DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 20-00384
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Daniel O'Reilley, Esq., Department Counsel
For Applicant: Dan Meyer, Esq.

03/08/2021

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Decision

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MURPHY, Braden M., Administrative Judge:

Applicant has a chronic, painful, medical condition. To manage it, she has used marijuana for medicinal purposes, under her state's medical marijuana program, since about December 2017, and continues to do so. During most of this time, she has held an active security clearance. Despite her awareness of marijuana's continued illegality under federal law, Applicant intends to continue using marijuana for medical purposes. Security concerns under Guideline H, drug involvement and substance misuse, are not mitigated. Applicant's eligibility for continued access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) in March 2018. On April 22, 2020, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H. The DOD CAF acted 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 Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective on June 8, 2017

Applicant answered the SOR on May 23, 2020, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on October 15, 2020. On December 10, 2020, DOHA issued a notice scheduling the hearing for January 5, 2021. On December 14, 2020, I issued a Case Management Order to the parties by e-mail. It largely concerned procedural matters relating to the health and safety of the hearing participants due to the COVID-19 pandemic. The parties were also ordered to submit their exhibits in advance of the hearing, and they did so.

Applicant's hearing convened as scheduled. Several documents were marked as hearing exhibits (HE), including the Government's exhibit list and discovery letter (HE I and HE II), as well as Applicant's exhibit list and pre-hearing brief. (HE III and IV) Near the end of the hearing, a 2014 memorandum from the Director of National Intelligence (DNI) concerning DOD's position on legalization of marijuana under state law (discussed below) was marked as HE V for administrative notice purposes. (Tr. 80)

Government Exhibits (GE) 1-3 and Applicant's Exhibits (AE) A-E were marked and admitted without objection. (Tr. 18-25) Applicant also testified. At my request, both parties submitted post-hearing briefs on January 19, 2021 concerning applicability of the 2014 DNI Memo and Appendix B of the Directive (Bond Amendment Guidance). The documents Applicant submitted with her post-hearing brief were marked together as AE F and admitted without objection. DOHA received the hearing transcript (Tr.) on January 15, 2021. The record closed on January 19, 2021.

Findings of Fact

Applicant admitted the sole allegation in the SOR (¶ 1.a). Her admission is incorporated into the findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 49 years old. She and her husband have been married for 16 years, though a divorce is pending. They have three children. (Tr. 42-44) Applicant has a bachelor's degree in biotechnology and has numerous professional certifications. (GE 1; AE C) She is also pursuing a master's degree in "medical cannabis science and therapeutics" at a school of pharmacy in her home state. (GE 1; AE C; Tr. 40-42)

Applicant has held a variety of government contracting positions since about 2006, supporting various federal agencies and departments, including DOD. She has held a security clearance since 2007. Her employment history since 2006 is detailed in her SCA. (GE 1 at 13-22; AE C; Tr. 26-29, 61).

Applicant was working for the State Department when she took a job with a cleared employer near her home in October 2016. After she was laid off from that job in June 2017, she was then unemployed until March 2018, when she began working for her current employer and clearance sponsor, a defense contractor. (GE 1; Tr. 26-29,

55-58) She currently works from home because of the pandemic, and has an annual salary of about $137,000. (Tr. 62-64)

In 2015, Applicant began experiencing immense joint pain and difficulty walking. In December 2015, she was diagnosed with rheumatoid arthritis (RA). She testified that the condition was sufficiently painful and debilitating that she was unable to work for a period of time. She began pursuing treatment options, and was prescribed prednisone and methotrexate, a cancer drug with significant side effects. (Tr. 35-37, 44, 49-51; GE 2; AE C)

Applicant lives in a state that has a medical marijuana program. In April 2017, following consultation with her physicians, she applied for and received approval in her home state to use medical marijuana. (Tr. 30-31, 44-45; AE C; AE E))

Applicant provided documentation from her physician confirming her condition and the fact that it was "amenable to treatment with medical cannabis" under her home state's regulations. The documentation states, however, that "[t]his is not a prescription." (AE F) Applicant also provided her medical marijuana Patient ID card, issued by her state's medical cannabis regulatory agency. (AE F)

