DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 21-01069
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Nicole A. Smith, Esquire, Department Counsel
For Applicant: *Pro se*

10/28/2021

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Decision

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GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding drug involvement and substance misuse. Eligibility for a security clearance is denied.

Statement of the Case

On October 27, 2020, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. On May 3, 2021, Applicant responded to those interrogatories. On June 9, 2021, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016) (AG), effective June 8, 2017.

The SOR alleged security concerns under Guideline H (Drug Involvement and Substance Misuse) and detailed reasons why the DCSA CAF adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn statement, dated June 23, 2021, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by DOHA on July 23, 2021, and he was afforded an opportunity, within a period of 30 days, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on July 28, 2021. His response was due on August 27, 2021. He timely responded and submitted a one-page statement – essentially a manifesto regarding marijuana – to which there was no objection. The document was marked and admitted into evidence as Applicant Exhibit (AE) A. The case was assigned to me on October 6, 2021. The record closed on August 27, 2021.

Findings of Fact

In his Answer to the SOR, Applicant admitted, without commentary, the factual allegations pertaining to drug involvement and substance misuse (SOR ¶¶ 1.a. through 1.c.). Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Background

Applicant is a 33-year-old employee of a defense contractor. He has been with his employer since July 2020, and currently serves as a test technician. He attended courses at two different colleges, including one from which he anticipates receiving a certificate, otherwise not described, but he has not received a degree. He has never served with the U.S. military. He has never been married. He has no children. He has never been granted a security clearance.

Drug Involvement and Substance Misuse

Applicant was a recreational substance abuser whose substance of choice was marijuana – a Schedule I Controlled Substance. He is aware that marijuana use is illegal federally, but it is legal in the state where he used it. Marijuana makes him feel relaxed, lazier, and makes him "buzzed" for about three hours. He denied that it impaired him or that it was outwardly noticeable. The frequency of his marijuana use varied. He started using marijuana in September 2008, initially weekly or monthly, but by 2011, it increased to daily. Between 2011 and 2021, the frequency was inconsistent, going between daily use, weekly use, and monthly use, as well as no use for short periods. He used marijuana before work, during lunch breaks, or after work, in a variety of locations, including houses,

parks, or cars. He frequently smoked marijuana with friends, but sometimes did it by himself at home. He last used marijuana on New Year's Day 2021, two months after completing his SF 86. (Item 3, at 29; Item 4, at 6-9)

Applicant purchased marijuana on numerous occasions between October 2008 and November 2020. He generally purchased small amounts of marijuana every week or two from different dealers whose identities he could not (or would not) recall. In October 2016, he obtained a medical recommendation to acquire marijuana from state-run dispensaries, supposedly to treat his insomnia. (Item 3, at 30; Item 4, at 7-9)

As noted above, in his Response to the FORM, Applicant submitted a manifesto regarding marijuana:

> . . . It is my firm belief that the federal laws regarding marijuana are under the best interpretation a foolish waste of taxpayer money. In the worst case they are a serious moral injustice visited upon the American people by their own government. Based on their public statements and sponsored legislation Charles Schumer and Jerry Nadler appear to agree with these interpretations. Millions have been incarcerated and millions more have been impacted by negative externalities of a drug that far exceed its inherent harm potential. There is a distinct possibility that when these proceedings are concluded, I will be one of them. I am convinced that it is only the exceedingly slow and detached nature of national level politics that has kept these laws on the books for so long. The evidence for this is clear: state governments, both faster moving and more reactive to the population, have begun legalizing marijuana at an accelerating pace, and national opinion polls show widespread and bipartisan support for national level legislation. Clearly by its nature, congress can only catch up. . . eventually.
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> . . . The speculation of the opposing counsel is true: I did not know that an intention to continue using marijuana would be immediately disqualifying until I received a copy of the adjudicative guidelines alongside the statement of reasons. The further assumption they have made whereby I would have inferred this based on being questioned about usage is incorrect. I was questioned about several of my responses, and it seemed reasonable to be asked for clarification on these topics.
>
> I now understand that it was foolish to believe that bureaucratic realities would reflect social or political realities rather than legal ones, or that every branch of the federal government would have the same attitude towards these laws. I recognize that despite my or anyone else's opinions of these laws, my compliance with them is necessary for these proceedings to come to a positive conclusion. Based on this, and as my intended continued use of marijuana was to be infrequent anyway, I am willing to come to the following agreement: I will henceforth abstain from any and all purchases or use of federally illegal marijuana or cannabis products until such time as those products are decriminalized or legalized at the federal level.

> I realize that any final decision you make must be guided, specifically, by the adjudicative guidelines laid down in 1992 and updated in 1999. I only ask that you take into account the sweeping changes that have taken place across this nation since that time when considering the impact my previous non-compliance should have. Further, I wish to remind you that the answers given in the e-QIP form and subject interview were given truthfully, and in good faith, and that the agreement offered in the preceding paragraph is in this same spirit.

(AE A)

Applicant continues to socialize with at least two friends who are still using marijuana. Until his response to the FORM, dated August 23, 2021 – approximately 9 weeks ago, and after 13 years of using marijuana – he planned to continue using marijuana in the future, but not as frequently as before. Only now has his declared intent changed, conditionally, until the use of marijuana is legalized at the federal level. As he noted, his use of marijuana was initially candidly reported by him in his SF 86. (Item 3, at 29-30) He was also candid when he was interviewed by an investigator from the U.S. Office of Personnel Management (OPM). He has never received counseling or treatment as a result of his use of marijuana. (Item, 4, at 8)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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. The President has authorized the Secretary of Defense or his designee to grant an applicant 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.)

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence." "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)). "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 Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government. (*See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).)

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials." (*Egan*, 484 U.S. at 531)

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." (*See* Exec. Or. 10865 § 7) Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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 avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Abuse is set out in AG ¶ 24:

> 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.

Furthermore, on October 25, 2014, the Director of National Intelligence (DNI) issued Memorandum ES 2014-00674, *Adherence to Federal Laws Prohibiting Marijuana Use*, which states:

> [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 (Reference H and I). 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 guideline notes some conditions under AG ¶ 25 that could raise security concerns in this case:

> (a) any substance misuse (see above definition);
>
> (c) illegal possession of a controlled substance, including. . .purchase. . .; and
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> (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant was admittedly a recreational substance abuser from September 2008 until January 2021 whose substance of choice was marijuana – a Schedule I Controlled Substance. He was aware that marijuana use is illegal federally, but it is legal in the state where he used it. He last used marijuana on New Year's Day 2021. He also purchased marijuana on numerous occasions between October 2008 and November 2020. He initially expressed an intent to continue using marijuana in the future, but not as frequently as before. It was not until approximately 9 weeks ago, and after 13 years of using marijuana, that his declared intent changed, conditionally. He now claims he will abstain

from further marijuana use until such use is legalized at the federal level. AG ¶¶ 25 (a), 25 (b), and 25 (g) have been established.

One issue deserves additional comment. The SOR addresses, in SOR ¶ 1.a., Applicant's continued purchase and use of marijuana from October 2008 to at least January 2021. It also alleges as a separate allegation in SOR ¶ 1.c., his use of marijuana that continued after he executed his SF 86 in October 2020 – a period already covered in SOR ¶ 1.a. This raises several separate concerns regarding the rules of pleading: duplicity, multiplicity, and the unreasonable multiplication of allegations – all of which are legally frowned upon.

Duplicity is the joining in a single count of two or more distinct and separate offenses – in this instance, purchasing and using marijuana. It is specifically raised here because the SOR alleges Applicant purchased and used marijuana from about October 2008 to at least January 2021. The evidence does not support the purchase segment of the allegation, for the specific date Applicant said he last purchased marijuana was in November 2020. (Item 4, at 7) On January 13, 2021, he confirmed that there had been no updates or changes regarding his use of marijuana, and the issue of the purchase of marijuana was not raised. (Item 4, at 9)

Multiplicity is the charging of a single offense in several counts – in this instance, not only repeating the reference to SOR ¶ 1.a. in SOR ¶ 1.c., but also alleging that the conduct continued after October 27, 2020 – a date included in the conduct alleged in SOR ¶ 1.a. Using marijuana after executing the SF 86 is not a separate offense under the AG, and the SOR merely resorted to unreasonable and unnecessary multiplication of charges.

The guideline also includes examples of conditions under AG ¶ 26 that could mitigate security concerns arising from Drug Involvement and Substance Misuse:

> (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 or misuse is grounds for revocation of national security eligibility.

Neither condition applies. Applicant regularly used marijuana for 13 years until at least New Year's Day 2021. There is no evidence of Applicant ever having received treatment and counseling as a result of his illegal use of a controlled substance. The circumstances of his use of marijuana, his surprise that the federal laws regarding marijuana might impact his eligibility for a security clearance, and his new assertion that

he would not continue to use marijuana in the future while the federal drug laws remain unchanged, do not constitute sufficient evidence to indicate that it is unlikely to recur. He was candid about his use of marijuana when he completed his SF 86 and spoke with the OPM investigator, and for that candor, he is given credit. He acknowledged his drug involvement and substance misuse, but he offered no evidence of actions taken to overcome those issues, such as exploring drug treatment and therapy; changing or avoiding the environment where marijuana was used; or disassociating from his drug-using friends. He failed to provide a signed statement of intent, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility

A person should not be held forever accountable for misconduct from the past. Continued abstinence is to be encouraged, but, when balanced against his full history of approximately 13 years of marijuana use, the relatively brief period of approximately ten months of reported abstinence is considered insufficient to conclude that the abstinence will continue. Applicant's claimed new compliance with laws, rules, and regulations, is in stark contrast to his cavalier attitude towards those same laws, rules, and regulations. His use of marijuana despite knowing that such use was prohibited by the Government, and his refusal, until several weeks ago, to disavow future marijuana use, continue to cast doubt on his current reliability, trustworthiness, and good judgment.

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis. (*See U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); *See also* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006))

There is some evidence mitigating Applicant's conduct. He is a 33-year-old employee of a defense contractor. He has been with his employer since July 2020, and currently serves as a test technician. He has attended college and anticipates receiving a certificate, otherwise not described. When completing his SF 86 and speaking with the

OPM investigator, he was candid in acknowledging that he had purchased and used marijuana. Approximately nine weeks ago, he stated that he will abstain from further marijuana use until such use is legalized at the federal level.

The disqualifying evidence under the whole-person concept is more substantial. Applicant was admittedly a recreational substance abuser from September 2008 until January 2021 whose substance of choice was marijuana – a Schedule I Controlled Substance. He was aware that marijuana use is illegal federally, but it is legal in the state where he used it. He last used marijuana on New Year's Day 2021. He also purchased marijuana on numerous occasions between October 2008 and November 2020. He initially expressed an intent to continue using marijuana in the future, but not as frequently as before. It was not until approximately 9 weeks ago, and after 13 years of using marijuana, that his declared intent changed, conditionally. He has never received treatment and counseling as a result of his illegal use of a controlled substance.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his drug involvement and substance abuse. *See* SEAD 4, App. A, ¶¶ 2(d) (1) through AG 2(d) (9).

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.b.:	Against Applicant
Subparagraph 1.c.:	For Applicant

Conclusion

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

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ROBERT ROBINSON GALES
Administrative Judge