



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



In the matter of:)
)
) ISCR Case No. 22-01029
)
Applicant for Security Clearance)

Appearances

For Government: Jenny Bayer, Esq., Department Counsel
For Applicant: Michael T. Pritchard, Esq.

11/25/2024

Decision

HARVEY, Mark, Administrative Judge:

Security concerns arising under Guideline H (drug involvement and substance misuse) are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On August 27, 2021, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SCA). (Government Exhibit (GE) 1) On June 10, 2022, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a statement of reasons (SOR) to Applicant. The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 4)

The SOR detailed reasons why the DCSA CAS did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline H. (HE 4) On

July 27, 2022, Applicant provided a response to the SOR and requested a hearing. (HE 5) On September 13, 2022, Department Counsel was ready to proceed.

On December 1, 2022, the case was assigned to another administrative judge. On December 16, 2022, the parties agreed to schedule Applicant's hearing on February 21, 2023. (Tr. 7) On February 13, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice scheduling her hearing for February 21, 2023. (HE 3) The personal appearance was held as scheduled, using the Microsoft Teams video teleconference system. The Government provided two exhibits and Applicant provided five exhibits, which were admitted without objection. (Tr. 15-19; GE 1-GE 2; Applicant Exhibits (AE) A-AE E) On March 2, 2023, DOHA received the transcript of the hearing. The record was not held open for additional documentation after her hearing. (Tr. 68)

The assigned administrative judge did not complete her decision, and the case was transferred to me on October 16, 2024. I contacted Applicant's counsel and advised him that I would be issuing the decision in Applicant's case. I advised him that Applicant had three options for submission of her case for my decision: (1) submit the file, including transcript and exhibits, with no additional evidence; (2) submit the file, including transcript and exhibits, and add additional documentation; and (3) have a new hearing, which would include the existing file with transcript and exhibits. (Hearing Exhibit (HE) 6) Applicant elected option two, and on November 4, 2024, her counsel submitted one exhibit, which was admitted into evidence. (AE F)

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

In Applicant's SOR response, she admitted in part, and she denied in part, the SOR allegations in ¶¶ 1.a and 1.b. (HE 5) She also provided extenuating and mitigating information. Her admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 45-year-old cyber security engineer or lead who has worked for defense contractors for more than six years. (Tr. 22; GE 1) She has worked for her current employer since March 2022. (Tr. 34) In 2003, she received a bachelor's degree in information systems technology or business administration. (Tr. 19) She worked for various contractors from 2004 to present, and she held a security clearance since 2005. (Tr. 11, 20-22, 43; GE 1) The only security issue relates to her medicinal use of marijuana or cannabis. (Tr. 22)

Drug Involvement and Substance Misuse

Applicant might have used marijuana in high school "maybe once." (Tr. 51-52) She denied that she used marijuana in college. (Tr. 52) She did not use marijuana again until December 2020, and her marijuana use was medicinal. (Tr. 52, 59) Her medical marijuana use in December 2020 did not violate state law. (Tr. 53, 61) She was aware that her marijuana use violated federal law. (Tr. 62)

During the COVID-19 pandemic, Applicant experienced anxiety due to the isolation, and she sought treatment from a therapist from June 2020 to October 2021. (Tr. 23-24; AE C) Her anxiety symptoms included breathing difficulty, faintness, dizziness, anxiety, fear, and inability to eat. (Tr. 35) She did not experience these symptoms at work. (Tr. 35) She received a diagnosis of adjustment disorder. (Tr. 36) She was prescribed medications; however, the side effects made their use impractical or ineffective. (Tr. 23-25, 48)

Applicant's therapist recommended that she try medicinal marijuana. (Tr. 23) A physician prescribed cannabis oil for Applicant. (Tr. 23) With the support of her physician, Applicant applied for and received a certification from the state for medicinal marijuana use on October 26, 2020. (Tr. 25-26; AE A) She received medicinal marijuana from a medical dispensary in the state where she is a resident. (Tr. 26) The bottles of marijuana from the medical dispensary had prescription labels on them. (Tr. 27) She is required to renew her marijuana prescription annually, and she sees her physician for her marijuana prescription on at least an annual basis. (Tr. 40)

