



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



In the matter of:)	
)	
)	ISCR Case No. 23-00347
)	
Applicant for Security Clearance)	

Appearances

For Government: Aubrey M. DeAngelis, Esq., Department Counsel
For Applicant: *Pro se*

01/10/2024

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Guideline H, drug involvement and substance misuse security concern. Eligibility for access to classified information is denied.

Statement of the Case

On March 22, 2023, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse. The action was taken under Executive Order (EO) 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 adjudicative guidelines (AG) effective on June 8, 2017.

Applicant answered the SOR on June 6, 2023, and elected to have his case decided on the written the record in lieu of a hearing. Department Counsel submitted the Government’s file of relevant material (FORM), and Applicant received it on August 21, 2023. He was afforded an opportunity to file objections and submit material in refutation,

extenuation, or mitigation within 30 days of receipt of the FORM. The Government's evidence is identified as Items 3 through 6 (Items 1 and 2 are the SOR and the transmittal letter, respectively). Applicant did not provide a response to the FORM. There were no objections to any of the evidence, and Items 3 through 6 are admitted into evidence. The case was assigned to me on November 30, 2023.

Findings of Fact

Applicant admitted all of the SOR allegations. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 49 years old. He earned a bachelor's degree in 1997 and a master's degree in 2010. He married in 2008 and has no children. He began work for a federal contractor in September 2022. (Item 4)

In September 2022, Applicant completed a security clearance application (SCA). In response to Section 23 about any illegal drug use in the last seven years, he responded that he possessed a medical marijuana card issued to him by his state. He stated that he periodically consumes "1/8 ML of CBD oil which contains the cannabinoid THC. The dose of CBD/THC is less than 5 mg." He takes this dose three to five times a week at bedtime. He takes it for ailments related to his disability. He obtains the drug from a dispensary in his state. He stated that he answered "yes" to the question about illegally purchasing drugs because he believed purchasing Tetrahydrocannabinol (THC) from a state dispensary is still considered illegal under federal law. He is aware that his use of THC is legal under his state's law but is illegal under federal law. He renewed his medical marijuana card in May 2022. He indicated on his SCA that he intended to use this drug in the future as prescribed by his doctor. (Item 4)

In October 2022, Applicant was interviewed by a government investigator. He disclosed to the investigator that he was prescribed medical marijuana by his doctor. His appointments were online, and he will have annual appointments. His last appointment was May 2022. He planned to continue to purchase and use medical marijuana. He used it at home and around his spouse. He used it to help control anxiety and to help him sleep. He has not participated in drug counseling or drug treatment. He has not been diagnosed for drug abuse or dependency. He did not use any other illegal drugs to include the misuse of prescription drugs. He did not associate with individuals who use drugs illegally. His spouse and friends were aware he uses medical marijuana. He did not believe his use of medical marijuana has contributed to any personal, financial, criminal, legal, security or disciplinary issues. He had not used any other illegal drugs other than the medical marijuana. He planned to continue to use medical marijuana until another course of treatment is prescribed. (Item 5)

In Applicant's SOR answer, he admitted his use and purchase of THC with varying degrees from May 2021 to the present (SOR ¶¶ 1.a and 1.b). He reaffirmed that he intended to continue using CBD oil that contains THC that he was prescribed until his

doctor recommends another course of treatment (SOR ¶ 1.c). Applicant did not respond to the FORM, so no new information was provided.¹

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. 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(c),

¹ The Security Executive Agent for the United States Government provided clarifying guidance concerning marijuana on December 21, 2021. Part of that guidance addressed CBD products:

With respect to the use of CBD products, agencies should be aware that using these cannabis derivatives may be relevant to adjudications in accordance with SEAD 4. Although the passage of the Agricultural Improvement Act of 2018 excluded hemp from the definition of marijuana within the Controlled Substances Act, products containing greater than a 0.3 percent concentration of delta-9 tetrahydrocannabinol (THC), a psychoactive ingredient in marijuana, do not meet the definition of "hemp." Accordingly, products labeled as hemp-derived that contain greater than 0.3 percent THC continue to meet the legal definition of marijuana, and therefore remain illegal to use under federal law and policy. Additionally, agencies should be aware that the Federal Drug Administration does not certify levels of THC in CBD products, so the percentage of THC cannot be guaranteed, thus posing a concern pertaining to the use of a CBD product under federal law. Studies have shown that some CBD products exceed the 0.3 percent THC threshold for hemp, notwithstanding advertising labels (Reference F). Therefore, there is a risk that using these products may nonetheless cause sufficiently high levels of THC to result in a positive marijuana test under agency-administered employment or random drug testing programs. Should an individual test positive, they will be subject to an investigation under specific guidelines established by their home agency.

The Substance Abuse and Mental Health Services Administration (SAMSHA) provided a warning about CBD products on July 24, 2019:

Studies have shown that some CBD products' labeling does not accurately reflect their content. Cannabis based products containing a THC level greater than 0.3% on a dry weight basis do not fall under the Farm Bill's definition of hemp even if they are labeled as such. In one study, the amount of CBD in 69% of the 84 tested CBD products was inconsistent with that on the label, and some products contained unlabeled cannabinoids, including THC in amounts up to 6.4 mg/ml. As such, an employee's drug test may be positive for the THC metabolite, delta-9-tetrahydrocannabinol-9-carboxylic acid (THCA), due to THC in the CBD product.

SAMSHA further advised that "federal agencies should make every effort to inform applicants and employees of the risk that using such products may result in a positive marijuana test."

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 avoided drawing 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. Directive ¶ E3.1.15 states 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 as to obtaining 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 that an 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.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H: Drug Involvement and Substance Misuse

The security concern relating to the guideline for drug involvement and substance misuse 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.

AG ¶ 25 provides conditions that could raise security concerns. The following are potentially applicable:

- (a) any substance misuse;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used THC with varying frequency from May 2021 to the present. It was prescribed to him by a doctor in a state where it is legal under state law. He did this before and after applying for a security clearance and with the knowledge it was illegal under federal law. He purchased THC from about May 2021 to the present. He intended to continue to use and purchase THC in the future. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from drug involvement and substance misuse. The following mitigating conditions under AG ¶ 26 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 to overcome the 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 being 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.

Applicant acknowledged his use of THC is illegal under federal law. He planned to continue to use and purchase THC. His decision to continue to use THC despite its prohibition under federal law raises questions about a person's ability or willingness to comply with laws, rules, and regulations. I find the above mitigating conditions do not apply.

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 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.

Applicant failed to meet his burden of persuasion. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement and substance misuse.

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.c:	Against Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge