DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 23-01530
	)	
Applicant for Security Clearance	)	

Appearances

For Government: William H. Miller, Esq., Department Counsel
For Applicant: *Pro se*

01/23/2024

_____

Decision

_____

MURPHY, Braden M., Administrative Judge:

Between about March 2021 and late September 2023, Applicant used cannabidiol (CBD) products for medicinal purposes, under his state's medical marijuana program, to treat chronic back pain. Applicant testified credibly, and provided sufficient supporting documentary evidence to establish, that the CBD products he used contained less than 0.2% delta-9 tetrahydrocannabinol (THC), which is below the 0.3% THC content considered to meet the legal definition of marijuana. Therefore, the CBD products Applicant took were not illegal under federal law, whether or not he had a clearance at the time. Further, Applicant has ceased using the product, and is now on an effective prescription regimen for his back pain, under doctors' care, and has no intentions to resume CBD use in the future. I therefore conclude that Applicant provided sufficient evidence to rebut security concerns under Guideline H (drug involvement and substance misuse). Applicant's eligibility for continued access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on February 11, 2022, in connection with his employment in the defense industry. On August 3, 2023,

the Defense Counterintelligence and Security Agency (DCSA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H. The DCSA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (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 August 17, 2023, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on December 15, 2023, soon after Applicant requested an expedited hearing in his case, since he faced termination by the end of January 2024 without a favorable decision. (Hearing Exhibit (HE) III; Tr. 28) The same day, after confirming the parties' availability, DOHA issued a notice scheduling the hearing for January 3, 2024.

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 HE III, noted above. Near the end of the hearing, I took administrative notice of memoranda issued in 2014 and 2021 by the Director of National Intelligence (DNI) concerning DOD's position on legalization of marijuana under state law (discussed below). Applicant also indicated that he was familiar with the memoranda. (Tr. 62-63)

Government Exhibits (GE) 1-5 and Applicant's Exhibits (AE) A-E were marked and admitted without objection. GE 2, the summary of Applicant's April 2022 background interview was admitted without objection after Applicant made two edits to the document. (GE 2 at 4; Tr. 14-16) He also testified.

At the end of the hearing, I held the record open until January 12, 2024, to allow Applicant the opportunity to submit post-hearing documentation. Later that day, he submitted an e-mail (AE F), along with photographs of the labels of the four prescription medications he is currently taking (AE G), publicly available information about two of his prescription medications (AE H and AE I), and a photo of his State 1 "Medical Marijuana Use Registry" identification card, expiration February 11, 2024 (AE J). These documents were admitted without objection. He later submitted letters from his current physicians (AE K and AE L), and in answer to an inquiry from me (HE IV), he submitted lab results regarding his marijuana gummies (AE M and AE N) and e-mails between himself and his facility security officer (FSO) about his disclosure of his medical marijuana use. (AE O and AE P), along with an e-mail (AE Q). Applicant's post-hearing exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on January 4, 2024. The record closed on January 12, 2024.

Findings of Fact

Applicant admitted the sole allegation in the SOR (¶ 1.a), with a narrative statement. His 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 61 years old. He has been married since 2002 and has several prior marriages. His children are grown. He served as an enlisted soldier in the Army from 1987 to 1988 when he was discharged after he was injured during training. He later served as a commissioned Army officer, from 2000 to 2003. He has a bachelor's degree (1996), a master's degree (2003), and a doctoral degree (2007). (GE 1; AE A; Tr. 36-38, 52-53)

Applicant's professional expertise is in the fields of public health and epidemiology. Among other positions during his career, he worked as a health research analyst for a major defense contractor from 2009 to 2011 and again from 2012 to 2017, while holding a security clearance. He worked in public health and disease control for a major corporation from 2017 to 2022. He has worked for his current employer and clearance sponsor since February 2022. (GE 1; AE A; Tr. 54-55)

