DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 19-00667
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Appellant: Kristen E. Ittig, Esq.

08/15/2019

_____

Decision

_____

GLENDON, John Bayard, Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse). Applicant has used marijuana for many years in two states pursuant to the "medical marijuana" laws of those states, and she intends to continue to do so for medical purposes. She testified and submitted a number of exhibits. Based upon the record as a whole, eligibility for access to classified information is denied.

Statement of the Case

On April 4, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (Dec. 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant responded to the SOR on April 30, 2019, admitting each of the three SOR allegations with additional comments in mitigation. She requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). Applicant subsequently retained counsel, who entered her appearance in this case. On June 18, 2019, the case was assigned to me. DOHA issued a notice of hearing on July 9, 2019, scheduling the hearing on July 24, 2019.

I convened the hearing as scheduled. Department Counsel offered two documents, which I marked as Government Exhibits (GE) 1 and 2. Applicant's counsel offered 13 documents, which I marked as Applicant's Exhibits A through M. All exhibits were admitted into the record without objection. I kept the record open until August 1, 2019, to give both parties the opportunity to submit a legal brief on a central issue in this case. Both counsel timely submitted briefs. DOHA received the transcript on August 5, 2019 (Tr.).

Findings of Fact

Applicant admitted, with explanations, all three allegations in the SOR. I have incorporated her admissions in the findings of fact. Applicant's personal information is extracted from GE 1, her security clearance application, dated February 12, 2018, unless otherwise indicated by a parenthetical citation to the record. After a thorough and careful review of the pleadings and the record evidence, I make the following findings of fact.

Applicant, 43, works as an attorney for a university that does significant research, including research for the DOD. The research facility she supports has sponsored Applicant to apply for a security clearance so that she can work more closely with it on classified matters. (AE M; SOR response.)

Since childhood, Applicant has been a highly responsible person who believed strongly in giving back to her community. As she grew up, she was attracted to serving the U. S. Government in various capacities. She aspired to become a U.S. astronaut, then an FBI agent, and subsequently a member of the U.S. Navy Judge Advocate General's Corps. For various reasons, she was unable to pursue those dreams. After law school, she worked at a prestigious law firm, but found that to be unfulfilling. She resigned and in November 2003, she accepted a legal position at a research center affiliated with a university in State 1 and relocated to that state. (Tr. 21, 23, 29, 58; SOR response at 2-3; AE K.)

In April 2013, she relocated to State 2 to marry and to be near her parents. She applied for a highly competitive position with her clearance sponsor and was rated as the employer's first choice. She began working at the university and is a respected and valued member of the university's general counsel's office. She has a deep belief in the importance of U.S. Government-sponsored scientific research and enjoys working as a lawyer in support of the research center of the university. (Tr. 24-26; SOR response at 4.)

In 1995, while on vacation during a college break, Applicant contracted a serious infectious disease that caused long-term damage to her immune system. Since then, she has suffered multiple and significant diseases. In 2007 or 2008, she was diagnosed with fibromyalgia, chronic fatigue syndrome, and an auto-immune disorder. To this date, she suffers from chronic pain, muscle cramps and spasms, extreme skin sensitivity, and insomnia due to pain. Over the ensuing years, she has taken opioids for pain, though only on a short-term basis, and a number of other prescribed medicines for pain and insomnia. Some of these drugs have significant side effects, the most serious of which is addiction and, in one case, blurred vision. (Tr. 33-37, 42-45; SOR response at 3-4; AE A, H.)

State 1 legalized marijuana for medical purposes by persons with a "debilitating medical condition" (Medical Marijuana) a few years before Applicant moved there. In 2004, she obtained a doctor's "permission" to use Medical Marijuana. At that time, State 1 had no regulations controlling the sale and use of Medical Marijuana. The doctor's permission merely provided a legal defense to potential criminal charges for possession of marijuana. From 2004 to 2009, there were no legal sellers of Medical Marijuana in State 1. From time to time, Applicant obtained, but claims she did not purchase, marijuana for her medical purposes from a third party, who also had a doctor's permission to use Medical Marijuana. In 2009, State 1 developed a regulatory scheme under which certain doctors could write a certification and state-regulated dispensaries could legally sell Medical Marijuana. Applicant received a doctor's certification, submitted a Medical Marijuana Registry Application Form, and obtained a card to purchase Medical Marijuana at the dispensaries. Applicant testified that she always purchased Medical Marijuana from state-run dispensaries. She used Medical Marijuana to relieve her chronic pain and muscle cramping so that she could sleep at night. Starting in 2009, she used Medical Marijuana every night while living in State 1. (Tr. 36, 39, 58-61, 63-65; AE B, C.)

