, and many of the “[c]onditions that could mitigate security concerns.” The AGs must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a

decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following individual guideline is pertinent in this case:

Drug Involvement

The Concern: 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 AG ¶ 24.

Criminal Conduct

The Concern: criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511

(1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Security concerns are raised about Applicant’s multiple use of illegal drugs and non-prescribed drugs, cultivation, sales, and purchases of illegal drugs over a considerable period time spanning 2007 through June 2013. His admissions to using marijuana and other illegal or non-prescribed drugs with varying frequency create security concerns over risks of recurrence, as well as judgment issues. On the strength of the evidence presented, two disqualifying conditions (DC) of the AGs for drug abuse are applicable: DC ¶ 25(a), “any drug abuse,” and DC ¶ 25(c), “illegal possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.”

Judgment concerns exist over Applicant’s active drug involvement over a number of years. While his marijuana activities (use, purchases, cultivation, and distribution) may have complied with his state’s law authorizing medicinal-based marijuana use and other marijuana-related actions, they reflect violations of both federal law and DOD’s mandated drug-free workplace and drug-free federal workforce policies in place for both DOD employees and DOD contractors. See *Adherence to Federal Laws Prohibiting Marijuana Use*, supra, and *Guidance Regarding Marijuana Enforcement*, supra.

When the CSA has been challenged on federalism grounds, the courts have consistently extended federal preemption authority over competing state laws that legalize marijuana use. In *Oakland Cannabis Buyers*, 532 U.S. 483 (2001), the

Supreme Court did not attempt to invalidate the enabling legislation adopted by the particular state in issue. This legislation was designed to implement the key enabling provisions of the state's Proposition 215, under §§ 11362.5 *et seq.* Proposition 215 (known as the Compassionate Use Act) was passed by this state's voters in 1996 to validate the right of residents of the state to possess and use marijuana for medical purposes, when they have a recommendation from a licensed physician. Proposition 215 gives the patient's primary care giver the right to cultivate and possess marijuana for the patient. But the *Oakland Cannabis Buyers* Court did affirm continued federal jurisdiction over drug violators covered by the law without regard to the state's marijuana exception.

More recently, the Supreme Court seized the opportunity to refine and clarify the reach of its holding in *Oakland Cannabis Buyers*, *supra*. In *Raich v. Gonzales*, 545 U.S. 1, 8-14 (2005), the Court addressed the claims of two state residents who suffered from a variety of serious medical conditions and has sought to avail themselves of medical marijuana pursuant to the terms of the state's Compassionate Use Act. Notwithstanding that county investigating officials had found that one respondent's medical use of marijuana was entirely lawful, federal agents seized and destroyed all six of her cannabis plants.

In *Raich v. Gonzales*, *supra*, the Supreme Court held that the regulation of marijuana under the CSA was fully within Congress' commerce power (U.S. Const., art. I, § 8), because marijuana production intended for home production could have a substantial effect on supply and demand in the national market. The *Raich* Court reasoned that federal failure to regulate the intrastate manufacturing and possession of marijuana would leave a considerable gap in the CSA. In turn, the Court vacated the Ninth Circuit's judgment.

So, even if Applicant complied with his state's permit to use, cultivate, and distribute marijuana for medicinal purposes, his state-approved medicinal permit would not foreclose the Federal Government from prosecuting illegal possession charges under the CSA.

Where (as here) there is additional probative adverse information covered by Guideline J that is not covered by Guideline H, and *vice versa*, and which reflects a recurring pattern of federally-based criminal activity, questionable judgment, or irresponsible behavior, independent grounds do exist for considering questionable judgment and trustworthiness allegations under Guideline J as well as Guideline H. Authority for considering overlapping conduct under both guidelines is contained in the guidance provided in Enclosure 2, § 2(d) of the Directive.

Under Guideline J, criminal conduct (both charged and alleged) are covered by D.C. § 31(a), "a single serious crime or multiple lesser offenses," and D.C. § 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted." Both disqualifying conditions apply to Applicant.

Applicant has made some noticeable gains in his efforts to mitigate his past involvement with illegal substances (mostly marijuana-related). Several of the listed illegal and non-prescribed drugs used were infrequent and have not been used since 2013 (codeine, Adderol, and Ecstasy) Three of the drugs he used (i.e., LSD, psilocybin mushrooms, and Ketamine), he quit using in 2011 and 2010, respectively. His cessation of marijuana involvement was more recent, though, and still leaves questions about his exposure to risks of returning to marijuana use.

With almost two years of claimed abstinence from illegal drug use and non-prescribed drugs and disassociation from friends he assisted in cultivating and distributing marijuana products, Applicant merits some consideration of two of the mitigating conditions of Guideline H: MC ¶ 26(b)(1), “disassociation from drug-using associates and contacts,” and MC ¶ 26(b)(2), “changing or avoiding the environment where drugs were used.” Both of these mitigating conditions have very limited application without more input from Applicant on his progress. And without more information from Applicant about his current abstinence efforts, none of the mitigating conditions covered by Guideline J are available to him.

In fairness to Applicant, he has exhibited open candor about his past drug use and involvement with marijuana cultivation and distribution and his associations with persons who have used, cultivated, and distributed marijuana. His commitments to breaking all ties and connections with friends and associates who use or are in any way involved with marijuana use and production are encouraging.

Still, Applicant has provided little evidence of his progress in breaking with his past friends and contacts and claims a relatively short period of abstinence in his answer and summary of interview with an agent of the OPM. Having a state-approved medicinal exception would not absolve him from potential exposure to federal enforcement actions. So, while Applicant’s assurances that he has no intention of ever resuming his involvement with marijuana, or any illegal substance, in the future, are entitled to some weight, they cannot be totally separated from the recurrence risks that face Applicant in the foreseeable future. Furthermore, medicinal use of marijuana that might be legal under the laws of Applicant’s state is not immune to federal prosecution for violation of the CSA under the federal government’s concurrent jurisdiction over manufacturing, distributing, and possessing illegal drugs.

Because of the recency of Applicant’s discontinued involvement with marijuana (less than two years), and the other illegal drugs and non-prescribed drugs he tried, and the uncertainty about his breaks from the past friend he assisted in cultivating and distributing marijuana, it is still too soon to conclude that Applicant’s illegal drug involvement and use of non-prescribed drugs and judgment lapses associated therewith are fully mitigated. More time is necessary before safe predictive judgments can be made that Applicant will not resume his involvement with marijuana and other illegal and non-prescribed drugs.

From a whole-person perspective, Applicant has established some understanding of DOD policy constraints on the use of illegal and un-prescribed substances. Because motivation is never easy to objectively establish, the placement

of reasonable time lines on clearance applicants to test and absolve them of recurrence risks makes safe and practical sense when balancing the interests of protecting national security with the interests of those who seek access to the nation's secrets.

Considering the record on a whole, at this time there is too little documented evidence of Applicant's mitigation efforts to avert foreseeable risks of recurrent involvement with illegal and non-prescribed drugs. While he is to be commended on his decision to discontinue illegal drug usage and activities related to marijuana cultivation and distribution, it is still too early to make safe predictions about his ability to sustain his abstinence, Taking into account all of the facts and circumstances surrounding Applicant's drug use and judgment lapses, Applicant fails to mitigate security concerns related to his drug use and criminal conduct issues. Unfavorable conclusions warrant with respect to the allegations covered by Guidelines H and J.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE H (DRUG INVOLVEMENT):	AGAINST APPLICANT
Subparas. 1.a through 1.i:	Against Applicant
GUIDELINE J (CRIMINAL CONDUCT):	AGAINST APPLICANT
Subpara. 2.a:	Against Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