Applicant had back surgeries in 2008, 2012, 2018 (twice), 2019, and 2020. He has chronic back pain that has long eluded effective medical treatment. His pain management doctors recommended prescription opiates, but Applicant, relying in part on his own professional background, has been wary of taking opioids as painkillers due to their addictive properties. (GE 2 at 4; Tr. 22-24)

Applicant lives in a state where marijuana use is approved for medical purposes. In February 2021, he applied for and received a State 1 "Medical Marijuana Use Registry" identification card. His registry remains valid as of this writing, but it is to expire within weeks, on February 11, 2024. (AE J; Tr. 24) He has not renewed it and does not intend to do so. (Tr. 29)

Beginning in early 2021 (either February 2021 (GE 2 at 4) or late March or early April 2021 (Tr. 39)), Applicant began using CBD products for medical purposes to alleviate his back pain, at the recommendation of his primary care physician. He said he used one "gummy" every night or every other night to help him sleep. He also used a prescribed topical oil or balm "applied to affected areas during working hours." The products contained THC but he said they had only 0.2% THC content. (GE 2 at 4; Tr. 15-16, 24, 31-32; Answer) He said in his hearing testimony that the products he used were CBD (cannabidiol) with a low amount of THC. (Tr. 55)

Post-hearing, Applicant submitted lab results for two of the THC gummy batches he purchased. One batch, from February 2023, contained 0.079% THC, 0.077% CBD, and 0.174% total cannabinoids. A second batch, from June 2023, contained 0.196% THC, 0.424% CBD, and 0.662 total cannabinoids. (AE M, AE N

At the time he started using the products, Applicant was not employed in the defense industry. He did not disclose this use on his February 2022 SCA because he did not believe his use was illegal. The "Illegal Use of Drugs or Drug Activity" portion of his SCA noted that:

> The following questions pertain to the illegal use of drugs or controlled substances or drug or controlled substance activity in accordance with federal laws, even though permissible under state laws. (GE 1 at 34)

Applicant voluntarily disclosed his use at the completion of his background interview, on March 28, 2022. (GE 1, GE 2 at 4; Tr. 24, 34) He testified that the interviewing agent told him that his use of marijuana was illegal under federal law but said use was being considered on a case-by-case basis. (Tr. 25, 41) He also said in his interview that he was not aware that using the products would cause a problem with his clearance. (GE 2 at 5) What the interviewer may have told him is not reflected in GE 2, the interview summary. (Tr. 39-40) Applicant also testified that he promptly disclosed his marijuana use to his employer's facility security officer (FSO), Mr. S. He said Mr S. told him about "the guidance not being exact regarding the use of medical marijuana or derivatives of cannabis." (Tr. 25, 35)

After the hearing, Applicant provided the e-mail he sent to his FSO on March 29, 2022 (the day after his background interview), in which he disclosed his medical marijuana use. Days later, on April 4, 2022, his FSO advised him that he had forwarded the information to DOD, and as a result, Applicant's interim clearance was withdrawn. He was also debriefed from access to classified information. (AE O, AE P)

In his e-mail to Applicant, his FSO said, in part, "The investigation [will] have to run its course and be adjudicated before a final determination can be made." Applicant said he understood, and that, "[h]opefully the adjudication process will have a different outcome." In response, the FSO said he himself was a former adjudicator, and that "[e]verything is circumstantial now." (AE P)

When asked during his hearing why he continued to use medical marijuana at this point, Applicant said that this was because of "the guidance not being exact on how medical marijuana usage was considered. While marijuana itself was still a Schedule One substance, there was not clear guidance on products derived from marijuana." (Tr. 42) He cited a memo from the Director of National Intelligence containing "guidance that a whole person consideration was to be made in lieu of just discounting [sic] someone for marijuana usage. So, during that time I was letting the adjudication process play out to see where it landed." (Tr. 42-43)

