



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



In the matter of:)	
)	
)	ISCR Case No. 23-00591
)	
Applicant for Security Clearance)	

Appearances

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

02/15/2024

Decision

RICCIARDELLO, Carol G., Administrative Judge:

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

Statement of the Case

On June 1, 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 July 12, 2023, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's file of relevant material (FORM), and Applicant received it on September 9, 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 2 through 7. (Item 1 is the SOR.) Applicant provided a response to the FORM, which is marked as Applicant's Exhibit (AE) A. There were no objections to any of the evidence and Items 2 through 7 and AE A are admitted in evidence. The case was assigned to me on January 10, 2024.

Findings of Fact

Applicant admitted the sole SOR allegation. His admission is incorporated into the findings of fact. After a thorough and careful review of the pleadings, statements, and exhibits submitted, I make the following findings of fact.

Applicant is 43 years old. He married in 2004 and has four minor children. He earned a bachelor's degree in 2005 and a master's degree in 2011. He has worked for his present employer, a federal contractor, since January 2018. (Item 3; AE A)

Applicant completed a security clearance application (SCA) in May 2019. In it, he disclosed he was granted a security clearance in 2013 by another agency. In March 2023, he completed government interrogatories. He disclosed that he has used medical cannabis in edible form from March 2022 to April 2, 2023, the date before he completed the interrogatory response. He stated he intended to continue using the marijuana in the future, acknowledging that it is illegal under federal law. He provided a certificate to show he is permitted to use medicinal marijuana in his state, where it is legal. He provided a statement that the medical marijuana is prescribed to him for a medical condition; that he follows the recommended dosage; and he only uses it as prescribed for symptom relief. He uses it two to four times a week, usually in the evening before going to bed. He provided a document showing that he first applied for a marijuana certificate in October 2021, and it was granted in December 2021. (Items 3, 4 5, 6)

In Applicant's answer to the SOR, he stated that he uses marijuana for medical reasons for a diagnosed health condition, and its use was recommended by his health care provider. He obtains the marijuana legally in his state from a licensed medical cannabis dispensary. He intends to use the marijuana until his medical condition improves and his doctor modifies his treatment plan. He is aware that his state's laws conflict with federal law. He has tried other medications with mixed results and marijuana has a positive impact on his health. He stated he hoped by self-reporting his use of marijuana that his trustworthiness, reliability, and good judgment would not be in question. He understood he may no longer be eligible for a security clearance but chooses to focus on his personal health. (Item 2)

In his response to the FORM, Applicant stated his intent when self-reporting his marijuana use was to be honest, transparent, and responsible because he takes his security clearance and the obligations associated with it seriously. (AE A)

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), 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;
- (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.

Applicant began using marijuana in March 2022 and continued to use it to about April 2023, acknowledging it is illegal under federal law and inconsistent with holding a security clearance. Applicant holds a security clearance but there is insufficient evidence that he has access to classified information. AG ¶ 25(f) does not apply. He stated his intent is to continue using marijuana in the future for medical purposes. He is prescribed medical marijuana by his health care provider and has a certificate to purchase it in his state where it is legal under state law. AG ¶¶ 25(a), 25(c) and 25(g) 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 has been using marijuana since March 2022 and intends to continue to do so in the future. He understands that his use is in violation of federal law and inconsistent with holding a security clearance. He has made the decision that using marijuana, which is prescribed by a health care professional, is helpful for his medical condition. I have considered that he uses it for medical purposes, has a legal prescription for it, and it is legal to purchase it in the state where he lives. However, marijuana for any purpose remains illegal under federal law. None of the mitigating conditions 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.

I have a duty to exercise prudence because 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." I am obligated to follow that directive. Although Applicant is using marijuana with a prescription for medical purposes and it may be obtained legally under state law, it

remains illegal under federal law. He acknowledged he understands his use is contrary to federal law and intends to continue to use marijuana. He failed to meet his burden of persuasion. After weighing the disqualifying and mitigating conditions under Guideline H and evaluating all the evidence in the context of the whole person, I conclude Applicant failed to mitigate the security concerns under the drug involvement and substance misuse guideline.

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
Subparagraph 1.a:	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