In her August 27, 2021 SCA Applicant said, "I use cannabis and cannabis oil everyday as prescribed by my doctor to help with anxiety." (GE 1) According to her SCA, she used cannabis from December 2020 to July 2021. *Id.* In her October 22, 2021 Office of Personnel Management (OPM) personal subject interview (PSI), Applicant said she uses cannabis "a couple of times a week, as prescribed by her doctor to help with anxiety and to prevent panic attacks. [She] currently has a medical marijuana card and [uses marijuana] as needed at home. [She] began use on 12/2020 and usage continues to present." (GE 2 at 2)

At her hearing, Applicant said she uses marijuana "as needed." (Tr. 27) She uses Indica marijuana two or three times a week before going to bed, and Sativa marijuana when she is not working during the day, such as on weekends. (Tr. 27-28, 53-54) Indica marijuana enables her to relax and helps her sleep. (Tr. 29) Sativa marijuana provides an "uplifting effect." (Tr. 41) After December 2020, she inhaled marijuana using a vape; she has never used marijuana recreationally; and she used it at home. (Tr. 28, 41) She has never gone to work while under the influence of marijuana. (Tr. 29) Marijuana use has never affected her work. (Tr. 32) She did not have any adverse side effects from using marijuana. (Tr. 31) Maintenance of her security clearance is more important to her than continuing to use marijuana. (Tr. 32, 42-43)

The marijuana oil Applicant uses has a tetrahydrocannabinol (THC) content of 10 to 18 percent. (Tr. 42) At her hearing, she said she stopped using marijuana and THC oil in July 2022. (Tr. 45, 50, 53) She renewed her marijuana card in case the federal policy against marijuana use changes. (Tr. 46) Her employer has a policy concerning marijuana use; however, she was unaware of whether her employer's policy specifically prohibited medical marijuana use. (Tr. 54, 58) Her rationale for not informing her employer of her marijuana use was that it was after duty hours and medicinal. (Tr. 54)

SOR ¶ 1.a alleges Applicant used THC with varying frequency from about December 2020 to present. (HE 2) SOR ¶ 1.b alleges she intends to continue to use THC

in the future. (HE 2) At her hearing, she said that she used marijuana from December 2020 to July 2022. (Tr. 35) She used therapy, medication, yoga, gardening, and exercise after she stopped using marijuana around July of 2022. (Tr. 36, 56-57, 60, 62) Applicant said that after the summer of 2022, she did not intend to use marijuana in the future. (Tr. 62) She has not informed her facility security officer of her marijuana use. (Tr. 62)

On November 4, 2024, Applicant's Counsel said that after her hearing on February 21, 2023, Applicant made important changes in her life. (AE F) He said:

[Applicant] stopped using medical marijuana in early 2024 and does not intend to use medical marijuana going forward. She made a conscious and dedicated effort to find other ways to manage her anxiety, including meditation, exercise, gardening and use of over the counter medications instead of medical marijuana. Part of her current medication regimen is the use of over the counter hemp/CBD products, however, none of those products contain THC or are otherwise comparable to marijuana.

[Applicant's] commitment to this change is demonstrated by declining to renew her medical marijuana card Moreover, she moved to [another state] in March 2024 and medical marijuana is not legal in [her new state of residence]. By relocating to a state without legalized medical marijuana . . . [Applicant] has demonstrated a sincere and long-term commitment to this new treatment plan for her anxiety. She continues to be employed by [her DOD contractor-employer] in the same position and continues to receive outstanding performance reviews for her work. (AE F)

In the Cannabis Administration and Opportunity Act, some members of the Senate and House of Representatives proposed removing cannabis from the Controlled Substances Act in states that have chosen to legalize medical cannabis. (AE B) If enacted, it would also remove some restrictions on cannabis use for federal employees. *Id.* This bill would also likely trigger a reduction in restrictions on cannabis use for DOD contractors.

