



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



In the matter of:)	
)	
XXXXXXXXXXXXXXXXXX)	ISCR Case No. 23-02912
)	
Applicant for Security Clearance)	

Appearances

For Government: Mark D. Lawton, Esq., Department Counsel
For Applicant: *Pro se*

07/02/2024

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department’s intent to deny her eligibility for access to classified information. She failed to mitigate the security concerns stemming from her drug involvement and substance misuse. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant submitted her security clearance application (SCA) on August 16, 2023. The Department of Defense issued Applicant a Statement of Reasons (SOR) on February 2, 2024, detailing security concerns under Guideline H, drug involvement and substance misuse. The DOD acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* 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.

On February 22, 2024, Applicant submitted an answer (Answer) to the SOR and elected a decision on the written record by an administrative judge of the Defense Office

of Hearings and Appeals (DOHA). On April 30, 2024, Department Counsel submitted the Government's file of relevant material (FORM), including documents identified as Items 1 through 3. DOHA sent the FORM to Applicant on May 2, 2024, who received the FORM on May 16, 2024. She was afforded 30 days after receiving the FORM to file objections and submit material in refutation, extenuation, or mitigation. On May 28, 2024, Applicant submitted a response (Response) to the FORM. The SOR and the Answer (Items 1S and 1A, respectively) are the pleadings in the case. Items 2, 3, and the Response are admitted without objection. The case was assigned to me on June 6, 2024.

Findings of Fact

Applicant is 41 years old, married, and has a four year-old daughter. She earned her bachelor's degree in May 2007. Since May 2015, she has worked for a defense contractor as a human resources manager. This is her first security clearance application. (Item 2.)

Under Guideline H, the SOR alleged that from about April 2022 until January 2024, Applicant purchased marijuana on various occasions, used marijuana with varying frequency, and intends to continue to use marijuana in the future. (Item 1S.) She admitted this allegation and stated: "[I] will not renew my medical card if it means I will get a clearance. I just don't want to take pills for my pain." (Item 1A.)

Applicant disclosed her use of marijuana in her SCA, stating that it was obtained "by prescription only" using a "medical marijuana card" issued by her State and that her first use was in April 2022. She described the back conditions that are treated by her marijuana use (degenerative and fractured discs). She uses it "for back pain at the end of the day." She uses "[it] at night to relax [her] back muscles." The SCA reached back seven years, which means she did not use marijuana from 2016 until April 2022. (Item 2.)

Applicant's personal subject Interview (PSI) reported that: "[She] uses [marijuana] before bed. [She] uses a vape pipe and takes four puffs. [She] does this while at home and not with anyone else. [She] does not do this while driving or working. [She] uses it to help sleep due to back pain." (Item 3.)

In her responses to interrogatories, Applicant said: "I bought cannabis from the dispensary using my medical card. If I need to give up my card for my job I will discontinue use." She uses marijuana "maybe once a day." (Item 3.)

Applicant's Employee Handbook requires current employees to undergo drug screening or testing if "contractual customer requirements" require such screening or testing." Beyond that, there is no required workplace drug testing. The Handbook prohibits: "The unlawful use, possession . . . of an illegal or controlled substance." That prohibition is limited to the following circumstances: "[R]eporting for work, while on the job, on [Employer] or customer premises or surrounding areas, or in any vehicle used for [Employer] business." (Item 3, Handbook at 12-13, 38.)

Applicant's Response stated: "If you could please pass along that I love my country and would do anything for it. I feel very sad that I wouldn't pass this due to medication. I'm trustworthy and loyal. I do not put myself in situations where this would be tested."

Law and 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).

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines. These guidelines are flexible rules of law that apply together with common sense and the general factors of the whole-person concept. An administrative judge must consider all available and 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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is then responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion in seeking a favorable security decision.

Discussion

Guideline H, Drug Involvement and Substance Abuse

Under AG ¶ 24 for illegal drug use, suitability of an applicant may be questioned or put into doubt because drug use can both impair judgment and raise questions about a person's ability or willingness to comply with laws, rules and regulations:

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. 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.