Additional documentation from Applicant's medical cannabis treatment facility noted that she has been compliant with state laws regarding the use of medical cannabis for her condition. The letter acknowledged, however, that "[a]lthough [State] recognizes the recommendation of medical cannabis for various conditions, our company does understand that this is still not recognized by Federal agencies." (AE E)

Applicant began using marijuana for medical purposes in December 2017. By that time, she was unemployed and was not actively sponsored for a clearance. (Tr. 55-59, 61-62) She reported her medical marijuana use (from December 2017 to March 2018) on her March 2018 SCA. She noted that she was an "approved medical cannabis user" in her home state. She said she used marijuana "as needed for [a] medical condition: oral tincture and pills mostly, and/or dried flower." She noted that she intended to use the drug in the future, and explained "I am currently trying to wean off prescription cancer medication and cannabis is helping me do this." (GE 1 at 38; Tr. 45-46)

At the time of her August 2018 background interview, Applicant typically used medical marijuana two to five times a week, always after work or on weekends. She acknowledged using marijuana while possessing at least an interim security clearance. (GE 2 at 2-3)

In February 2020, before the SOR was issued, a DOHA Department Counsel (DC) e-mailed Applicant about her case. The DC noted that Applicant had acknowledged in her interview summary that she used marijuana pursuant to a valid medical prescription in her home state. He noted further that "while some states have legalized marijuana, possessing marijuana remains illegal under Federal law. Thus, the

use of marijuana, even in states where doing to [sic] is legal, is incompatible with holding a DOD clearance." (GE 3 at 1-2).

The DC then offered Applicant an opportunity to declare an intention to forego future medical marijuana use, and noted that if she were to do so, "you will establish eligibility for a clearance." (GE 3 at 2) He then advised that if Applicant were to "declare that you intend to continue to use marijuana, or any other substance whose use is illegal under Federal law, you will not be granted a clearance at this juncture." He wrote that if she chose to continue her use of marijuana, her case would then proceed to a hearing before a DOHA administrative judge, and she would have the opportunity to appear and present evidence. (GE 3 at 2)

Applicant responded and elected the latter option, though her response was silent as to her future intentions as to marijuana use. (GE 3 at 2) The SOR was issued in April 2020. During her testimony, Applicant acknowledged the e-mail exchange, and confirmed her response, and her awareness of the negative impact on her clearance application. (Tr. 74)

At her hearing, Applicant testified that she now uses medical marijuana about one to three times a week, typically on the weekends. She used medical marijuana as the weekend before the hearing. She confirmed a future intention to continue doing so. (Tr. 76-78) ("I will continue to use medical cannabis for medical purposes, and weaning off of methotrexate," while continuing to pursue other RA medications. (Tr. 64-68))

Applicant has not used marijuana recreationally or for any other purpose. (She tried marijuana in college about 30 years ago and did not use it again until December 2017). (Tr. 47-49)). Applicant typically consumes the medical marijuana in capsule or tincture form (dissolved in alcohol). (Tr. 52-53) She uses it only at home, and never at or before work. (Tr. 54) She takes care not to drive under the influence of marijuana. (Tr. 34-35, 54, 60-61) She gets the marijuana from a legal dispensary, and does not grow or distribute it herself. (Tr. 72, 78-79) She confirmed that she uses marijuana or cannabis, beyond cannabidiol (CBD). (Tr. 75-76)

Applicant testified that she considers treatment options for her RA other than medical marijuana "all the time." (Tr. 59-60) She remains under the care of her physicians, including a lead physician at a pain-management practice, and a rheumatologist. They are aware of her medical marijuana use, and see no evidence of substance abuse. (AE C; AE E) Applicant testified that she uses medical marijuana under their consultation. (Tr. 32-33) Applicant testified that she uses the medical cannabis "just like I would any other prescribed medication," for pain relief. (Tr. 31) Applicant testified further that her RA is chronic, and worsening. She remains on painkillers that allow her to walk and function. (Tr. 36-37)

