



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



In the matter of:)
)
) ISCR Case No. 23-02848
)
Applicant for Security Clearance)

Appearances

For Government: William Miller, Esq., Department Counsel
For Applicant: *Pro Se*

11/15/2024

Decision

GOLDSTEIN, Jennifer I., Administrative Judge

Applicant did not mitigate the security concerns under Guideline H, drug involvement and substance misuse, regarding her use of marijuana from February 2018 to at least December 2023. Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on July 11, 2023. On January 30, 2024, 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.

Applicant answered the SOR on February 2, 2024, and requested a hearing before an administrative judge. (Answer) The case was assigned to another administrative judge and then reassigned to me on September 24, 2024. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 2, 2024, scheduling the hearing for October 30, 2024. The hearing was convened as scheduled. The Government offered

Exhibits (GE) 1 and 2, which were admitted without objection. The Government also presented two hearing exhibits (HE) marked HE I and HE II. Applicant testified on her own behalf. The record was left open until close of business October 30, 2024, for receipt of additional documentation. Applicant presented two documents, marked Applicant Exhibit (AE) A and B in a timely manner. Department Counsel had no objections to AE A and AE B, and they were admitted. DOHA received the transcript of the hearing (Tr.) on November 7, 2024.

Findings of Fact

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

Applicant is 36 years old and is married to her second spouse. She has one minor child. She has technical training from a trade school. She currently works as a bartender. (GE 1; Tr. 18)

Applicant first experimented with marijuana in 2015 to help her sleep. Since 2018, she has used medical marijuana to treat insomnia and post-traumatic stress disorder (PTSD). (GE 1; GE 2) It was prescribed by her treating psychiatrist under her state's medical-marijuana laws. She received the marijuana from a state dispensary and used a "pen" to ingest it when needed for sleep. She sometimes used it daily. She documented that she had a medical marijuana card valid for 2.5 ounces of marijuana to be dispensed between February 15, 2018, and February 15, 2019. (Tr. 33; AE 1)

When she answered questions on her March 2022 SCA about her history of illegal drug use, Applicant disclosed that she had a medical marijuana card issued by her state, and that she had used marijuana from February 2018 to February 2019. In January 2023, Applicant continued to pursue a job with a government contractor. In order to apply for the position, she was required to go through a series of tests, including a hair follicle drug test. Knowing this, she stopped using marijuana for three or four months prior to the test. (Tr. 25)

Applicant indicated her intent to discontinue her marijuana use when she submitted her SCA, after she was interviewed by an agent for the Office of Personnel Management (OPM), and after she submitted her answers to interrogatories. (GE 1; GE 2) In her answers to interrogatories, Applicant indicated that she stopped using marijuana "as of 12/19/2023." (GE 2 at 11) Since that statement, she estimated that she has used marijuana three times. Her last used was in September 2024. As of the date of the hearing, she retained marijuana and paraphernalia for her personal use, however, she indicated that she did not intend to use it again. She has not participated in any drug treatment programs. (Tr. 28-34; GE 2 at 7)

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 currently classified as a Schedule I controlled substance, §812(c), based on its high potential for abuse, lack of accepted medical use, and lack of 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 since 2015 with varying frequency since 2018, 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. She engaged in frequent use of marijuana from at least 2018 through 2022, and despite promises to stop using marijuana she continued to use it up through September 2024. Her abstinence is tied to her job eligibility. Her drug involvement is also recent, as she purports it ended about two months ago. The only changed circumstance appears to be her desire to be hired by a government contractor.

Applicant's assertions that she understands that marijuana use is federally illegal, and that illegal drug use is incompatible with holding a security clearance, must be

balanced. against her overall record. The recency of her marijuana use, and the circumstances of her use, 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 her 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.

Jennifer Goldstein
Administrative Judge