



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



In the matter of:)
)
) ISCR Case No. 23-02805
)
Applicant for Security Clearance)

Appearances

For Government: Dan O’Reilly, Esq., Department Counsel
For Applicant: *Pro se*

09/26/2024

Decision

CERVI, Gregg A., Administrative Judge:

This case involves security concerns raised 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 November 3, 2022. On February 1, 2024, the Defense Counterintelligence and Security Agency, Consolidated Adjudication Services (DCSA CAS) (now known as the DCSA Adjudication and Vetting Services (AVS)), sent her a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DCSA CAS acted 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 adjudicative guidelines (AG) promulgated in Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR and requested a decision on the written record without a hearing. Department Counsel submitted the Government’s written case on April

30, 2024. On May 1, 2024, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. She received the FORM on May 8, 2024, but did not submit a response or object to the Government's exhibits. The case was assigned to me on September 9, 2024. The FORM identified the SOR and Applicant's Answer to the SOR as GE 1 and 2. Government Exhibits (GE) 3-5 are admitted into evidence without objection.

Findings of Fact

Applicant is a 38-year-old customer support representative for a non-government employer since 2022. She is sponsored for a security clearance by a defense contractor. Applicant earned an associate degree in 2007. She married in 2013 and has no children. She has never held a security clearance.

The SOR alleges under Guideline H that Applicant used marijuana from 2016 to April 2023. In September 2022, she tested positive for marijuana on a hair follicle drug test administered by her employer. Applicant admitted both allegations.

In her Answer to the SOR, Applicant noted her use of medically prescribed marijuana for post-traumatic stress disorder (PTSD) following her victimization in a 2008 home invasion and kidnapping incident. During a 2022 employer drug test, she provided her medical card and a statement to the test administrator that she was using medical marijuana. She stated that she uses it as prescribed and has never abused it.

In her January 2024 response to Government interrogatories, Applicant admitted using medical cannabis three times per week, from 2016 to April 2023. She noted that she stopped using marijuana in order to obtain a security clearance, she does not associate with persons who use drugs, and she does not frequent places where drugs are used. She purchased marijuana from a dispensary. She also stated that she was diagnosed with PTSD but has not received treatment for it other than a prescription for medical cannabis.

In April 2024, Department Counsel contacted Applicant by email about her past medical marijuana use and informed her that the Government's concern could be mitigated "if you have not used marijuana recently AND if you agree not to use marijuana or any illegal drugs in the future." GE 5. Applicant responded "Based upon this email. It seems as though I am ineligible to obtain security clearance at this time." *Id.* Applicant did not respond to the FORM, which included Department Counsel's email as an exhibit.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The

President has authorized the Secretary of Defense or his designee to grant Applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the Applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the Applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the Applicant that may disqualify the Applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an Applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the facts. 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. Sep. 22, 2005).

An Applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue a security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern 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. 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 guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition); and
- (b) testing positive for an illegal drug.

Applicant has used medicinal marijuana from 2016 to April 2023. She tested positive for marijuana in September 2022 in an employer-administered drug test. She did not stop using marijuana after this test. In her January 2024 response to interrogatories, she indicated that she stopped using marijuana in April 2023. However, when she was subsequently offered the opportunity to confirm her cessation of use and future intent, she equivocated by failing to clearly and convincingly state that she continued to abstain from marijuana use, and that she did not intend to use marijuana in the future. AG ¶¶ 25(a) and (b) apply.

