



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 21-00669
)
Applicant for Security Clearance)

Appearances

For Government: Nicholas T. Temple, Esq., Department Counsel
For Applicant: *Pro se*

20/09/2022

Decision

MURPHY, Braden M., Administrative Judge:

Applicant has used marijuana to treat a medical condition since August 2018, and indicated that he intends to continue doing so. Marijuana use remains illegal under federal law. Security concerns under Guideline H (drug involvement and substance misuse) 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 September 20, 2020. On June 14, 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). 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 (SEAD 4), *National Security Adjudicative Guidelines* (AG), effective June 8, 2017. When Applicant answered the SOR on July 31,

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 September 23, 2021, Department Counsel submitted the Government's File of Relevant Material (FORM), including documents identified as Items 1 through 3. Items 1 and 2 are the pleadings in the case, the SOR and the Answer. Item 3, Applicant's SCA, is offered as substantive evidence.

The FORM was mailed to Applicant on September 23, 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 to do so. Applicant signed for his receipt of the FORM on October 8, 2021. No subsequent response from Applicant was received by DOHA, and the case was assigned to me on January 12, 2021. Since Applicant did not respond to the FORM, he did not submit any evidence after submitting the answer to the SOR, nor did he offer any objection to Item 3, which is therefore admitted.

Findings of Fact

In his Answer, Applicant admitted SOR ¶¶ 1.a and 1.b, with a brief narrative statement. Applicant's admissions and his statement 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 69 years old. He and his second wife have been married since 1994. He has two children from his first marriage, and three stepchildren, all now adults. (Item 3) Applicant has worked as a subject matter expert for a large defense contractor since September 2020. (Item 3 at 13) Previously, from August 2002 to September 2020, he was the president of a computer company that provided consulting services to the U.S. Navy and the U.S. Coast Guard. (Item 3 at 14) Applicant lived and worked in State 1 from 2002 to 2018. Since January 2019, he has lived and worked in State 2. (Item 3 at 9-10)

Item 3, Applicant's 2020 SCA, is the only exhibit in the record. When asked on his SCA if he had ever held a clearance before, Applicant reported that he either had a background investigation or been granted a security clearance by the Coast Guard. When asked the level of his access granted, he checked "I don't know." (Item 3 at 41)

Applicant disclosed on his SCA that he has used medical cannabis daily to relieve severe head pain since September 2018. He indicated that it was legally prescribed in State 1, where he used to live. He said "I still need this for pain relief." (Item 3 at 39) Applicant answered "No" to the question asking about illegal drug use while possessing a security clearance. (Item 3 at 39) It is presumed that Applicant had a background interview during the security clearance application process, as is customary, but the summary of that interview, which might provide additional details, is

not in the record. It therefore does not appear that Applicant has ever held a clearance before, or holds one currently, as the Government would have noted if it were so.

SOR ¶¶ 1.a and 1.b concern Applicant's admitted use of marijuana and his stated intentions to continue using marijuana in the future. Applicant admitted both allegations. In his Answer to the SOR, he said his marijuana is prescribed for a severely painful and chronic neurological condition. He said there is another prescription available for this condition, but it is contraindicated for him, since he takes another prescription for a heart condition. (Item 2) This is undocumented.

Applicant said "even on bad days I limit my use [of medical marijuana] to the evening to help me sleep. On "light days (only one or two attacks,)" he said that CBD (cannabidiol) "can give me sufficient relief and [I] have started to phase out the use of marijuana when possible." (Item 2)

Applicant provided no further information in his SOR response. He gave no updated information about the frequency of his use of medical marijuana or CBD. He did not document his medical diagnosis, his need for medicinal marijuana or a prescription for it, nor did he assert its purported legality, under state law, either in State 1, where he used to live, or State 2, where he lives now. (Item 2) Applicant did not respond to the Government's FORM.

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);

(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).

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). The current National Security Adjudicative Guidelines went into effect on June 8, 2017, after 2014 DNI memo was issued. Nevertheless, the principle continues to apply.

Moreover, on December 21, 2021, DNI Avril D. Haynes issued a memorandum entitled, “*Security Executive Clarifying Guidance Concerning Marijuana for Agencies*

Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position.” (2021 DNI Memo) The memo incorporates the AGs (at reference B) and the 2014 DNI Memo (at reference G) among various other relevant federal laws, executive orders, and memoranda. I take administrative notice of the 2021 DNI memo here, given its relevance to this case, its reliance on the AGs, and its recency.

The 2021 DNI memo specifically notes that “under policy set forth in SEAD 4’s adjudicative guidelines, the illegal use or misuse of controlled substances can raise security concerns about an individual’s reliability and trustworthiness to access classified information or to hold a sensitive position, as well as their ability or willingness to comply with laws, rules, and regulations.” (citing Guideline H, alleged in this case, and the AGs for personal conduct and criminal conduct, Guidelines E and J, not alleged here). Thus, consistent with these references, the AGs indicate that “disregard of federal law pertaining to marijuana remains relevant, but not determinative, to adjudications of eligibility for access to classified information or eligibility to hold a sensitive position.” (2021 DNI Memo)

Applicant disclosed on his September 2020 SCA that he has used medical marijuana on a daily basis as pain relief due to a chronic condition. AG ¶ 25(a) applies. AG ¶ 25(f) is not established, as there is no evidence that Applicant used marijuana while granted access to classified information or holding a sensitive position.

Applicant indicated in his answer to the SOR that he has continued to use marijuana and CBD to alleviate the chronic pain from his condition. He also failed “to clearly and convincingly commit to discontinue” his medical marijuana use, so AG ¶ 25(g) 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;
- (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; and
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended.

As the 2021 DNI memo notes, relevant mitigating factors under the AGs include, but are not limited to,

frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.”

Applicant’s use of marijuana is frequent, recent and likely ongoing, and he stated an intention to continue using marijuana as pain relief for his chronic medical condition. It is not established that Applicant’s use of medical marijuana is legal under his state law (particularly in State 2, where he now lives, as Department Counsel points out) (FORM at 3). Even if so, legality of Applicant’s conduct under state law is not mitigating where his use of 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, and good judgment with respect to his eligibility for a DOD security clearance. He has also continued to use marijuana after submitting his SCA, and gave no indication after receiving either the SOR or the FORM that he intends to cease doing so. He has neither established a pattern of abstinence or changed circumstances, nor has he clearly stated an intent to abstain from marijuana use in the future. AG ¶¶ 25(a) and 25(b) do not apply.

AG ¶ 25(c) also does not apply. It is chiefly geared towards applicants with evidence of prescription drug abuse. It is not established that Applicant’s use of marijuana is, in fact, pursuant to a prescription, since that is undocumented. Even if so, Applicant also continues to use marijuana, and has given no indication that his use has ended.

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 Guideline H in my whole-person analysis.

In this case, Applicant offered little whole-person evidence to consider. The only exhibit is his SCA, and the only statement he offered is in his answer to the SOR. He did not request a hearing nor did he respond to the FORM, opportunities where he might have offered additional evidence, either in mitigation or at least explanation, either under Guideline H or under the whole-person concept.

Applicant seeks 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, may be legal under the law of State 1, where he used to live, or State 2 where he lives now (neither of which he established) he has a recent history and pattern of disregarding Federal law in using marijuana, even for medical purposes.

Even though Applicant has a sympathetic case, 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, frequent, even daily 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.b:	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.

Braden M. Murphy
Administrative Judge