DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 20-03519
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Raashid S. Williams, Esq., Department Counsel
For Applicant: *Pro se*

11/30/2021

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Decision

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MURPHY, Braden M., Administrative Judge:

Applicant used and purchased marijuana for medical purposes, under his state's medical marijuana program, between March 2018 and December 2019, to treat a medical condition. During this time, he held a security clearance. Applicant indicated an intention to continue using marijuana for medical purposes, and has not clearly disavowed that intention. Marijuana use remains illegal under federal law. Security concerns under Guideline H, (drug involvement and substance misuse) and Guideline E (personal conduct), are not mitigated. Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 27, 2020. On May 21, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse) and Guideline E (personal conduct). The DOD issued the SOR under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017. When Applicant answered the SOR on May 26, 2021, he requested a decision based on the administrative (written) record, without a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

On July 29, 2021, Department Counsel submitted the Government's File of Relevant Material (FORM), including documents identified as Items 1 through 4. Items 1 and 2 are the pleadings in the case. Items 3 and 4 were offered as substantive evidence.

The FORM was mailed to Applicant in a letter dated July 30, 2021. He was afforded an opportunity to note objections and to submit material in refutation, extenuation, or mitigation, and was given 30 days from receipt of the FORM in which to do so. It is unclear when Applicant received the FORM, but he submitted an undated response that was received by DOHA Department Counsel on or about September 8, 2021. Department Counsel did not object to admission of Applicant's FORM Response, and it is admitted. In his FORM Response, Applicant did not note any objections to the Government's proposed evidence. FORM Items 3 and 4 are admitted without objection. The case was assigned to me on November 3, 2021.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a, 1.b, 1.c, and 1.d, with brief narrative comments. Although he did not answer SOR ¶ 2.a, since it is a cross-allegation of SOR ¶¶ 1.c and 1.d, I consider it admitted. Applicant's admissions and comments are 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 53 years old. He was married from 1990 to 2000 and he remarried in 2003. He has three adult children from his first marriage, and he and his second wife have a teenage son. (Item 3 at 20-25) Applicant earned a Ph.D. in 2011 and a subsequent master's degree in 2013. (Item 3 at 11-12) Applicant worked as a scientist for a military research lab on a U.S. military base in State 1 from August 2007 to January 2018. (Item 3 at 15) In January 2018, Applicant accepted a new position with a defense contractor in State 2. He worked there until March 2019, when he accepted a new position as a research analyst for another defense contractor in the same state. (Item 3 at 13-15) Applicant has maintained a secret clearance since about October 2011. (Item 3 at 37)

The allegations in the SOR concern Applicant's use and purchase of marijuana, including while in possession of a security clearance, between about March 2018 and about mid-December 2019 (SOR ¶¶ 1.a, 1.b, and 1.c) and Applicant's intent to use marijuana in the future (SOR ¶ 1.d).

Applicant admitted SOR ¶¶ 1.a (concerning marijuana use), 1.b (concerning purchases of marijuana) and 1.d (concerning his intentions to continue using marijuana in the future), all without comment. Applicant admitted SOR ¶ 1.c, concerning his use and purchase of marijuana while granted access to classified information, though he stated that he "handled nothing about FOUO" (i.e., unclassified information marked "For Official Use Only.") (Item 2)

Applicant did not disclose any drug use on his SCA. During his December 2019 background interview, he reviewed his responses to the questions on his SCA, and disclosed drug use and drug treatment while in high school in the 1980s. Applicant then disclosed to the interviewing agent that he had a medical marijuana card issued by his current state of residence (State 3) and that he used and purchased marijuana on a regular basis, for medicinal purposes, to treat his arthritis. Between March 2018 and December 2019 (the time of the interview), Applicant used marijuana between 7 and 10 times a week, during which time he held a security clearance. (Item 4 at p. 14-15) Applicant indicated that he intended to continue to purchase and use marijuana for medicinal purposes in the future. (Item 4 at p, 15)

Applicant stated that he did not list this marijuana use on his SCA because it is not illegal under his home state's law, so he did not believe he had to disclose it. (Item 4 at p. 14; Item 3 at 2) Because Applicant's omission is not alleged under Guideline E, it will not be considered as disqualifying conduct.

Since January 2018, Applicant has lived in State 3, within commuting distance of his job in State 2. (Item 3 at 9-10) Applicant stated in his Answer to the SOR (Item 2) that when he relocated, he

> deliberately chose to live in [State 3] to take advantage of their medical marijuana program [citation to state law omitted] such that I do not 'illegally use illegal drugs.' I answered truthfully then as now based on my interpretation of this confusion. While I faithfully held a security clearance for over a decade, I felt obligated to take this chance at this time (two years ago, of course), come what may."

Applicant indicated in his February 2021 interrogatory response (by checking "No") that he had not "engaged in any additional drug use since December 13, 2019," and also that he had not used "ANY illegal drug in addition to marijuana." (Item 4 at 3) (Emphasis in original).

In his FORM Response, Applicant reaffirmed his views:

> . . . I do not 'illegally use illegal drugs,' and I do not 'illegally use drugs," and I do not 'use illegal drugs.' I have only engaged in medical therapy in private, after-hours settings.

