



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



In the matter of:)	
)	
)	ISCR Case No. 23-01569
)	
Applicant for Security Clearance)	

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: *Pro se*

03/06/2024

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 August 28, 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 August 30, 2023, and elected to have her 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 October 18, 2023. She 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 4 (Item 1 is the SOR). Applicant did not provide a response to the FORM. There were no objections to any of the evidence and Items 2 through 4 are admitted into evidence. The case was assigned to me on January 30, 2024.

Findings of Fact

Applicant admitted the sole SOR allegation. Her admission is 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 42 years old. She earned a bachelor's degree in 2004. She married in 2006 and divorced in 2018. She has 17-year-old child from the marriage. She is being sponsored for a security clearance for the first time. (Item 3)

Applicant completed a security clearance application (SCA) in March 2023. In it she disclosed her drug use. She indicated that she uses "THC (such as marijuana, weed, pot, hashish, etc.)" She stated: "I have an active medical marijuana card for the state of [X]." She estimated she began using marijuana in March 2022 and her most recent use was March 2023. She further disclosed:

I have anxiety, and it is at its peak when I'm trying to fall asleep. My doctor recommended trying medical marijuana, as I have tried medication, reading, exercises, melatonin, etc. I use the medical marijuana before bed, and it has been a great help. I have not used marijuana outside of the use under the medical marijuana card.

I plan to continue use before bed as a sleep aid, I am willing to discontinue use and not renew my medical marijuana card if that will help me obtain/maintain security clearances. (Item 3)

Applicant was interviewed by a government investigator in May 2023. In August 2023, she verified the accuracy of her summary of interview and did not make any changes or additions. She confirmed that she continues to use medicinal marijuana to help her sleep. She uses at home and has a valid prescription. It does not violate state law where she lives. She has never participated in drug counseling. She said she does not associate or socialize with individuals who use illegal drugs. She is likely to continue to use marijuana as she prefers natural prescriptions as a sleep aid but is willing to figure out another avenue if it is required to obtain and maintain a security clearance. (Item 4)

As part of her interrogatories, Applicant was asked if she continued to use any controlled substance since her background interview in May 2023. She indicated she continued to use medical marijuana nightly since then. She purchases it in her state where it does not violate state law. In response to whether she intended to use this drug in the future, she stated: "will cease use if required to do so to obtain a clearance." (Item 4)

In Applicant's answer to the SOR, she admitted she uses medicinal marijuana on the recommendation of her doctor to help her sleep. She further stated:

I have stated, and I maintain, that I will forfeit/destroy my [State X] medical marijuana certification to be in compliance with U.S. Government security clearance if so required. I am a responsible, law-abiding citizen, and have never/would never use any medication outside of its intended use. Outside of medical marijuana, I have never engaged in illegal drug use, or misuse of any controlled substance.

* * *

I take my career seriously and would not engage in behavior that would be detrimental to the company I worked for, or my own reputation.

* * *

Additionally, I have been told by multiple parties involved with and throughout this process, that my medical marijuana certification would be a non-issue, or I would have forfeited/destroyed it upon application for security clearance as I offered. (Item 2)

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; and

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

Applicant uses marijuana prescribed by her doctor in a state where it does not violate state law. However, it is illegal under Federal law. She has expressed her intent to continue to use it to help her sleep. 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.

On October 25, 2014, the Director of National Intelligence (the Security Executive Agent (SecEA)) issued DNI Memorandum ES 2014-00674, "*Adherence to Federal Laws Prohibiting Marijuana Use*," which states:

[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.

On December 21, 2021, the SecEA promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications. It states in pertinent part:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The

SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a “whole-person concept.” This requires adjudicators to carefully weigh a number of variables in an individual’s life to determine whether that individual’s behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations 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 has repeatedly stated that she will discontinue using medicinal marijuana if it is required to obtain a security clearance. However, she has not stated unequivocally that she has stopped using marijuana, despite having gone through the security clearance process. When she completed her SCA, was interviewed by a government investigator, completed government interrogatories, and answered the SOR, she could have stated that she is no longer using marijuana. She did not. After she received the FORM, she had a final opportunity to state that she is no longer using marijuana, but she did not provide a response to it. Despite her assertions that she would stop using marijuana in the future if it is required for holding a security clearance, she has not done so. Applicant continues to use marijuana in violation of federal law. None of the above 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.

Applicant failed to meet her 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 mitigated the security concerns under the 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
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