



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



In the matter of:)
)
) ISCR Case No. 23-02888
)
Applicant for Security Clearance)

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel,
For Applicant: *Pro se*

03/19/2025

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant failed to mitigate the drug involvement and substance misuse security concern. Eligibility for access to classified information is denied.

Statement of the Case

On December 28, 2023, 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 action was taken 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) implemented by DOD on June 8, 2017.

Applicant submitted a response to the SOR (Answer) on February 4, 2024, and he requested a hearing before an administrative judge. The case was assigned to me on June 6, 2024. The Defense Office of Hearings and Appeals (DOHA) issued a notice on June 26, 2024, scheduling the matter for a video conference hearing on August 27, 2024. I convened the hearing as scheduled.

At the hearing, I admitted in evidence without objection Government Exhibits (GE) 1 and 2. Applicant testified, did not call any witnesses, and submitted documentation I

marked as Applicant Exhibits (AE) A-B and admitted in evidence without objection. Applicant did not request for the record to be kept open for additional documentation and the record closed. I reopened the record for the limited purpose of admitting in evidence, without objection, additional documentation submitted by Applicant on February 13, 2025, that I marked and admitted as AE C. DOHA received the hearing transcript (Tr.) on September 6, 2024.

Findings of Fact

Applicant admitted the sole SOR allegation in his Answer. He is 42 years old, married, and he has three children, ages 12, 10, and 8. He has owned his home in state A since September 2012. (Tr. 26; GE 1)

Applicant graduated from high school in 2001. He attended community college from 2017 to 2018 but did not earn a degree. He also attended a trade school. He served honorably in the U.S. military from June 2001 until he was discharged in June 2005, and he deployed to Iraq twice. He worked as a federal correctional officer from September 2006 to April 2007, and he was granted a security clearance by that U.S. Government agency. He was a stay-at-home father from July 2010 until August 2023. He has since worked as machinist for his employer, a DOD contractor. As of the date of the hearing, he did not hold a DOD security clearance but is sponsored for one by his employer. (Tr. 5-9, 22-31; GE 1-2)

Applicant used marijuana with varying frequency, at times daily, from approximately September 2013 until February 2025, including after he submitted a security clearance application (SCA) on June 9, 2023. He disclosed his marijuana use on his SCA and he discussed it in his October 2023 response to interrogatories. (SOR ¶ 1.a; Tr. 15-16, 22-61; GE 1-2)

When Applicant was discharged from the military in 2005, he received a disability rating from the U.S. Department of Veterans Affairs (VA) of 50% for Post-Traumatic Stress Disorder (PTSD) "and a couple of small ratings for . . . shoulder, back issues . . ." (Tr. 31-32) He appealed that rating in 2008, was sent to a neurologist, and he received a combined rating of 100 percent that is "70 percent [traumatic brain injury] (TBI). 50 percent PTSD, and I believe 50 percent migraines, and a couple of others." (Tr. 32)

Between 2005 and 2013, Applicant sought treatment from the VA but he did not find the various narcotics prescribed to him to be effective. He talked to a few counselors but did not find them helpful because he did feel comfortable discussing his issues with them. In 2013, he obtained a prescription for medical marijuana. He has since abided by state A law, which permits recreational marijuana use, and he has used the medical marijuana that he has purchased from state A dispensaries to manage his PTSD, anxiety, depression, pain from injuries he sustained in combat, to include his TBI. He primarily used marijuana around bedtime, to help him relax and sleep. He stated he has never used marijuana before or during work. He stated he has not abused marijuana and he has never received a drug-related diagnosis. (Tr. 22-24, 33-45, 48-49, 52-53)

Applicant stated that his employer drug tested him in May 2023, as part of the pre-employment process, and although he believed he tested positive for marijuana he was never informed of such. He provided his employer with a copy of his medical marijuana card. He has not since been drug tested by his employer, he does not believe his employer has a drug testing policy, but he is aware that his employer prohibits the use of illegal drugs. He stated that the security clearance process was the first time he was informed that marijuana is a Schedule I drug, it remains federally illegal, any future use might affect his security clearance eligibility, and there were no exceptions for medical marijuana use. (Tr. 15-16, 22-24, 33-49, 51-52; GE 1-2)

Applicant referenced the U.S. Department of Justice, Office of the Deputy Attorney General's August 29, 2013 Memorandum titled, "Guidance Regarding Marijuana Enforcement," as well as the Office of the Attorney General's January 4, 2018 Memorandum titled, "Marijuana Enforcement." He asked for both memoranda to be applied to his usage of marijuana. (Tr. 15-17, 22-24, 47-48; AE A-B)

Although Applicant stated in his SCA and response to interrogatories that he intended to continue to use marijuana, he testified that he would consider abstaining if it meant he could obtain his clearance. (Tr. 44-45, 49-50, 56-61; GE 1-2) He stated he intended to work with his private doctors and VA care providers to find alternative means to manage his PTSD, anxiety, depression, and pain. (Tr. 53-56) On February 13, 2025, he provided a statement of intent to discontinue his use of marijuana. He stated:

I'm writing to you today to inform you of my commitment to discontinue the use marijuana. *I have limited my use strictly to weekends for the past couple of months and I intend to discontinue use entirely.* (emphasis added) I find substantial satisfaction in my career and I wish to pursue advancement that's limited by my current situation. It is an absolute honor to continue to serve my country. I am currently in consideration for a position in research and development, I will do whatever it takes to ensure that I don't jeopardize my future. (AE C)

Applicant received a Combat Action Ribbon for his deployments and he also received a number of awards, to include a Presidential Unit Citation. (Tr. 31-32) His spouse, who was also his caregiver through the VA Caregiver Program, attested to Applicant's use of medical marijuana to manage his PTSD, TBI, and other physical injuries sustained during his military service. She stated she monitors his daily use of marijuana, and he only uses it after returning home from work. She further stated that his use of marijuana has not negatively affected his work performance. (Tr. 56; GE 2)

Policies

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 to be 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, 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 national security eligibility will be resolved in favor of the national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant 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. Section 7 of Exec. Or. 10865 provides that adverse 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* Exec. Or. 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 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 the following applicable conditions that could raise security concerns under AG ¶ 25:

- (a) any substance misuse . . . ; and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant used marijuana with varying frequency, at times daily, from approximately 2013 through February 2025. AG ¶¶ 25(a) and 25(c) apply.

AG ¶ 26 provides the following potentially relevant mitigating conditions:

- (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.

In addition, in October 2014, noting the recent decriminalization of marijuana use in several states and the District of Columbia, the Director of National Intelligence issued a memorandum titled, “Adherence to Federal Laws Prohibiting Marijuana Use,” reminding agency heads that such changes to state marijuana laws do not alter the existing National Security Adjudicative Guidelines and asserting that an individual’s disregard of federal marijuana law remains adjudicatively relevant in national security determinations.

Subsequently in December 2021, however, particularly in response to the increasing number of state and local governments legalizing or decriminalizing marijuana use, the Director of National Intelligence issued “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,” (Clarifying

Guidance) which instructs that “prior recreational marijuana use by an individual may be relevant to adjudications but not determinative,” and reiterates the requirement that agencies utilize the Whole-Person Concept “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.”

Applicants cannot be expected to be constitutional law experts or versed in the concept of Federal supremacy. The ambiguity between state and federal drug laws and the ensuing confusion was addressed by the Clarifying Guidance. Relevant to the topic of notice, the Clarifying Guidance encourages employers “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 [SCA].” Implicit in this guidance is the recognition that the SCA itself no longer puts applicants on notice and that employers should affirmatively be providing notice to prospective employees. The Clarifying Guidance to employers, however, cannot be presumed to have been followed. See ISCR Case No. 23-00476 (App. Bd. May 1, 2024)

Here, Applicant self-reported information about his marijuana use on his SCA, and he discussed it during his response to interrogatories. He maintained he did not truly understand that marijuana, which is federally illegal, would impact his security clearance eligibility and provided no exceptions for medical marijuana use until he underwent the security clearance process. In February 2025, he signed a statement of intent to abstain from marijuana and illegal drug use in the future. AG ¶¶ 26(b)(1), 26(b)(2), and 26(b)(3) apply.

However, Applicant has used marijuana since approximately 2013. Although he provided a statement of intent in February 2025, he noted therein that he continued to use marijuana after his security clearance hearing in August 2024. He had not yet discontinued use after he understood that marijuana was federally illegal and incompatible with holding a security clearance. He has not yet established a pattern of abstinence at this time. His marijuana use did not happen so long ago, was not so infrequent, and did not happen under such circumstances that are unlikely to recur. His drug involvement continues to cast doubt on his current reliability, trustworthiness, and judgment. More time is necessary to establish his future abstinence from marijuana use. AG ¶ 26(a) does not apply and AG ¶ 26(b) does not fully apply.

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 have considered information about Applicant's whole person, to include his combat service. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the drug involvement and substance misuse security concerns.

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

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

Candace Le'i Garcia
Administrative Judge