Applicant was assessed for substance abuse by a drug counseling center, and did not fit the criteria for a diagnosis, though the center did recommend counseling. At

the time of the hearing, she had not pursued counseling, but would commit to it if it were recommended in this forum. (Tr. 37-38, 69-72; AE E)

Applicant has not been charged with any drug-related criminal offense. (Tr. 79) She testified that she is aware of state laws in her home state and does not violate them. Applicant acknowledged that she was "very well versed" with the fact that marijuana remains a Schedule 1 controlled substance under Federal law. Recognizing the "contradictory nature" of state and Federal law, Applicant nevertheless asserted a desire to "be up front and transparent and navigate this to the best that I can without encroaching on my principles and how I want to manage my own health. And it is a very difficult place for me to be in." (Tr. 73; Tr. 76)

Applicant testified that she believes she is regarded at work as reliable, trustworthy, experienced, and knowledgeable. There has been no negative impact on her work performance or quality, her integrity or her ethics. She believes she provides an important service to her government customer and the important work that they do. She understands the importance of confidentiality and integrity and is proud and privileged to contribute to the defense community. (Tr. 32, 380-39; AE C)

Applicant provided strong recommendation letters from several references. (AE D) Mr. N is a retired project manager both as a cleared contractor and employee of a U.S. government agency. He is familiar with the SOR and the issues in the case. He has known Applicant since 2007 when they worked together for two years on a large project. He also served as a career mentor. Mr. N attested that Applicant made a significant contribution and was a conscientious and talented employee who he could count on to perform. He attested to her sound judgment and attention to protecting sensitive government information. Mr. N is aware of Applicant's medical condition and her legal use of medical marijuana to treat it. She "remains as reliable and trustworthy as [he] knew her to be" when they worked together. (AE D)

Mr. W is a retired Army officer who currently works as a program manager for the Army. He has held a clearance for many years. He is familiar with the SOR and the issues in the case. He was a supervisor and co-worker of Applicant's from 2000 to 2006 at a factory that manufactured frozen dairy products. Applicant was involved in quality control, inventory, and shipping. Mr. W and his team "placed great trust in her ability to document, maintain, and manage proprietary information." She has excellent judgment, trustworthiness, and responsibility. Mr W is aware of Applicant's medical condition and her legal use of medical marijuana to treat it, and he believes her worthy of holding a clearance while under proper medical care. (AE D)

Mr. S and Ms. F are lifelong friends of Applicant's. Their families know each other well. Both are familiar with the SOR and the issues in the case. Applicant is a caring and supportive mother to her three children. She is also a consummate professional. She is focused and detail-oriented. She is trustworthy and "unimpeachably honest." Her integrity and honesty are "beyond reproach," and they both highly recommends that she be granted a clearance. (AE D)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court has held, "the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials." *Department of Navy v. Egan*, 484 U.S. 518, 531 (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 used 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline H: Drug Involvement

AG ¶ 24 expresses the security concern for drug involvement:

> The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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 following disqualifying conditions under AG ¶ 25 are potentially applicable:

> (a) any substance misuse (see above definition);
>
> (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
>
> (g) expressed intent to continue drug involvement and substance misuse or failure to clearly and convincingly commit to discontinue such misuse.

The Controlled Substances Act ("CSA") makes it illegal under Federal law to manufacture, possess, or distribute certain drugs, including marijuana. (Controlled Substances Act, 21 U.S.C. § 801, et seq. *See* § 844). All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. §§811, 812. Marijuana is classified as a Schedule I controlled substance, §812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment, §812(b)(1). *See Gonzales v. Raich*, 545 U.S. 1 (2005).

At the end of the hearing, I took administrative notice of a memorandum issued by the Director of National Intelligence (DNI) in October 2014 (DNI Memorandum, "*Adherence to Federal Laws Prohibiting Marijuana Use*" (HE V) and asked the parties to brief its applicability to the facts of the case. I have read and considered their positions, set forth in their closing arguments and their post-hearing briefs.

The DNI Memorandum makes clear that changes in the laws pertaining to marijuana by the various states, territories, and the District of Columbia do not alter the existing National Security Adjudicative Guidelines, and that federal law supersedes state laws on this issue:

> [C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines . . . . An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

The Appeal Board has cited the 2014 DNI memo in holding that "state laws allowing for the legal use of marijuana in some limited circumstances do not pre-empt provisions of the Industrial Security Program, and the Department of Defense is not bound by the status of an applicant's conduct under state law when adjudicating that individual's eligibility for access to classified information." ISCR Case No. 14-03734 at 3-4 (App. Bd. Feb. 18, 2016).

Applicant has held a security clearance since 2007, though it was likely inactive during her periods of unemployment. Since December 2015, Applicant has used marijuana for medicinal purposes to help alleviate the pain from her chronic medical condition. She has done so under medical supervision, as a legal participant in her state's medical-marijuana program. She has used medical marijuana on a regular basis, usually on weekends, since she resumed working as a cleared employee with a defense contractor in March 2018, and as recently as the weekend before the hearing. She indicated an intent to continue doing so. AG ¶¶ 25(a), 25(f), and 25(g) therefore apply.

I have considered the mitigating conditions under AG ¶ 26. The following are potentially applicable:

> (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
>
> (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; and (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement is grounds for revocation of national security eligibility.

Applicant's use of marijuana is recent and ongoing, and she intends to continue using marijuana for medicinal purposes as treatment of her chronic medical condition. The fact that her use is legal under her state's law, and the fact that she is fully compliant with the requirements of that program, is not mitigating when her involvement with marijuana continues to violate federal law. As such, her ongoing use of medical marijuana continues to cast doubt on her current reliability, trustworthiness, or good judgment, at least with respect to her suitability for a DOD security clearance. AG ¶ 25(a) therefore does not apply. Given Applicant's stated intentions of continued use of marijuana in the future, AG ¶ 25(b) also does not apply.

Bond Amendment

Given the facts of the case, I also asked the parties to brief the issue of applicability of Appendix B of SEAD 4 (Bond Amendment Guidance). I have read and considered their positions.

Appendix B reflects language in the Bond Amendment to the Intelligence Reform and Terrorism Prevention Act of 2008, as amended (IRTPA), which prohibits granting or renewing a "security clearance for a covered person who is an unlawful user of a controlled substance or an addict ...". (SEAD 4, App. B, para. 1) In citing this prohibition, the DNI memorandum notes that "under Federal law, use of marijuana remains unlawful." (DNI Memo at 2)

Thus, regardless of whether Applicant's use of medicinal marijuana is legal under her state's law (under a prescription or otherwise), it is not legal under Federal law, and the Bond Amendment applies. I am therefore prohibited from granting Applicant a clearance as long as her marijuana use remains current and ongoing.

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 the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

> (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.

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. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and the record evidence, including Applicant's testimony and other statements, as well as Applicant's strong whole-person evidence from her work references. I have incorporated my comments under Guideline H in my whole-person analysis.

Applicant presents as an intelligent, thoughtful individual who is caught on the horns of a dilemma. She has a debilitating, chronic medical condition, and she has chosen to relieve her suffering through medical marijuana, administered, with appropriate oversight from her physicians, under her lawful state's medical marijuana program. This is the only issue with her clearance suitability, as she otherwise presents as an appropriate, even excellent, candidate for continued eligibility. Her problem is that she seeks a security clearance (and renewal of it) by the U.S. Department of Defense, and marijuana remains a Schedule 1 controlled substance under Federal law. Even though her marijuana use, for purely medical purposes, is legal under her home state's law, I therefore cannot find that Applicant has met her burden of showing that she has fully mitigated the security concerns set forth by her ongoing use of medical marijuana, and her declared intention to continue such use in the future.

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

Conclusion

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

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Braden M. Murphy
Administrative Judge