



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



In the matter of:)
)
) ISCR Case No. 23-02907
)
Applicant for Security Clearance)

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: *Pro se*

09/13/2024

Decision

BENSON, Pamela C., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline H (Drug Involvement and Substance Misuse). National security eligibility for access to classified information is not granted.

Statement of the Case

On April 4, 2023, Applicant submitted a security clearance application (SCA), also known as the Electronic Questionnaires for Investigation Processing. On March 18, 2024, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline H. The action was taken under Executive Order (EO) 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 the Adjudicative Guidelines (AG) effective within the DOD on June 8, 2017.

On April 13, 2024, Applicant provided a response to the SOR. (Answer) She requested a hearing before an administrative judge, and the case was assigned to me on May 8, 2024. On May 16, 2024, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing by video teleconference scheduled for June 18, 2024. The hearing was convened as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 and 2. She also requested that I take administrative notice of guidance issued by the Director of National Intelligence, who is responsible for issuing direction and instructions to heads of federal agencies to ensure appropriate uniformity in the process relating to the determination of eligibility for access to classified information or eligibility to hold a sensitive position. The guidance concerns the federal law's prohibition of marijuana use, and that federal law supersedes even if state law has legalized the use of marijuana. In addition, Department Counsel provided an April 2024 disclosure letter. I marked these two documents as Hearing Exhibits (HE) 1 and 2. There were no objections, and GE 1 and 2 were admitted into evidence, and HE 1 and 2 were appended to the record. Applicant testified and submitted one document, a college transcript, marked as Applicant Exhibit (AE) A, which I admitted into evidence without objection. I held the record open for two weeks in the event either party wanted to supplement the record. DOHA received the transcript (Tr.) on June 26, 2024. On July 1, 2024, Applicant timely submitted four documents labeled as AE B through E, which I admitted into evidence without objection. The record closed on July 5, 2024.

Findings of Fact

Applicant admitted both SOR ¶¶ 1.a and 1.b under Guideline H. (Answer) Having thoroughly considered the evidence in the record, I make the following findings of fact:

Applicant is 51 years old. She is married and does not have any children. Applicant submitted a college transcript for the Spring 2024 semester. She took an on-line college class and received a grade point average of 4.0. She does not have a college degree. Since about June 2023, she has worked for a federal contractor doing a variety of tasks. This is her first application for a DOD security clearance. (Tr. 17-21; GE 1; AE A)

SOR ¶ 1.a alleges that Applicant used Tetrahydrocannabinol (THC), with varying frequency, from about June 1983 to at least February 2024. She admitted this information in her Answer, and during the hearing she stated that she had first used THC, or marijuana, in middle school on a few occasions, and then stopped all use until about 1994, when she resumed using marijuana while working as a waitress. She used marijuana a couple times a week until September 2001. At that time, she was hospitalized for 30 days, and then she received 30 days of intensive outpatient care due to a psychotic break, major depression. She did not use any marijuana until approximately 2008. (Tr. 21-30; GE 1)

Applicant stated that she used marijuana on about a monthly basis, from about 2008 to about 2021. From 2021 to 2023, she used marijuana a couple times a week. She used marijuana for relaxation, to treat her depression, and to help with her stutter. In March 2023, her state signed into law the legalization of medical marijuana beginning on January 1, 2025. The governor, however, decriminalized the possession of marijuana for medical use only by granting a conditional pardon by executive order dated November 15, 2022. Applicant obtained a medical marijuana card and would go to a different state to purchase marijuana. From that time until now, she has used marijuana on a daily basis. She has never participated in a substance abuse counseling program. (Tr. 32-38; AE D)

SOR 1.b alleges that Applicant intends to use marijuana in the future. At the hearing, she testified that is true. She had disclosed her future intent to use marijuana on the April 2023 SCA, during her May 2023 background interview, and in her February 2024 interrogatory. In her April 2024 Answer, however, Applicant provided a statement which read: "I intend to abstain from all drug involvement and substance misuse, and I acknowledge that any future involvement or misuse is grounds for revocation of national security eligibility." At the hearing, Applicant admitted she last used marijuana on June 16, 2024. She stated that since she is following her state law, by definition, she cannot be "misusing" a drug. She stated;

Now, I know that the federal law is different, that the federal law does have it [marijuana] scheduled as a Schedule I controlled substance. So, I'm not able to adhere to the federal level of that promise... (Tr. 39-42; Answer)

Applicant clarified that she understood the principle under current federal law, and that any use of marijuana is inconsistent with holding a security clearance. It was her hope, however, that the federal law would soon change or that the government would grant her a waiver to use marijuana. She added unverified information in her Answer that the U.S. military has a history of using medical marijuana for treating soldiers during World War I. She requested DOHA provide that same consideration for her. She did not provide any evidence that individuals who possess DOD security clearances are legally permitted to use marijuana. (Tr. 43, 46; Answer)

Character evidence

Applicant submitted a letter of recommendation from a former supervisor. Her supervisor reported that Applicant is dependable, self-motivated, and works well with others. She stated that Applicant would be a great employee for any employer. (AE C)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG 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 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 forth at AG ¶ 24:

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.

The guideline at AG ¶ 25 contains the following conditions that could raise a security concern and may be disqualifying:

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

The record evidence and Applicant's admissions support the disqualifying conditions listed in AG ¶¶ 25(a) and (g), above.

The burden has shifted to Applicant to rebut or prove mitigation of the resulting security concerns. AG ¶ 26 provides conditions that could mitigate security concerns in this case:

- (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;
 - (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; and
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended.

None of the above mitigating conditions apply to the facts of this case. Applicant admitted that she used marijuana over the years, and that her current use of medical marijuana is daily. She is aware that, although medicinal use of marijuana was decriminalized in her state, marijuana was still considered a controlled substance and prohibited under federal law. She admitted that she is unable to follow federal law in this instance and asked that DOHA grant her a waiver to allow her to continue her use of

medical marijuana, which I have no authority to do. Applicant is unwilling to make a commitment to discontinue her use of marijuana. Drug Involvement and Substance Misuse security concerns are not mitigated.

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.

To Applicant's credit, she was very candid about her history of marijuana use. She is aware that using marijuana is illegal under Federal law, and she admitted that she is unable to follow federal law since she intends to continue her medicinal use of marijuana. As such, the record evidence leaves me with questions and doubts about her eligibility and suitability 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
Subparagraphs 1.a and 1.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge