



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



In the matter of:)	
)	
)	ISCR Case No. 23-01229
)	
Applicant for Security Clearance)	

Appearances

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

03/07/2024

Decision

HOGAN, Erin C., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H, Drug Involvement and Substance Misuse. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on April 26, 2022. The Defense Counterintelligence & Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR) on June 29, 2023, detailing security concerns under Guideline H, Drug Involvement and Substance Misuse. DCSA CAS acted 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

Applicant timely answered the SOR and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On October 19, 2023, Department Counsel submitted the Government’s file of relevant

material (FORM), including documents identified as Items 1 through 4. Applicant received the FORM on October 30, 2023. He was afforded 30 days after receiving the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any information within the prescribed time period. The case was assigned to me on February 2, 2024.

Several names and other facts have been modified to protect Applicant's privacy interests. More detailed facts can be found in the record.

Findings of Fact

In Applicant's SOR response, he admitted all SOR allegations. Applicant's admissions are accepted as findings of fact. (Item 3)

Applicant is 29 years old. He has been employed by a defense contractor since 2017 and is applying for a security clearance. It is unclear whether he previously held a security clearance. During his employment with the defense contractor, he has been promoted to positions of greater responsibility. His highest level of education is a bachelor's degree. He is single and has no children. (Item 3)

The SOR alleges under Guideline H that Applicant used and purchased marijuana (THC) with varying frequency from approximately March 2014 to present. (SOR ¶ 1.a: Item 4 at 30-31); and that Applicant intends to use marijuana in the future. (SOR ¶ 1.b: Item 4 at 31)

Applicant listed his illegal marijuana use on his July 2022 SCA in response to Section 23 - Illegal Use of Drugs or Drug Activity. He indicated he is prescribed medical cannabis as sanctioned under state law. He was diagnosed with several chronic medical issues. His physician recommended that he obtain a medical marijuana card in order to help with his medical conditions. He began using marijuana in March 2014. He uses marijuana every other night before bed. (Item 4 at 30-31)

On his July 2022 SCA, he states he intends to use marijuana in the future:

I have the right to use my prescription under the [state statute]. I do not intend to stop my usage. It is the only medication that helps with my ailments, without all the adverse side effects other prescriptions have caused. My usage has never and will never infringe upon my work, ethics, and/or responsibilities. It is solely for medical relief. (Item 4 at 31)

In his response to the SOR, Applicant indicates his primary care doctor and cardiologists recommended he use marijuana. He did not provide medical records or letters from his medical doctors describing his need for marijuana as a treatment for his health issues. He has held a state medical marijuana card since 2014. He states his use of marijuana has been a major factor in the improvement of his health. (Item 3)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

The adjudicative guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines 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 access to classified information 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. 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 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.

Analysis

Guideline H: Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern for drug involvement:

The illegal use of controlled substances . . . 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.

I have considered the disqualifying conditions for drug involvement and substance misuse under AG ¶ 25 and the following are potentially applicable:

AG ¶ 25(a) any substance misuse;

AG ¶ 25(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The record evidence shows Applicant has a history of habitual marijuana use from 2014 to the present. He uses marijuana every other night and admits to purchasing marijuana from his state medical marijuana dispensary. He intends to continue using marijuana. AG ¶¶ 25(a), 25(c), and 25(g) apply.

While Applicant's use of marijuana is legal in the state where he resides, it remains illegal under Federal law. On October 25, 2014, the Director of National Intelligence (DNI) issued an October 25, 2014, memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

The Government's substantial evidence and Applicant's admissions raise security concerns under Guideline H. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 22, 2005))

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement and substance misuse. The following mitigating conditions under AG ¶ 26 potentially apply:

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 on 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 mitigating condition applies. Applicant has used marijuana several times a week since 2014. His use is for medicinal purposes and it is legal in the state where he resides. However, it remains illegal under federal law. He intends to continue to use marijuana on a regular basis in the future. He did not mitigate the concerns under Drug Involvement and Substance Misuse.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position 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 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 and the AG ¶ 2(d) factors in this whole-person analysis.

I note that Applicant has been an employee with the same DOD contractor since 2017 and he has been promoted to positions with more responsibility during that time. Applicant provided full disclosure about his marijuana use for medical purposes. While his marijuana use was legal under state law, it remains illegal under federal law and raises security concerns. Concerns under Drug Involvement and Substance Abuse are not mitigated.

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 presented, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

Erin C. Hogan
Administrative Judge