In terms of eligibility for access to classified information, the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), provides that the grant, denial, or revocation of an industrial security clearance is the exclusive province of the Executive Branch of the Federal Government. See also Executive Order 10865. In *Egan*, the Court enunciated the general principle that "the grant of a security clearance to a particular [individual], a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." *Id.* at 527. The Court reasoned that the President's "authority to classify and control access to information flows primarily from this constitutional investment of power in the President [*citing* U.S. Const., Art. II, § 2] and exists quite apart from any explicit congressional grant." *Id.* at 527, *citing Cafeteria Workers v. McElroy*, 367 U.S. 886, 890 (1961). The Court stated further that "the authority to protect [national security] information falls on the President as head of the Executive Branch and as Commander in Chief." *Id.*

State laws cannot override provisions of a Federal national security program under the exclusive auspices of the Executive Branch evaluating the security implications of an individual's conduct. 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 (App. Bd. Feb. 18, 2016). A security clearance adjudication remains a determination that must be made within the confines of the basic premise that use of marijuana remains illegal under Federal law and illegal drug use is inconsistent with holding a security clearance. See ISCR Case No. 20-01772 at 3 (App. Bd. Sep. 14, 2021). Simply put, there is no exception that permits security clearance holders or applicants to use marijuana or any other drug that is illegal under Federal laws, regardless of state laws that may permit such use.

Security clearance-related concerns arising from the legalization or decriminalization of marijuana in a number of states were addressed in an October 25, 2014, memo issued by the Director of National Intelligence (DNI Memo) and reiterated in clarifying guidance issued in 2021. Consistent with the discussion, above, the DNI Memo unequivocally states that "changes 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." The DNI Memo also explicitly states that "under federal law, use of marijuana remains unlawful," and "while several states have decriminalized marijuana or allowed its use for medical or recreational purposes, such use of marijuana remains subject to the applicable disqualifying conditions in the Directive." See *also* ISCR Case No. 16-00258 at 2 (App. Bd. Feb. 23, 2018).

The 2014 DNI Memo confirms that DOHA's administrative judges retain significant latitude and discretion when evaluating an applicant's suitability to hold a security clearance. In terms of possible mitigation of drug use, each case is fact-specific and, "[a]s always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria." The DNI Memo is deferential to the adjudicative process, stating that 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, national security positions." ISCR Case No. 23-01942 at 3-5 (App. Bd. May 20, 2024).

The Adjudicative Guidelines provide conditions that could mitigate security concerns under Guideline H. AG ¶ 26. I have considered all of the mitigating conditions and find none that apply. Federal law prohibits the use of marijuana, regardless of state law. Applicant has a history of using medical marijuana since 2016 with a state-issued medical marijuana permit. She tested positive for marijuana in September 2022. She did not cease her marijuana use after her positive test.

Although Applicant stated that she stopped using marijuana in April 2023 to obtain a security clearance, she has not convincingly indicated that she continued to abstain from marijuana since then. When provided the opportunity in April 2024 to state that she does not currently use marijuana and to commit to discontinued use in the future, she declined. She also declined to respond to the FORM, where she again could have explained or clarified her current status with regard to marijuana use. Additionally, there is no evidence in the record that Applicant has sought counseling or medical assistance to find a substitute for marijuana to treat her PTSD. Finally, even if Applicant discontinued use of marijuana in April 2023, there is insufficient evidence in the record to determine that her drug-use circumstances have changed and to conclude that the risks of recurrence are minimal.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the 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).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guideline H in my whole-person analysis. I considered Applicant's admissions and explanations, along with the state medical marijuana permit and previous indications of abstinence. Applicant was straightforward and honest about her use of medical marijuana and the reasons for its use. However, marijuana remains illegal under federal law and for cleared individuals, and she failed to convincingly indicate that she has ceased all marijuana use and intends to abstain in the future.

Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate her credibility and sincerity based on demeanor. I also did not have the opportunity to question her about the circumstances with regard to her marijuana use and any action she has taken to address it. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003).

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person, including exceptions available under Appendix C of SEAD 4. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the national security interests of the United States to grant her eligibility for access to classified information.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as amended, 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

I conclude that it is not clearly consistent with the national security interest of the United States to grant Applicant's eligibility for access to classified information. Applicant's security clearance is denied.

Gregg A. Cervi
Administrative Judge