Marijuana is a Schedule I controlled substance, and possession of it is regulated

by the federal government under the Controlled Substances Act. 21 U.S.C. § 811 *et seq.* The knowing or intentional possession and use of any such substance is unlawful and punishable by imprisonment, a fine or both. 21 U.S.C. § 844. In an October 25, 2014 memorandum, the Director of National Intelligence (DNI) affirmed that the use of marijuana is a security concern. James R. Clapper, Director of National Intelligence, Memorandum: *Adherence to Federal Laws Prohibiting Marijuana Use* (October 25, 2014). See also <http://www.dea.gov/druginfo/ds.shtml>

More recently, on December 21, 2021, DNI signed the memorandum, *Security Executive Agent 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*. It emphasizes that federal law remains unchanged with respect to the illegal use, possession, production and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior medicinal or recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the “whole-person concept” stated under SEAD 4, to determine whether the applicant’s behavior raises a security concern that has not been mitigated.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including...purchase... and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant admitted facts that trigger disqualifying conditions AG ¶¶ 25(a), (c), and (g).

The next inquiry is whether Applicant’s security concerns raised by marijuana use have been mitigated, The following mitigating condition under AG ¶ 26(b) for drug involvement is the most appropriate and will be discussed here:

[T]he individual acknowledges . . . 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 or misuse is grounds for revocation of national security eligibility.

Mitigating condition AG ¶ 26(b) is the most appropriate one and will be discussed here. The initial requirement is that Applicant acknowledges “her drug involvement.” She satisfied this requirement by her Answer, her PSI, and her responses to interrogatories.

The next requirement is to show a “pattern of abstinence” (with some non-exclusive examples). Applicant did not begin using marijuana until April 2022 and continued through at least January 2024. Therefore, on this record, she has been using medical marijuana for fewer than two years. By contrast, according to her SCA, she did not use marijuana from 2015 until her first use in April 2022, almost seven years, a period of abstinence far longer than the duration of her period of use. This element, however, looks retrospectively and at the current status of usage. Her use of marijuana is recent and ongoing. Moreover, she intends to continue using prescribed marijuana for medical purposes as treatment of her chronic back condition. Thus, this element of AG ¶ 26(b) is not satisfied.

The suggested disassociation and change of environment have no relevance here. The “signed statement of intent to abstain,” however, is quite relevant here, since she only used it at home before bed pursuant to her medical prescription. In Applicant’s Answer to the SOR, her PSI, and her responses to interrogatories, she offered to forego the use of medically prescribed marijuana in order to obtain a clearance. This pledge was made three times under penalty prescribed by 18 U.S.C. § 1001. There is no question she is aware of the consequences ahead if she were to break those pledges – a revocation of her clearance. On balance, however, given the absence of a meaningful pattern of abstinence, AG ¶ 26(b) is not satisfied, and her marijuana use is not mitigated.

Bond Amendment

Appendix B of the Directive reflects language in the Bond Amendment to the Intelligence Reform and Terrorism Prevention Act of 2008, as amended (IRTPA), which prohibits granting or renewing a “security clearance for a covered person who is an unlawful user of a controlled substance” (SEAD 4, App. B, para. 1.) In citing this prohibition, the DNI memorandum notes that “under Federal law, use of marijuana remains unlawful.” Thus, regardless of whether Applicant’s use of medicinal marijuana is legal under her state’s law (under a prescription or otherwise), it is not legal under Federal law, and the Bond Amendment applies. I am, therefore, prohibited from granting Applicant a clearance as long as her marijuana use remains current and ongoing.

Whole-Person Concept

As noted above, DNI stressed that federal law pertaining to marijuana, *including prior medicinal use remains relevant, but not determinative*, to adjudications of eligibility. This language is routinely quoted in DOHA decisions. It is fair to conclude that DNI does not engage in surplusage in its written guidances. This is an individual case that presents an opportunity to assess the impact of state-legalized medical use of marijuana on national interests. The following analysis will be guided by AG ¶¶ 2(d)(1) through (9).

- (1) Nature, extent, and seriousness of the conduct. This case is solely about the narrow issue of medically prescribed state-legitimized use of marijuana. The entire premise, therefore, is whether under Applicant's circumstances, her prior use of marijuana for back pain relief, should preclude a security clearance. The federal legal seriousness of her conduct is minimal, if that. Her prior use for back pain only is undisputed. No national security interests were negatively impacted by her prior use.
- (2) & (3) Circumstances, recency, and frequency surrounding the conduct. Applicant used marijuana at most once a day, alone before retiring for the night. She was a very disciplined user, using a vape pipe, and taking only four puffs per day. It helped her sleep. She did not use while driving or while on the job. Her once-a-day use at bedtime only did not violate any of her employer's prohibitions on drug use while engaged in the employer's business or involving customers. Her solo use at home before bed did not negatively impact national security interests.
- (4) Individual's age and maturity. Applicant is 41, married, a college graduate, and the mother of a four- year-old daughter. It is clear from her security clearance papers that she is quite aware of the stakes involved in this process. She knows that the continued use of marijuana for back pain will disqualify her from obtaining or continuing to hold a security clearance.
- (5) & (6) Voluntariness and rehabilitation. Applicant could not be more clear that she understands the consequences of foregoing her medical use of marijuana. She will need to find a federally legal alternative. And she understands what her continued use of marijuana will mean – no clearance. Her voluntariness is not in question. Rehabilitation does not apply here, since there is no hint of a substance use disorder.
- (7) Motivation for the conduct. There are two motives to consider here. First, what was Applicant's motive to seek a medical prescription for marijuana? The answer is undisputed – she was experiencing lower back pain from a degenerative spinal condition that interfered with her sleep. Second, what is her motive to forego a medical marijuana prescription and card? Again, the answer is her candid response: "If I need to give up my [medical marijuana] card for my job I will discontinue use." Department Counsel interprets that to

mean: “It is not compliance with Federal law that will motivate Applicant to stop using marijuana, it is the potential loss of her job.” I respectfully disagree that her response calls into question her willingness to comply with federal law. In fact, it shows a willingness to abate her painful medical condition by using pain relievers that are *not federally* illegal. The adjudicative guidelines do not require purity of motive. In fact, they expressly allow applicants to change their behavior to mitigate disqualifying conditions. For example, Guideline F (financial considerations) sets forth disqualifying conditions but then describes six behavior-based mitigating conditions that an applicant could establish to mitigate a poor financial record. Similarly, Guideline G (alcohol consumption) sets forth disqualifying conditions but then describes three behavior-based mitigating conditions that an applicant could establish to mitigate a record of alcohol abuse. In both examples, an applicant’s motives would be mixed, to remedy disqualifying conditions *and* to keep or get a job. That is simply what Applicant has done here. Her offer to abstain in no way negatively impacts national interests. In fact, since she will forego the medical use of marijuana, the national interest in preventing state-legalized use of marijuana (whatever that national interest may be) will be advanced.

- (8) Potential for pressure, coercion, exploitation, or duress. There is no evidence that granting Applicant a clearance and her foregoing medical marijuana would subject her to any potential for pressure, coercion, exploitation, or duress.
- (9) Likelihood of continuation or recurrence. This factor is not applicable here. She has convincingly committed to discontinue marijuana use.

The foregoing analysis demonstrates that Applicant’s prior use of marijuana has not negatively impacted her professional or private life. Her prior use was disciplined, private, and minimal. It played a minor role in her private life. There is no evidence that her prior use subjected her to any pressure, coercion, exploitation, or duress in fulfilling her job requirements or would impair her ability to protect classified information in the future. No specific or articulable national interest has been harmed by her prior use.

In sum, however, AG ¶ 26(b) does not mitigate Applicant’s state-legalized medical use of marijuana, and notwithstanding an overall favorable whole-person assessment, the Bond Amendment controls. I find against Applicant on SOR ¶ 1. If she could find a federally-legal pain reliever of the same efficacy as marijuana and shows a pattern of abstinence from marijuana use, she could be a worthwhile candidate for reapplication.

Applicant leaves me with questions about her eligibility and suitability for a security clearance. For those reasons, I conclude that Applicant has not mitigated the security concerns arising under Guideline H, drug involvement and substance abuse.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H (Drug Involvement):	Against Applicant
Subparagraphs 1.a and 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 Applicant eligibility for access to classified information. National security eligibility for access to classified information is denied.

Philip J. Katauskas
Administrative Judge