In June 2023, Applicant responded to a interrogatory from the DSCA about his drug use. He answered YES to the following question:

1. Do you **currently** illegally use any drugs or controlled substances?

> Please note: marihuana (marijuana) and extracts of marijuana are classified as Schedule 1 drugs by the DEA and are thus illegal federally. Please consider all forms of use, such as cannabis leaf, flower, kief, hashish, and oil (including THC and CBD) AND manners of use, such as smoking, inhaling vapor, infusing, into food oils, or otherwise incorporated into food, applied topically or ingesting tincture, or otherwise. (GE 3 at 3)

When asked for specifics, Applicant reported that he used 10 milligrams (mg) of "Low-THC medical Marijuana," that he did so "Daily," most recently on June 8, 2023 (the day before he signed the interrogatory response) and that he intended "to continue future rate of illegal use." (GE 3 at 4, 8) He explained that his use of medical marijuana was approved by his state's "Office of Medical Marijuana Use" following examination and review of his medical records by a medical doctor in April 2021 regarding chronic pain following multiple back surgeries. He said he obtained the medication from a licensed dispensary and that it was taken orally following a physician's direction. He said the marijuana relieves his back spasms and leaves him relaxed and drowsy. (GE 3 at 4-5, 9)

Applicant also acknowledged that he understood that "marijuana remains illegal under federal law and that any future use of marijuana may affect your security clearance eligibility." He nonetheless indicated that he intended "to illegally use drugs or controlled substances in the future," specifically, medical marijuana, to treat his chronic pain, limited to "non-working times" as previously described. (GE 3 at 8)

In his testimony, Applicant said that he answered "Yes" because he had "learned from the [interviewing] agent that any form of cannabis product is considered illegal." He also answered "Yes" to "continued [future] use since it still seemed that the content of THC and medical direction were being, or might be, taken into consideration." (Tr. 25)

Applicant also acknowledged that his employer had a drug policy, and he provided a copy of it. He signed each page of the policy. (GE 3 at 7, 10-15) During his hearing, he said he found the policy online through his employer while responding to the interrogatory. He said he had not been previously aware of it or been provided a copy of it. (Tr. 43-45)

The employer's "Drug-Free Workplace Policy" notes that it governs the company's compliance with the federal Drug-Free Workplace Act of 1988. It includes the following:

> While the use of marijuana has been legalized under several state laws for medicinal and/or recreational uses, it remains an illegal drug under federal law, and its use as it impacts the workplace is prohibited by [company] policy, and employees found to be in possession of or under the influence of alcohol or any drug may be subject to disciplinary action up to [and] including termination. (GE 3 at 10)

The company's policy also addresses drug and alcohol testing, including for marijuana, based on reasonable suspicion, pre-employment drug testing for prospective employees, periodic or random testing, and post-incident testing. (GE 3 at 11-12, 13) Applicant said he was not required to participate in pre-employment drug testing before he was hired. He said he has never been drug tested while employed there. (Tr. 32)

SOR ¶ 1.a alleges that Applicant has used marijuana with varying frequency since about April 2021, and that he intends to continue using marijuana in the future. Applicant answered the SOR in August 2023. He admitted the allegation with a narrative explanation. He noted that he "intend[s] to comply with the National Security Adjudicative Guidelines and will consider processes to obtain approval for continued use of medical cannabis." (Answer)

On September 26, 2023, after he received Department Counsel's discovery letter (HE I), he provided a sworn statement of intent to immediately abstain from "marijuana, medical or otherwise, in any form." He further acknowledged that any further involvement would be grounds for the immediate revocation of his national security eligibility. (AE B; GE 4) He also said,

> It was never my intent to disregard any laws regarding the use of marijuana and I had wrongly interpreted the issuance of a medical marijuana card in [State 1] to also negate any federal prohibition against the use of marijuana derivatives for that purpose. Now that I have that clarification, I will immediately abstain and seek out other treatment options. (GE 4)

In later e-mails seeking a status update on his case, Applicant stated that he had abstained from using marijuana in any form, for any purpose, as of September 24, 2023. (GE 4) He confirmed this during his hearing testimony, and said he intends to continue to abstain from any product derived from cannabis. (Tr. 26, 35, 39)

Since June 2023, Applicant has taken prescription medications, under appropriate medical supervision, to address his chronic back pain. His prescriptions include duloxetine (Cymbalta), lidocaine, and celecoxib (Celebrex). (Tr. 49-50, 53) He provided photos of the prescription labels after the hearing. (AE C, AE G, H, I) along with letters from his prescribing physicians. (AE K, AE L) He said his prescriptions have proven "very effective" in managing his chronic pain. (Tr. 25, 34-35)

Applicant testified that while his marijuana use continued after he responded to the interrogatories in June 2023, he lessened his use so as to wean himself off of the marijuana, as he transitioned to the prescription pain medications. He continued using marijuana medicinally until September 24, 2023, as noted above. He no longer possesses any THC medications or gummies, and he disposed of them that day. Applicant specifically disavowed any future intent to "go back to using what I now know to be a clearly illegal treatment." Neither his wife nor his children use marijuana. (Tr. 29, 31, 46-49)

Applicant has never used marijuana or other illegal substance in the past except in this circumstance. (Tr. 39-40) He has never been charged with any drug-related or other criminal offense. He has never been diagnosed with drug abuse or drug dependency. (Tr. 56)

When asked why his assertions of future abstinence should be considered credible, Applicant said he has "a clearer understanding of the legalities surrounding products derived from cannabis." He said he has strived throughout his life to demonstrate respect for the law. He has a background in law enforcement and seeks to be a role model for his children and grandchildren. (Tr. 51)

Applicant provided strong character letters from several personal and professional references, all of them with doctoral degrees. They attested that he is a dedicated professional, who has a long history of public service. They wrote that he demonstrates the utmost integrity, honesty, sincerity, and ethical conduct. He is regarded as reliable and trustworthy, and his references recommend him for security clearance eligibility. (AE D) He provided annual evaluations noting that he is highly effective and an expert in his field. (AE E)

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

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 the 2014 DNI memo was issued. Nevertheless, the principle continues to apply.

On December 21, 2021, the DNI 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.

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." 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)

Further, the 2021 DNI Memo says that using CBD products and 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. (2021 DNI Memo)

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);
>
> (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.

From early March 2021 to late September 2023, Applicant used CBD products for medicinal purposes to help alleviate the pain from his chronic medical condition. He did so as a legal participant in his state's medical-marijuana program. He used the CBD products on a daily or near-daily basis, including after beginning work with a government contractor in February 2022. He held an interim clearance until it was withdrawn in early April 2022, after he disclosed his use to his FSO. He was also debriefed from access to classified information as a result.

AG ¶¶ 25(a) and 25(c) warrant consideration because marijuana remains a Schedule 1 controlled substance under federal law. AG ¶ 25(f) warrants consideration because Applicant has been in a sensitive position since February 2022, had access to classified information until he was debriefed, in April 2022, and used the CBD products in that timeframe.

However, Applicant testified credibly and provided sufficient supporting documentary evidence to establish that the CBD products he used had less than 0.2% THC content. That is below the 0.3% THC content considered to meet the legal definition of marijuana, and, thus, illegal under federal law, as detailed in the 2021 memo from the Director of National Intelligence. Therefore, the CBD products Applicant took were not illegal under federal law, whether or not he had a clearance at the time.

AG ¶ 25(a) therefore does not apply, since Applicant established that his consumption of the CBD products, with low-level THC content does not constitute "any substance abuse" as defined in AG ¶ 24. Similarly, AG ¶ 25(c) does not apply because it is not established that Applicant illegally possessed a controlled substance; and AG ¶ 25(f) does not apply because Applicant did not engage in "illegal drug use" while granted (interim) access to classified information or while holding a sensitive position.

AG ¶ 25(g) also does not apply, first because the CBD products Applicant expressed intent to continue using, up to late September 2023, did not constitute "drug involvement and substance misuse." Further, by the time of the hearing, it no longer applied anyway, since Applicant has ceased using the product, and is now on an effective prescription regimen for his back pain, under doctors' care, and has no intentions to resume CBD use in the future. (He also provided a signed statement to that effect, which satisfies AG ¶ 26(b)(3)).

Since I have concluded that no Guideline H disqualifying conditions apply to the medicinal CBD products Applicant was taking, I need not address the mitigating conditions under AG ¶ 26.[1] It is nonetheless appropriate to note that I considered the cases cited by the parties in their closing arguments.[2] In ISCR Case No. 20-02974 at 6 (App. Bd. Feb. 1, 2022), the DOHA Appeal Board held that it was a security concern

[1] AG ¶ 26(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

AG ¶ 26(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.

[2] Department Counsel cited this case in his closing argument. The case cited by Applicant, ISCR Case No. 20-00421 (A.J. Glendon, Jan. 19, 2023) is a hearing-level case that is not precedential. It also involved an applicant with four years of demonstrated abstinence from medical marijuana use, so it is also distinguishable from this case.).

when an applicant purchased and used medical marijuana after applying for a clearance and after being adequately placed on notice that his conduct was inconsistent with holding a clearance. In the same case, the Board held that the applicant had used marijuana little more than six months before his hearing, in reversing a favorable decision. Here, Applicant was placed on notice multiple times that marijuana use was illegal under federal law – on his SCA, in the interview, when his interim clearance was withdrawn, and when responding to the interrogatory, as well as when he received the SOR. He stopped using the CBD products in late September 2023, just over three months before his early January 2024 hearing date.

The Appeal Board case is therefore quite instructive when considering this case. The difference here is that Applicant demonstrated with sufficient evidence that the products he was taking were not illegal under federal law, since they did not contain 0.3% THC. Therefore, the recency of his actions has little relation to the end result. Moreover, while Applicant's actions were not illegal, they also happened under such circumstances that they are unlikely to recur and do not cast doubt on his reliability, trustworthiness, or 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 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 his work references. I have incorporated my comments under Guideline H in my whole-person analysis.

Applicant presents as an intelligent, thoughtful, highly educated and highly skilled professional who was on the horns of a dilemma. He has had chronic back pain for many years. He did not want to take prescription opioid painkillers because of what he

knew about their addictive properties. He turned to CBD gummies as a last resort, under his state's medical marijuana program. He said in his interview and testified consistently that the products he used had low-level THC content, and the testing documentation he provided supports this assertion. There is no indication that he used any other form of marijuana, for any other purpose. He never tested positive for marijuana (and has not taken a drug test). I found Applicant to be a highly credible witness, and I do not believe he had any intentions to violate the law (and, indeed, I conclude that he did not). I also believe that through his participation in this process, he has concluded that it is not worth the risk to resume CBD or medical marijuana use in the future. I find that his future intentions to avoid medical marijuana use are sincere, and believe he recognizes the security significance of medical marijuana involvement, even in a changing legal landscape. In this regard, I credit Applicant with his candor in disclosing his use in his background interview, and in informing his FSO immediately thereafter.

Applicant has established by sufficient evidence that the CBD products he used for medical purposes do not meet the legal definition of marijuana under federal law, as defined in the 2021 DNI memo. Notwithstanding his admission to the conduct, his use of the products did not establish disqualifying conditions under Guideline H. Overall, the record evidence leaves me without questions or doubts as to his judgment, trustworthiness, reliability, or 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

Conclusion

In light of all of the circumstances, it is clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for continued access to classified information is granted.

_____
Braden M. Murphy
Administrative Judge