



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



In the matter of:)
)
Redacted) ISCR Case No. 15-06026
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

03/29/2017

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant has used marijuana since December 2013, and she intends to continue to use marijuana as medically prescribed because alternative treatments for her condition have not been as effective. Marijuana use is illegal under federal law and prohibited by Department of Defense (DOD) policy. Clearance is denied.

Statement of the Case

On May 5, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H, Drug Involvement, and explaining why it was unable to find that it is clearly consistent with the national interest to grant her security clearance eligibility. The DOD CAF took the action under Executive Order 10865 (EO), *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6 (Directive), *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on September 1, 2006.

Applicant responded to the SOR allegations on May 27, 2016. She requested a decision on the written record without a hearing. On June 20, 2016, the Government requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge under ¶ E3.1.7 of the Directive. On July 20, 2016, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On July 22, 2016, I scheduled a hearing for August 9, 2016.

I convened the hearing as scheduled. Two Government exhibits (GEs 1-2) and three Applicant exhibits (AEs A-C) were admitted into evidence without objection. Applicant testified, as reflected in a transcript (Tr.) received on August 18, 2016.

Findings of Fact

The SOR alleges that, as of May 5, 2016, Applicant has used marijuana from approximately December 2013 to present (SOR ¶ 1.a) and that she intends to continue to use marijuana (SOR ¶ 1.b). She admitted the allegations but explained that she uses marijuana under a medical prescription and does not abuse her prescription. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 40-year-old welder with an associate's degree awarded in July 2011. She began working for her employer, a defense contractor, in December 2014. She worked part time in retail from October 2014 to December 2014, after being unemployed for about 2.5 years. She had previously worked in the restaurant industry. She has never held a DOD security clearance. (GE 1.)

Applicant has been married since September 2012. (GE 1.) She has two children: a son now age 23 who is serving in the U.S. military, and a daughter now age 14 who lives with her. (GE 2; Tr. 27-28.)

Applicant was required to submit to a pre-employment drug screen for her employer. On September 13, 2014, she submitted a hair sample, and she informed the collector that she has a medical marijuana card. The drug screen was negative for all substances tested, including marijuana. (AE A.) According to Applicant, she used small amounts of marijuana every day for a couple of months before submitting the hair sample. (Tr. 32.)

On December 5, 2014, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86). Applicant responded affirmatively to an inquiry into whether she had illegally used any drugs or controlled substances in the last seven years. She disclosed that she had used marijuana from December 2013 to November 2014 "DAILY 0-3 TIMES PER DAY." Applicant also answered "Yes" to whether she intends to use the drug in the future and stated, "MEDICAL MARIJUANA IN CBD NOT THC."¹ (GE 1.)

¹ According to the National Center for Complementary and Integrative Health (NCCIH), CBD or cannabidiol is an active cannabinoid which may relieve pain, lower inflammation, and decrease anxiety without causing the "high" of delta-9-THC. See <https://nccih.nih.gov>.

On April 29, 2015, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM) in part about her drug use. Applicant admitted that she uses marijuana daily in quantity totaling a gram every four days. She resides in a state that allows for the use of marijuana when prescribed for medical reasons, and she has a medical marijuana card valid from June 3, 2014, to June 3, 2016. Applicant indicated that she obtains her marijuana legally. She denied ever testing positive for marijuana, including for her current employer, or ever using marijuana at work. She expressed an intention to continue to use marijuana as prescribed for pain. Applicant denied any susceptibility to blackmail or coercion because of her medical marijuana use, which she indicated is known to her spouse, other family members, and her employer. (GE 2.)

Applicant went to see her gastroenterologist in February 2016, who noted that she takes medical marijuana for a chronic medical condition. He advised her to avoid nonsteroidal anti-inflammatory ibuprofen medications. (AE C.) In response to DOHA interrogatories, Applicant admitted that she was still using marijuana as of April 6, 2016. Applicant indicated that the marijuana contains minimal amounts of THC. (GE 2.) A physician at the medical marijuana center confirmed by letter dated May 26, 2016, that Applicant was currently a qualified medical marijuana patient who has been advised by her physician to avoid nonsteroidal anti-inflammatories. (AE B.)

At her hearing in August 2016, Applicant admitted that she had tried marijuana and found that it helped, so she obtained a valid prescription for medical marijuana. She does not now recall the specific circumstances of her first use. (Tr. 34.) She has been using marijuana with some consistency under a valid prescription for medical marijuana. (Tr. 23.) Depending on how she feels, she uses small amounts of marijuana daily to every few days, usually in late afternoon or at night. Marijuana helps alleviate fatigue and other issues related to her medical condition, and she had experienced unpleasant affects from drugs like Naproxen. She expressed a willingness to submit to random drug screens to show that she is not using marijuana to excess. (Tr. 18-20.) Applicant obtains her marijuana, which has a pretty low THC level but a higher "CBD" level, from an authorized provider. (Tr. 25.) She does not intend to cease her use of medical marijuana, even though she understands that it conflicts with federal law. (Tr. 26.)

Applicant has never had any adverse involvement with law enforcement because of her use of marijuana. (Tr. 28.) Her use of marijuana has not negatively impacted her job performance. (Tr. 28-29.) She has never smoked marijuana before reporting for work. (Tr. 29.) Applicant finds that the more physically active she is, the better she feels. Her work as a welder helps, as does jogging, which she significantly increased in 2016. (Tr. 31.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (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 required to be considered 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 overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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 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. 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 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 that the 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. Section 7 of EO 10865 provides that 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement

The security concern for drug involvement is set out in AG ¶ 24:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

Under AG ¶ 24(a), drugs are defined as "mood and behavior altering substances," and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens),² and

(2) inhalants and other similar substances.

Under AG ¶ 24(b), drug abuse is defined as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” Applicant began using marijuana in approximately December 2013. After she tried marijuana illegally with good effect in alleviating symptoms of her chronic medical condition, she obtained a prescription for medical marijuana and used the drug with some consistency to at least August 2016.³ There is no evidence that she has abused her prescription or violated state law by sharing or selling some of the marijuana that she obtained from an authorized provider. However, federal law does not recognize marijuana as having any legitimate medical use. See 21 U.S.C. § 812(B) (defining Schedule I drugs as having a high potential for abuse, no currently accepted medical use in treatment in the United States, and lack accepted safety for use under medical supervision). State laws pertaining to marijuana use do not alter existing national security adjudicative guidelines, and marijuana use remains against DOD policy. Disqualifying condition AG ¶ 25(a), “any drug abuse,” applies. Her possession and purchase of marijuana implicates AG ¶ 25(c), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.” Moreover, because she intends to continue to use marijuana to alleviate her medical symptoms, AG ¶ 25(h), “expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use,” is established.

None of the mitigating conditions under AG ¶ 26 apply. Applicant’s decision to continue to use marijuana, despite knowing that it is against federal law and DOD policy, raises serious doubt about her judgment and willingness to comply with DOD requirements and regulations. AG ¶ 26(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,” cannot reasonably apply. She has not demonstrated an intention to abstain from marijuana, so AG ¶ 26(b) is not established. The drug involvement security concerns are not mitigated.

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 her conduct and

²Schedules 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 drug.

³ Applicant’s medical marijuana card, which was issued on June 3, 2014, was valid for two years. She presented no evidence that she had a valid marijuana card when she first used marijuana in December 2013. Nor did she submit a copy of her current medical marijuana card, which she presumably renewed in June 2016.

all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).⁴

Applicant has been advised by a physician to avoid nonsteroidal anti-inflammatory medications, which have exacerbated rather than alleviated her medical problems. Even though acceptable alternatives to medical marijuana like jogging have provided some relief, she remains committed to medical marijuana. It is well settled that once a security concern arises, there is a strong presumption against the grant or continuation of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). For the reasons discussed, I am not able to find that it is clearly consistent with the national interest to grant Applicant security clearance eligibility.

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

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge

⁴The factors under AG ¶ 2(a) are as follows:

(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.