Applicant also protested Department Counsel's argument that he does not possess the requisite reliability, judgment, or trustworthiness required of security clearance holders, based on a consideration of his whole-person evidence and life experience. (FORM Response) Applicant sees his position as within his right to pursue "the physical health and well-being that is an inalienable right of all citizens," and akin to the "don't ask, don't tell" policy regarding homosexual conduct. (FORM Response)

Since Applicant has raised the matter, I take administrative notice of the fact that a "don't ask, don't tell" policy concerning homosexual conduct by U.S. military service members was instituted by the Defense Department in the 1990s. Unlike the Defense Department's policy position on marijuana, discussed below, the "don't ask, don't tell" policy is no longer in force.

Applicant offered no additional evidence in his FORM Response beyond his own statements. He did not document his medical diagnosis, his medical need for medicinal marijuana, or his participation in his home state's medicinal marijuana program. Nevertheless, I accept his assertions, which the Government did not challenge.

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials." 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 and Substance Misuse

AG ¶ 24 expresses the security concern regarding 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

> (a) any substance misuse (see above definition);
>
> (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
>
> (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).

Further, in October 2014, the Director of National Intelligence (DNI) issued a memorandum entitled "*Adherence to Federal Laws Prohibiting Marijuana Use,*" (2014 DNI Memo) which 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 DOHA Appeal Board, which I am required to follow, 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 for about 10 years, in connection with his employment with various defense contractors. Between about March 2018 and mid-December 2019, he purchased marijuana on a regular basis and used marijuana several times a week, for medical purposes to help alleviate the pain from his medical condition. He did so through his home state's medical-marijuana program. AG ¶¶ 25(a) and 25(f) therefore apply. Whether Applicant actually handled classified information, or only handled unclassified information marked "FOUO" does not matter. AG ¶ 25(c)

applies to his marijuana purchases, which remain illegal under federal law, even under his home state's medical marijuana program.

Applicant indicated in his December 2019 background interview that he intended to continue using medical marijuana in the future. He admitted SOR ¶ 1.d, which alleged that he intended to continue using marijuana in the future. In his FORM Response, he reaffirmed his belief that he does not "illegally use illegal drugs," does not "illegally use drugs," and does not "use illegal drugs," but has "only engaged in medical therapy in private, after-hours settings." I therefore infer that his medical marijuana use has continued. At the very least, he failed "to clearly and convincingly commit to discontinue" his medical marijuana use AG ¶ 25(g) therefore applies.

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 frequent, recent and likely ongoing, and he stated an intention to continue using marijuana as treatment of his chronic medical condition. The fact that his use is legal under his home state's law is not mitigating when his involvement with marijuana, a Schedule 1 controlled substance, continues to violate federal law. As such, Applicant's pattern and use of medical marijuana continues to cast doubt on his current reliability, trustworthiness, or good judgment with respect to his suitability for a DOD security clearance. He has neither established a pattern of abstinence or changed circumstances, nor clearly stated an intent to abstain from marijuana use in the future. Therefore, AG ¶¶ 25(a) and 25(b) do not apply.

Guideline E, Personal Conduct

AG ¶ 15 details the personal conduct security concern:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect

> classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . .

SOR ¶ 2.a is merely a cross-allegation of the drug involvement allegations in SOR ¶¶ 1.c and 1.d. The personal conduct general concern (AG ¶ 15) is established given that Applicant's admitted conduct establishes his questionable judgment and his willingness to comply with rules and regulations. While the Government did not address Guideline E in its FORM, and the cross-allegation is largely redundant and unnecessary, the resulting personal conduct security concerns are also unmitigated for the same reasons as set forth under Guideline H.

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. I have incorporated my comments under Guidelines H and E in my whole-person analysis.

Applicant has a long career in the defense industry, and is highly educated. He has a debilitating, chronic medical condition that he has chosen to treat with medical marijuana, through his state's lawful medical marijuana program, despite holding a security clearance.

Indeed, Applicant specifically chose to move to State 3 to take advantage of their medical marijuana program. There is no evidence, however, that he sought advice or information from appropriate industrial security authorities, who might have advised him of the illegal nature, under Federal law, of his intended plan. Instead, he has operated under significant misconceptions of his rights and responsibilities as a federal security

clearance holder. In his Answer to the SOR, Applicant references his possession of a security clearance, and also notes that he "felt obligated to take this chance" and use medical marijuana. This suggests he may have been aware of the requirements of a clearance holder under federal law, and consciously decided to disregard them anyway.

Applicant seeks renewal of a security clearance with the U.S. Department of Defense, and marijuana remains a Schedule 1 controlled substance under federal law. Even though his marijuana use, for purely medical purposes, is legal under his home state's law, he has a recent history and pattern of disregarding federal law in using marijuana.

I therefore cannot find that Applicant has met his burden of showing that he has fully mitigated the security concerns set forth by his pattern of recent purchases and use of marijuana for medical purposes and his intention to continue such use in the future. I conclude Applicant did not provide sufficient evidence to mitigate the security concerns about his drug involvement and substance misuse. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility for a security clearance.

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
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

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Braden M. Murphy
Administrative Judge