Applicant stored her Medical Marijuana in a cigar humidor. Months after moving to State 2 in 2013, she discovered the humidor, which had been in storage, and found that it contained some Medical Marijuana. She used that Medical Marijuana in State 2 in small amounts on an occasional basis until mid-2016. (Tr. 45, 65-67.)

In about 2014, State 2 decriminalized the possession of marijuana, and state regulations for the sale and use of Medical Marijuana become effective in late 2017. In April 2018, Applicant received a doctor's "certification" to be permitted to purchase Medical Marijuana at a state-regulated dispensary for chronic pain. She has registered with State 2 to be able to purchase Medical Marijuana. She buys vape cartridges containing THC and other cannabinoids and uses the drug in the evenings. She has never used Medical Marijuana before or during work. It is not allowed on her university's campus. In 2015, she received a workplace accommodation due to her medical condition that permits her to telework from her home during flare-ups of her symptoms and to wear loose-fitting clothing in her office. She currently uses Medical Marijuana daily and intends to continue using it in the future. She does not believe that prescription pharmaceutical drugs are an acceptable alternative to Medical Marijuana because they are less effective and can be addictive or have other side effects. (Tr. 47-50, 55, 66-72, 75; SOR response at 4; AE D, E, F at 3, I, J.)

In her SOR response, Applicant argued that her use of Medical Marijuana that is legally purchased and used in State 2 does not cast doubt on her reliability, trustworthiness or judgment. Her superiors at the university support her application and encouraged her to apply for a security clearance even though they know she uses Medical Marijuana. Applicant understands that if she is denied a security clearance due to her use of Medical Marijuana, her employment as a highly valued lawyer will continue. (SOR Response; Tr. 54; AE M at 5.)

Appellant's counsel submitted eight written character references in support of Applicant's case for mitigation. The references attest to Applicant's excellent character, ethics, and trustworthiness. The senior member of Applicant's university research center wrote that she asked Applicant to apply for a security clearance to enable Applicant to be a fully informed member of the research department's efforts to protect information that is sensitive to national security. Applicant was selected for this role because of her intelligence, trustworthiness, and good judgment and because Applicant values honesty and integrity. With her SOR response, Applicant also submitted her performance reviews for the last three years. Her performance was rated each year as "Outstanding," which is defined as "Exemplary performance in all areas of the job."(AE M; SOR response.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern under this guideline is set out in AG ¶ 24 as follows:

> 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.

The parties have submitted legal briefs on the underlying issue of whether the use of Medical Marijuana that is legally prescribed under state law by a practitioner in that

state should be exempted from application of the Guideline H disqualifying conditions. The U.S. Supreme Court has established that the granting, denial, or revocation of industrial security clearances is the exclusive province of the Executive Branch of the Federal Government. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). Accordingly, state laws "legalizing" marijuana for medical purposes cannot pre-empt provisions of a federal national security program. Moreover, the DOD is not bound by the status of an individual's conduct under state law in evaluating the security implications of that conduct and adjudicating that individual's eligibility for access to classified information.

In making that evaluation, I am guided by the U.S. Department of Justice's policy with respect to the prosecution of marijuana offenses under the Controlled Substances Act, 21 U.S.C. § 801 *et seq* (the CSA). As recently as January 2018, the Department of Justice (DOJ) reiterated its position regarding the illegality of the possession of marijuana under federal law. Jefferson B. Sessions, III, Attorney General *Memorandum for all United States Attorneys* (Jan. 4, 2018.)

I am also guided by the 2016 ruling of the DOJ's Drug Enforcement Administration (DEA) denying a petition by two state governors to reschedule Medical Marijuana and "related items" as a Schedule II drug under the CSA. The DEA concluded, *inter alia*, that marijuana has a high potential for abuse, that its abuse was widespread and can lead to dependence, and that it there is no "currently accepted medical use for marijuana in the United States." DEA, *Schedule of Controlled Substances: Maintaining Marijuana in Schedule I of the Controlled Substances Act* at 3 (Jul. 2016)

More specifically as to security clearances, in October 2014, the then-Director of National Intelligence (DNI), issued a memorandum addressing changes in state laws relating to marijuana. He wrote: "An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations." James R. Clapper, Director of National Intelligence, memorandum, *Adherence to Federal Laws Prohibiting Marijuana Use* (Oct. 25, 2014).

In ISCR Case No. 14-03734 at 3 (App. Bd. Feb. 18, 2016), the DOHA Appeal Board noted that the DNI's 2014 memorandum specifically stated that state laws permitting the use of marijuana "do not alter the existing National Security Adjudicative Guidelines[.]" The Board ruled that the Administrative Judge properly applied the Adjudicative Guidelines in concluding that the applicant's past use of marijuana was disqualifying under the Adjudicative Guidelines of Guideline H and was not mitigated by the fact that the applicant used marijuana to provide him with relief from chronic pain. The Board also observed that "DOHA proceedings are not a proper forum to debate the pros and cons of whether marijuana should be legal for some purposes, how it should be classified as a controlled substance, or the merits of DoD policy concerning drug abuse." *Id. See also* ISCR Case No. 16-00258 at fn. 1 (App. Bd. Feb. 23, 2018) ("It merits noting, however, that while several states have decriminalized marijuana or allowed its use for medical or recreational purposes, such use of marijuana remains subject to the applicable disqualifying conditions in the Directive.")

Accordingly, Appellant's admissions in her SOR response and the record evidence establish the following potentially disqualifying condition under Guideline H:

> AG ¶ 25(a): any substance misuse (see above definition [in AG ¶ 24]);
>
> AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
>
> AG ¶ 25(g): expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The allegation in SOR subparagraph 1.b regarding Applicant's use of marijuana after her completion and signing of her security clearance application covers a period in time encompassed by the time frame alleged in SOR subparagraph 1.a and is not an independently disqualifying fact.

The following mitigating conditions are potentially applicable:

> 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; and
>
> AG ¶ 26(c): abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended.

AG ¶ 26(a) is not established. The behavior is current and frequent. The circumstances surrounding Applicant's health are somewhat unusual, but these circumstances do not suggest that the behavior is unlikely to recur since Applicant intends to continue using Medical Marijuana. Applicant argues that her circumstances do not cast doubt on her current reliability, trustworthiness, or good judgment. For the reasons set forth at length in my whole-person analysis, below, I conclude that the record evidence casts doubts about her reliability, trustworthiness, and judgment.

AG ¶ 26(c) is not established. Under federal law, Applicant's use of Medical Marijuana constitutes an abuse of a controlled substance. The record also establishes that Applicant has used Medical Marijuana pursuant to a state certification from a licensed practitioner similar to a prescription for a number of years to relieve the serious symptoms she has experienced. The second prong of this mitigating condition, however, is not satisfied because the abuse has not ended and Applicant has no intention to cease using Medical Marijuana in the future. Satisfaction of the second prong of this mitigating condition is an important requirement for the application of this adjudicative guideline. Applicant has not provided the necessary mitigating evidence under this guideline.

Whole-Person Analysis

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances and applying the adjudicative factors in AG ¶ 2(d), specifically: (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.

I have considered the nature, extent and seriousness of Applicant's conduct. Her knowing violation of federal law with respect to the possession of marijuana is problematic. As an experienced and accomplished attorney, she has chosen to ignore her legal duty as a U.S. citizen to comply with federal law. Her conduct raises a concern as to whether she might find other federal laws to be inconsistent with her beliefs or her perceived necessities or convenience and might ignore them as well. Someone with access to classified information cannot decide which federal laws will be followed and which will be ignored. I view the circumstances of her health conditions with much sympathy, and I understand the motivation of her conduct. Applicant has suffered more serious illnesses in her 43 years than most people could imagine experiencing in their lifetimes. I also find that Applicant's openness about her use of Medical Marijuana materially reduces the potential for pressure, coercion, or exploitation. Her health and her use of marijuana in a state where Medical Marijuana has been legalized, however, does not justify creating an exception to the established rules set forth in the Adjudicative Guidelines. Applicant's past use of Medical Marijuana, including at times when it was not legal in State 2, and her intent to continue using the drug in the future raise unmitigated disqualifying security concerns about her reliability, trustworthiness, and judgment.

After weighing the disqualifying and mitigating conditions under Guideline H and evaluating all of the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by her drug involvement and substance misuse.

Formal Findings

Guideline H, Drug Involvement and Substance Misuse:	AGAINST APPLICANT
Subparagraph 1.a:	Against Appellant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

John Bayard Glendon
Administrative Judge