



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



In the matter of:)	
)	
)	ISCR Case No. 23-01803
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: *Pro se*

08/14/2024

Decision

MURPHY, Braden M., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H, drug involvement and substance misuse, regarding his use of marijuana from 1993 to 2023. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 13, 2023. On October 19, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse). The DOD issued the SOR 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 the Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

When Applicant answered the SOR on November 6, 2023, he admitted the single allegation and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to a judge in DOHA's west coast office on or about February 4, 2024. On or about February 13, 2024, after confirming his availability, DOHA issued a notice scheduling the hearing for March 22, 2024. However, the day before, on February 12, 2024, Applicant emailed Department Counsel and requested "that my case be presented in writing to the arbitrator." He did so, in part, "to expedite the process." (HE 1) As a result, the hearing was cancelled two days later.

On February 13, 2024, Department Counsel prepared and submitted the Government's File of Relevant Material (FORM), including documents identified as Items 1 through 3. Item 1 is comprised of the pleadings in the case (the SOR and Answer). Item 2 is the SCA, and Item 3 is the summary of Applicant's May 2023 background interview. Government Items 2 and 3 are admitted without objection.

The FORM was mailed to Applicant on February 14, 2024. He was afforded an opportunity to note objections and to submit material in refutation, extenuation, or mitigation, and was given 30 days from receipt of the FORM to do so. He received the FORM on March 21, 2024. He did not respond to the FORM at that time. Applicant's case file was then forwarded to the DOHA Washington Hearing Office, and the case was assigned to me on July 5, 2024.

On July 15, 2024, I emailed Applicant to ask, (1) whether he still wanted to waive a hearing in his case (since the processing of his case had not been "expedited" as he seemed to expect) and (2) whether he had submitted any documents in response to the Government's FORM. Applicant responded the next day. He confirmed that he did not want a hearing. He confirmed that he had not submitted documents previously, though he said it was because he thought he missed the deadline. He said he wanted to submit a "subjective appeal" and would do so within two days. I interpreted his response as a request to submit an additional statement on his own behalf and gave him until July 23, 2024 to do so. (HE 2). No response was received. The record closed on July 23, 2024.

Findings of Fact

Applicant admitted the sole allegation in the SOR (§ 1.a) with a brief comment. His admission is incorporated into the findings of fact. Additional findings follow.

Applicant is 34 years old. He was married for five years in the mid-1990s and has been remarried since 2015. He has no children. He has earned two associate degrees. He has been employed as a technician by a large defense contractor since March 2022 after several years in a similar position with another employer. He served honorably in the Navy for about 10 months in the late 1980s. He has never held a clearance. (Item 2)

When he answered questions on his March 2022 SCA about his history of illegal drug use, Applicant disclosed that he had used marijuana for the previous 30 years,

from 1993 to as recently as February 2023. He explained that his marijuana use was “limited and sporadic” about 10 times) until 2007, after which he engaged in “very regular usage,” of “approximately five to 10 doses per week, varying.” He said he used “recreationally and also to self-medicate for migraine headaches and insomnia.” He said before marijuana became “recreational legally” in State 1, where he lives, he purchased it legally with medical marijuana cards via medical doctors and clinics. (Item 2 at 61; Item 3 at 1) In his background interview, he said that since 2007, he used it nightly, via a glass pipe, a cigarette, or a vaporizer. His use did not change after 2016, when it became legal recreationally. (Item 3 at 1)

Applicant said he initially stopped using marijuana in January 2022, after he interviewed for a job with his current employer, “under the impression I would be seeking [a] clearance. When this did not materialize, I resumed usage in December 2022.” He stopped usage again in February 2023 after it was suggested that he apply for a clearance. (Item 2 at 61) He said in his May 2023 background interview and his November 2023 Answer that he had not used it since February 2023. (Item 3 at 1; Answer)

Applicant further explained that he would stop using marijuana if he were granted a clearance and the only reason he would consider resuming use would be “if cannabis became Federally legal AND it was no longer restricted” for those with a clearance. The only exception would be for pain relief and end-of-life treatment if he were terminally ill. (Item 2 at 61, 63)

Applicant’s marijuana use is alleged as SOR ¶ 1.a. as a security concern under Guideline H. As noted above, he did not respond to the Government’s FORM, nor did he provide additional information after I contacted him in July 2024 to offer him the chance to do so. He therefore offered no additional statements or other evidence that might have been considered in mitigation. In particular, he offered no evidence of how he addresses what appear to be chronic medical issues (migraine headaches and insomnia) through legal means beyond marijuana. He also offered no evidence to corroborate his assertions.

Policies

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

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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(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 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 not drawn 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 to obtain 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline H, Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern regarding drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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.

The Controlled Substances Act (“CSA”) makes it illegal under Federal law to manufacture, possess, or distribute certain drugs, including marijuana. (Controlled Substances Act, 21 U.S.C. § 801, et seq. See § 844). All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. §§811, 812. Marijuana is classified as a Schedule I controlled substance, §812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment. §812(b)(1). See *Gonzales v. Raich*, 545 U.S. 1 (2005).

Further, in October 2014, the Director of National Intelligence (DNI) issued a memorandum entitled “*Adherence to Federal Laws Prohibiting Marijuana Use*,” (2014 DNI Memo) which makes clear that changes in the laws pertaining to marijuana by the various states, territories, and the District of Columbia do not alter the existing National Security Adjudicative Guidelines, and that Federal law supersedes state laws on this issue:

[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.

The DOHA Appeal Board, which I am required to follow, has cited the 2014 DNI Memo in holding that “state laws allowing for the legal use of marijuana in some limited circumstances do not pre-empt provisions of the Industrial Security Program, and the Department of Defense is not bound by the status of an applicant’s conduct under state law when adjudicating that individual’s eligibility for access to classified information.” ISCR Case No. 14-03734 at 3-4 (App. Bd. Feb. 18, 2016).

The current National Security Adjudicative Guidelines went into effect on June 8, 2017, after the 2014 DNI memo was issued. Nevertheless, the principle continues to apply.

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 memo incorporates the AGs (at reference B) and the 2014 DNI Memo (at reference G) among various other relevant federal laws, executive orders, and memoranda. I take administrative notice of the 2021 DNI memo here, given its relevance to this case, its reliance on the AGs, and its recency.

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)

I have considered the disqualifying conditions for drug involvement under AG ¶ 25, and the following is potentially applicable: AG ¶ 25(a) (any substance misuse (see above definition)). Applicant’s use of marijuana over the last 30 years (with increased use, both recreationally and medicinally, since 2007 establishes AG ¶ 25(a).

I have considered the mitigating conditions under AG ¶ 26. The following 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 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 is grounds for revocation of national security eligibility.

No mitigating conditions fully apply. Applicant’s illegal marijuana use was not infrequent and not isolated. He has engaged in daily or nightly use of marijuana, either medicinally or recreationally, after 2007, and up to February 2023. His abstinence is tied to his clearance eligibility. His drug involvement is also recent, as, at best, it ended about 18 months ago. He also did not establish that he has disassociated from drug-using associates and contacts, or that he has changed or avoided the environment where drugs were used. The only changed circumstance appears to be his desire to hold a clearance.

Applicant's recent assertions that he understands that marijuana use is federally illegal, and that illegal drug use is incompatible with holding a security clearance, as well as his assertions that he no longer intends to use marijuana must be balanced against his overall record. Further, Applicant offered no mitigating evidence after receiving the Government's FORM.

Since Applicant elected a decision on the written record, in lieu of a hearing, I did not have the opportunity to ask him questions about his conduct. I also had no opportunity to observe his demeanor during a hearing, and thus, to assess his credibility beyond the documentary record. The fact that I cannot assess his credibility undercuts the strength of his case in mitigation. The recency of his most recent use, and its circumstances, preclude full application of either AG ¶ 26(a) or AG ¶ 26(b).

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 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 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 conclude Applicant did not provide sufficient evidence to mitigate the security concerns about his drug involvement and substance misuse. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility for a security clearance.

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

Considering all of the circumstances, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Braden M. Murphy
Administrative Judge