Character Evidence

A coworker who has worked with Applicant for five years lauded her diligence, enthusiasm, and strong moral character. (AE D) Applicant is knowledgeable, ethical, dedicated, mature, and committed to her work. *Id.* A federal employee who has worked with her for four years praised Applicant's responsibility, trustworthiness, and conscientious compliance with security rules. (AE E) The character evidence supports approval of her access to classified information. (AE D; AE E)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant’s 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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, these guidelines are applied 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, 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 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 “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-

31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Drug Involvement and Substance Misuse

AG ¶ 24 provides the security concern arising from drug involvement and substance misuse stating:

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.

AG ¶ 25 provides conditions that could raise a security concern and may be disqualifying in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The record establishes AG ¶¶ 25(a) and 25(c). AG ¶ 25(f) is not established because it is unclear whether Applicant’s position when she used THC was a “sensitive position” as contemplated in the Directive. She did not explicitly indicate she used marijuana while having access to classified information. Additional discussion of the disqualifying conditions is in the mitigation section, *infra*.

AG ¶ 26 lists four conditions that could mitigate security concerns:

- (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;
- (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 or misuse is grounds for revocation of national security eligibility;

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

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2, [App. A] ¶ 2(b).

Possession of Schedules I, II, and III controlled substances is a federal criminal offense (Schedule III substances may be possessed with a lawful prescription). Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substance.

The Security Executive Agent (SecEA) promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications as follows:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a "whole-person concept." This requires adjudicators to carefully weigh a number of variables in an individual's life to determine whether that individual's behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the

individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.

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 (Dec. 21, 2021) at 2 (quoted in ISCR Case No. 20-02974 at 3-4 (App. Bd. Feb. 1, 2022)).

Applicant possessed and used marijuana or THC from December 2020 to early 2024. Sometimes her use was three times a week, and sometimes she did not use marijuana for several months. Her decisions to repeatedly possess and use marijuana, especially after her hearing, are an indication she lacks the qualities expected of those with access to national secrets.

Applicant provided some important mitigating information. She voluntarily and candidly disclosed her cannabis use on her SCA, in her OPM PSI, in her SOR response, during her hearing, and in her post-hearing exhibit. Her statements throughout the security clearance process have been credible and consistent. She expressed her intention not to use cannabis in the future.

None of the mitigating conditions fully apply. Based on medical advice, Applicant decided that using cannabis would be beneficial and therapeutic. While cannabis use by federal and non-federal employees has some support in the Congress, the Executive Branch and Congress may not approve future cannabis or marijuana use for security clearance holders or for those employees holding sensitive positions. In any event, security clearance decisions are based on the laws as they exist in the present.

Applicant might conclude in the future that resumption of her use of cannabis is necessary for her health or for other reasons. Use of cannabis raises concerns about her judgment in the context of safeguarding classified information.

I am not convinced Applicant's cannabis use "happened under such circumstances that it is unlikely to recur [and] does not cast doubt on [her] current reliability, trustworthiness, [and] good judgment." A concern remains that she will continue to use marijuana in the future. More time without illegal drug use is necessary to fully mitigate Guideline H security concerns.

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), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline H are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 45-year-old cyber security engineer or lead who has worked for defense contractors for more than six years. In 2003, she received a bachelor's degree in information systems technology or business administration. She worked for various contractors from 2004 to present, and she held a security clearance since 2005. The only security issue relates to her medicinal use of marijuana.

Applicant was honest and candid in her descriptions of her use of marijuana. She provided two written character statements. Their statements support her access to classified information.

The evidence against reinstatement of Applicant's security clearance is more persuasive. Applicant used cannabis, sometimes about three times a week, from December 2020 to early 2024 for medical reasons. She also stopped using cannabis before her hearing, and then she resumed cannabis use after her hearing. Her decisions to repeatedly possess and use cannabis, which is illegal under federal law, are an indication she lacks the qualities expected of those with access to national secrets.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. *See Dorfmont*, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

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. Applicant failed to mitigate drug involvement and substance misuse security concerns.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to be eligible for a security clearance. The determination of an individual's eligibility and suitability for a security clearance is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under her current circumstances, a clearance is not warranted. In the future, she may well demonstrate persuasive evidence of her security worthiness.

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
Subparagraph 1.b:	For Applicant

Conclusion

Considering 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 access to classified information. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge