



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



In the matter of:)	
)	
[Name Redacted])	ISCR Case No. 23-01966
)	
Applicant for Security Clearance)	

Appearances

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

06/25/2024

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 January 26, 2023. The Defense Counterintelligence & Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR) on October 26, 2023, detailing security concerns under Guideline H. DCSA CAS acted under Executive Order (Exec. Or.) 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 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

On November 20, 2023, Applicant 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 January 17, 2024, Department Counsel submitted the

Government's file of relevant material (FORM), including documents identified as Items 1 through 4. Applicant received the FORM. He was afforded 30 days after receiving the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant submitted a Response to the FORM on March 15, 2024. Department Counsel did not object to the Response to the FORM. The case was forwarded to the DOHA Hearing Office on March 19, 2024, and assigned to me on May 3, 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 2)

Applicant is 37 years old. He has been employed by a DOD contractor since December 2022 and is applying for a security clearance. 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) on various occasions between June 2018 and October 2023 (SOR ¶ 1.a: Item 3, Section 23, at 29); he purchased marijuana on various occasions approximately from June 2018 to October 2023 (SOR ¶ 1.b: Item 3 at 29; Item 4 at 8); and that he intends to continue to use marijuana. (SOR ¶ 1.c: Item 4 at 9)

Applicant listed his marijuana use on his January 2023 SCA in response to Section 23 - Illegal Use of Drugs or Drug Activity. He indicated in 2018, he legally obtained a medical marijuana card to deal with pain management for a broken hand without having to use narcotics. While using it, he realized that it also helped with his depression, anxiety, migraines, and lower back pain. He uses it a few times a week before bed. He has never come into work inebriated or under the influence. No one can blackmail him about his marijuana use. He indicated he is willing to stop his marijuana use if it prevents his ability to obtain a security clearance. (Item 3 at 29)

In his response to the DOHA Interrogatories, Applicant indicated he applied for a medical marijuana card in 2018. The use of medical marijuana is legal in the state where he resides. He initially applied for a medical marijuana card after he broke his hand at work. He realized using marijuana helped with his anxiety. He said it helps with his pain, anxiety, and improves his mood. He does not believe his marijuana use causes problems in his life. If he is required to stop using marijuana to keep his job, he will do so. (Item 4 at 4)

Applicant indicated that he has used medical marijuana from July 2018 to October 17, 2023. His level of usage was daily from 2018 to 2019; weekly between 2019 to 2020; 3-4 times a week from 2020 to 2022; three to four times a week, sometimes every day from 2022 to 2023. (AE 4 at 7) He purchased medical marijuana from his state's licensed dispensaries from July 2018 to July 2023. (AE 4 at 8) He indicated that he intends to

continue to use medical marijuana, CBD and THC products from state-licensed dispensaries to treat his physical and mental health. He acknowledged that marijuana use and possession remain illegal under federal law even if it is legal under state law, and that any future use of marijuana or products containing THC after being granted a security clearance or a position of public trust may affect his ability to maintain a security clearance or public trust position. (Item 4 at 9)

In his response to the SOR, dated November 20, 2023, Applicant admitted the allegations in SOR ¶¶ 1.a -1.c. He mentioned that he used marijuana legally for medically relevant reasons under the law of the state where he resides which legalized medical marijuana use. (Item 2)

In his response to the FORM, Applicant takes issue with the Government's comments about his prior statements that he will stop using marijuana if it effects his ability to keep his job. He does not see how being forthright about his use of medical cannabis makes him untrustworthy. He uses medical marijuana to treat treatment resistant depression, anxiety, migraines and Complex Post-traumatic Stress Disorder (CPTSD). He contends his use of medical cannabis only poses a security threat if he hid the fact that he used medical cannabis products, leaving him open to blackmail. He is not subject to blackmail since he is upfront about his marijuana use. He complains that security clearance holders are not subject to random urinalysis and that he is being held to a higher standard by his admission of cannabis use than those who currently hold a security clearance who may use marijuana. He also believes that any high functioning alcoholic can maintain a security clearance even if they hide it from their family and friends. (Response to FORM)

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 2018 to at least October 2023. He used medical marijuana on a regular basis to treat pain, treatment resistant depression, anxiety, migraines, and CPTSD. He purchases marijuana and THC products from his state-licensed marijuana dispensaries. During his background investigation interview, he expressed reservations about stopping his marijuana use. He later mentioned in his interrogatory response that he is willing to cease his marijuana usage if the ability to keep his job requires it. The record is unclear as to

whether he actually stopped using marijuana. He failed to demonstrate that he clearly and convincingly stopped 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 a 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.

Moreover, on December 21, 2021, DNI Avril D. Haynes 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 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.)

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 on a regular basis from 2018 to at least October 2023, only eight months ago. He never provided a signed statement of intent indicating he would abstain from all drug involvement and substance abuse, acknowledging that any future involvement or misuse is grounds for revocation of national security.

Questions about Applicant's judgment remain. In 2018, he began to purchase and use medical marijuana which is legal in the state where he resides. He has worked for DOD contractors since 2015. While marijuana is legal in the state where he resides, he should have realized that there may be issues with his use of marijuana throughout the security clearance process as well as his employment as a DOD contractor. It is unclear that he stopped using marijuana at the close of the record. Even if he stopped using marijuana, not enough time has passed to persuasively demonstrate he has the commitment to stop using marijuana over the long term. He did not mitigate the security 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 considered that Applicant has been an employee of several DOD contractors since 2015. I considered he started using medical marijuana in 2018. I considered he provided full disclosure about his marijuana use for medical purposes on his January 26,

2023, security clearance application. While his marijuana use was legal under state law, it remains illegal under federal law and raises security concerns. Applicant's failure to realize his marijuana use could be an issue during the security clearance process raises questions about his judgment. He did not realize the gravity of the issue until it was too late. Concerns under Drug Involvement and Substance Misuse 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.c:	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