



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



In the matter of:)
)
) ISCR Case No. 24-00206
)
Applicant for Security Clearance)

Appearances

For Government: Brittany White, Esq., Department Counsel
For Applicant: *Pro se*

10/01/2024

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 15, 2023. On March 11, 2024, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (CAS) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (drug involvement and substance misuse). (Item 1) The CAS issued the SOR under Executive Order 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 Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR on April 22, 2024 and May 15, 2024. In his answers, he elected to have his case decided by an administrative judge of the Defense Office of Hearings and Appeals (DOHA) on the administrative (written) record, instead of a hearing. (Item 2.)

On July 1, 2024, DOHA Department Counsel submitted the Government's file of relevant material (FORM), including documents identified as Items 1 through 5. Applicant received the FORM on July 3, 2024. He was given 30 days from receipt of the FORM to submit materials in response, and to object to the Government's evidence. He did not submit anything further.

On or about August 20, 2024, having received no response from Applicant, the case was forwarded to the DOHA hearing office. The case was assigned to me on September 26, 2024.

Government Items 1 and 2, the SOR and the answer, are the pleadings in the case. Government Items 3 through 5 are admitted without objection.

Findings of Fact

In Applicant's answer to the SOR, he admitted SOR ¶¶ 1.a and 1.b. His admissions are included in the findings of fact. After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact.

Applicant is 31 years old. He has been employed by a government contractor since June 2022. He is unmarried and has no children. (Item 3.)

When he answered questions on his January 2023 SCA about his history of illegal drug use, Applicant disclosed that he purchased and used marijuana. He explained that he was "licensed as an Adult Medical Marijuana patient under [State] Law, beginning in 2022," and that he had not used marijuana recreationally. (Item 3 at 34.) He estimated that his marijuana use extended from June 2002 to October 2022. Further, he indicated that he had "no intent to continue use at this time and no intent to use other drugs or controlled substances." (Item 3 at 35.) Despite that statement, in Applicant's answers to interrogatories dated December 2023, he disclosed that he continued to use marijuana to treat insomnia and anxiety after submitting his SCA, and that he intended to use marijuana in the future. (Item 4.)

Applicant's marijuana use is alleged as SOR ¶ 1.a as a security concern under Guideline H. His stated intention to continue to use marijuana is alleged as SOR ¶ 1.b. In his answer to the SOR, he explained that he intended to continue to use marijuana, "acknowledging this is incongruent with the current Federal position" but that "if this is the only obstacle to obtaining a security clearance in good standing, I'm willing to discontinue use." (Item 2.)

As noted above, Applicant did not respond to the Government's FORM. He offered no additional statements or other evidence that might have been considered in mitigation. He also offered no evidence to corroborate his assertions or establish that he has stopped using marijuana.

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court has 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).

The adjudicative guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines 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 access to classified information 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. 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 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.

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 currently 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). While the Drug Enforcement Agency has proposed to reschedule marijuana to a Schedule III Controlled Substance in the *Schedules of Controlled Substances: Rescheduling of Marijuana*, [89 FR 44597](#) (May 21, 2024), that change is still under review. Until that change is official, marijuana legally remains a Schedule I controlled substance.

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 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 are potentially applicable: AG ¶ 25(a) (any substance misuse (see above definition)); AG ¶ 25(c) (illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia); and AG ¶ 25(g) (expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse). Applicant’s use of marijuana since 2022 establishes AG ¶¶ 25(a) and 25(c).

Applicant has vacillated in his willingness to abstain from future marijuana use. In his January 2023 SCA, Applicant expressed his intent to abstain from marijuana use in the future. In his December 2023 answers to DOHA interrogatories, he expressed his intent to continue to use marijuana for medical reasons. After the issuance of the SOR, he expressed a qualified intent to abstain from marijuana use, only if it was necessary to obtain a security clearance. Given the timing of Applicant’s recent and qualified intent to

abstain, he has failed to “clearly and convincingly commit to discontinue” his marijuana use. AG ¶ 25(g) applies.

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 or isolated. He has engaged in the use of marijuana from 2022 through at least his 2024 answer to the SOR, despite his expressed intent to discontinue marijuana use stated on his SCA. His recent willingness to abstain from marijuana is tied directly to his clearance eligibility and there is no evidence that establishes he has ceased marijuana use since then. 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. The recency of his marijuana 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. Should circumstances change, (i.e., marijuana is rescheduled to a Schedule III controlled substance) and Applicant obtains a prescription to an FDA approved marijuana-based drug, or other legislative changes are made, he should note that he is eligible to reapply for a security clearance one year from the date of this decision.

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:	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.

Jennifer I. Goldstein
Administrative Judge