



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 17-00268
)	
Applicant for Security Clearance)	

Appearances

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

12/20/2017

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used and purchased marijuana from June 2013 to at least August 2017. He was not fully candid about his marijuana use during a September 2016 interview for his background investigation, and he did not self-report his drug use while he possessed a DOD clearance to his facility security office. He has a medical marijuana card and intends to continue to use marijuana on a daily basis. Marijuana use is illegal under federal law and prohibited by Department of Defense (DOD) policy. The drug involvement and personal conduct concerns are not mitigated. Clearance is denied.

Statement of the Case

On April 10, 2017, 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 Guideline E, personal conduct, and explaining why it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action under Executive Order (EO) 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 for Determining Eligibility for Access to Classified Information effective within the DOD on September 1, 2006.

On May 1, 2017, Applicant answered the SOR allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On June 1, 2017, 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.

While this case was pending a hearing, Security Executive Agent Directive 4 was issued establishing National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The AG supersede the adjudicative guidelines implemented in September 2006 and are effective for any adjudication made on or after June 8, 2017.

On June 28, 2017, I scheduled a hearing for August 2, 2017, and advised Applicant that his security clearance eligibility would be adjudicated under the new AG.¹ I convened the hearing as scheduled on August 2, 2017. Three Government exhibits (GEs 1-3) and five Applicant exhibits (AEs A-E) were admitted into evidence without objection. Applicant testified, as reflected in a transcript (Tr.) received on August 10, 2017.

Summary of SOR Allegations

The SOR alleges under Guideline H that Applicant used and purchased marijuana from June 2013 to at least March 2017 (SOR ¶¶ 1.a and 1.b) and that he tested positive for marijuana in a drug urinalysis test administered between June 2015 and September 2015 (SOR ¶ 1.c). The SOR alleges under Guideline H and cross-alleges under Guideline E that Applicant continued to use marijuana after being granted a security clearance on March 13, 2013 (SOR ¶¶ 1.d and 2.a). Additionally, Applicant is alleged under Guideline E to have deliberately failed to disclose his use of marijuana from June 2013 to July 2014 to his facility security office (SOR ¶ 2.b) and to have made false statements about his marijuana use during a personal subject interview on September 16, 2016 (SOR ¶ 2.c). Applicant admitted the allegations without explanation.

Findings of Fact

After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 24-year-old high school graduate with some community college credits. He has never been married. In mid-March 2013, he began working as an assembler for a defense contractor. He was laid off in July 2014 but recalled in October 2015. (GEs 1-2; Tr. 16, 30-31, 37.)

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case.

On February 28, 2013, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86). (GE 1.) He was granted a DOD security clearance on March 13, 2013,² and he started working for his employer a few days later. (GE 2; Tr. 16, 32.)

From June 2013 to October 2014, Applicant used marijuana one to two times every two months to alleviate stress from work and school. He did not use marijuana before reporting to work. He purchased the drug once every two months from random sellers or through a friend. (GE 2; Tr. 42.) Applicant did not disclose his marijuana use to his facility security officer because recreational marijuana use had been decriminalized in his state, and he viewed his use as “something as serious as a parking ticket,” which he was not required to report. (Tr. 33.) He later testified that he knew that his drug use at that time was illegal under federal law, but the drug helped him with his back pain. (Tr. 42.)

While unemployed following his layoff in July 2014, Applicant attended a cannabis convention in August or September 2014, where he learned that he could obtain a medical marijuana card to use the drug legally for joint pain. (GE 2; Tr. 33-34.) Applicant has a stable benign brain tumor that has been medically monitored since approximately July 2007. He also has a congenital disability of his left side that causes him chronic back pain. (AEs A-B, Tr. 41.) On March 16, 2015, Applicant was evaluated by a medical provider, who approved him for a medical marijuana card.³ (AE C.) After obtaining his medical marijuana card, Applicant used cannabis in varying forms. He smoked marijuana once or twice daily, used a topical cream every two to three days, and ingested marijuana in edibles once every two to three weeks. (GE 2.) Marijuana was easier to obtain with the card. Previously, he had to go to a street corner looking for the drug. (Tr. 44.)

From June 2015 to September 2015, Applicant worked as a material handler for a technology company. The SOR alleges that Applicant tested positive for cannabis in a urinalysis administered to him sometime between June 2015 and September 2015, apparently based on his admission of a positive drug screen during his September 2016 interview with an Office of Personnel Management (OPM) investigator. (GE 2.) At his hearing, Applicant testified discrepantly that he assumed but was never informed that he had tested positive in the drug screen. (Tr. 36.)

² Applicant indicated during his subject interview of September 16, 2016, that he held a DOD confidential clearance during his employment with the defense contractor from March 2013 to July 2014. (GE 2.) At his hearing, he was asked to confirm whether he was granted a DOD secret clearance on March 13, 2013, and he responded affirmatively. (Tr. 32.)

³ AE C, which includes a medical record of an office visit of March 16, 2015, tends to indicate that medical marijuana was first approved by the physician on that date. It states in part:

The patient has been advised that they may benefit from the medical use of cannabis. Education has been given to patient's satisfaction, including risks and benefits of the medical use of cannabis. Patient will be added to the DPH online registry and will receive an email on the next steps they need to take.

That same medical record also states, “Patient understood Patient will be provided with a six-month certification [and] will follow up in six months sooner if needed”

Applicant informed his current employer's facility security officer (FSO) that he held a medical marijuana card when he was recalled to work in October 2015 for a material-handler position. (GE 2; Tr. 30, 37.) He did not inform his FSO about his drug use that occurred while he was working for the company and held a security clearance in 2013 and 2014.

On September 16, 2016, Applicant was interviewed by an authorized investigator for the OPM primarily to discuss his prescription for a medical marijuana card. When first asked about any illegal drug use in the last seven years, Applicant reported that he had obtained a medical marijuana card in approximately October 2014. He denied any illegal drug use other than with his medical marijuana card. After being reminded that he was under oath and required to tell the truth under Title 18, Section 1001 of the United States Code, and after he was asked four times about any illegal drug use in the last seven years, Applicant responded that he used marijuana once before he obtained his medical marijuana card. The investigator questioned Applicant three or four more times about his use of drugs without a medical marijuana card before Applicant disclosed that he used marijuana one to two times every two months from June 2013 to October 2014. Applicant explained that he obtained his medical marijuana card so that he could use marijuana free from police intervention and because of his left side hemiparesis.⁴ Applicant indicated that he informed his employer's FSO about his medical marijuana card during the first day of orientation in October 2015. Applicant indicated that he did not inform the FSO about his illegal drug use in 2013 and 2014 because he believes marijuana should be legal, and he did not think he had to report off-duty activity. Applicant later acknowledged that he was nervous that his illegal drug use would affect his job with the defense contractor. Applicant admitted that since obtaining his medical marijuana card, he has continued to smoke marijuana in a bowl or joint once or twice a day at night. He used marijuana with a friend at the friend's house at times until the summer of 2015, but he and that friend had grown apart. Applicant denied any dependency on marijuana or any adverse effect on his work because of his drug use. Applicant informed the OPM investigator that he had tested positive for marijuana during his previous employment in 2015, but also that he had informed the company that he held a medical marijuana card. Applicant admitted that he had illegally used marijuana while holding a DOD security clearance, reportedly at the confidential level, during his previous tenure with the company. (GE 2.)

In response to DOHA interrogatories, Applicant indicated on March 1, 2017, that he was using marijuana currently on a regular basis at night. (GE 3.) On April 14, 2017, Applicant was medically recertified until April 13, 2018, for medical marijuana for "Hemiparesis Chronic Back Pain." (AE C.) As of early August 2017, Applicant was still using marijuana once or twice a day with occasional application of creams and ingestion of edibles containing marijuana, as follows:

⁴ Concerning his reason for obtaining a medical marijuana card so that he could use marijuana without worrying about police intervention, Applicant testified, "What I meant to say was that I was using medical weed and I wanted to not worry about the medicine that I'm using." (Tr. 34.)

I usually just do a bowl pack. Usually a bowl pack helps. Then on weekends I might do a brownie which is easier because eating for me is a lot easier than smoking it. But I don't do that during the day because [sic] can last until the morning and even afterwards. Smoking by the time I wake up I'm not high anymore. I do use creams but cream doesn't get me high. It's just a cream and it alleviates the pain but it doesn't get me high. (Tr. 47-48.)

Applicant intends to continue to use marijuana daily despite being advised that it is against federal law. (Tr. 37-38, 45.) Marijuana alleviates his pain. He has never tried other analgesic prescription medications because he has heard that they are severely addictive. (Tr. 43-44.) However, when asked if he intended to continue to use marijuana knowing that it could cost him his clearance, Applicant responded that if could keep his job, he would definitely look for alternatives. He recently obtained a new medical provider. (Tr. 45-47.) On August 1, 2017, the medical provider recommended aqua therapy. (AE A.) Applicant does not consider himself a threat to security. He is only trying to do his job for the defense contractor to the best of his ability. (Tr. 49-50.) Concerning his initial reluctance to acknowledge the full extent of his illegal drug use to the OPM investigator, Applicant now asserts that he felt intimidated by the investigator, was scared, and felt out of place. (Tr. 40.)

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(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. 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 about 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 and Substance Misuse

The security concerns about drug involvement and substance misuse are set forth 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.

Applicant began using and purchasing marijuana⁵ in June 2013. He held a DOD security clearance at the time. He used marijuana once or twice every two months with a friend or at home until he obtained a medical marijuana card. While he claimed that he was certified for his state’s medical marijuana program in approximately October 2014, available medical record information suggests that he first received his medical marijuana card in March 2015. With marijuana easier to acquire with a medical marijuana card, he

⁵ 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 drug. Despite some states providing for medical marijuana use or the decriminalization or legalization of recreational use of minor amounts of the drug, marijuana remains a Schedule I controlled substance under federal law. Such drugs have a high potential for abuse, no currently accepted medical use in treatment in the United States, and lack accepted safety for using the drug under medical supervision.

began using it daily. As of his hearing in August 2017, Applicant was still using marijuana on a daily basis, and he intended to continue to use marijuana in the future. Four disqualifying conditions under AG ¶ 25 apply:

- (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;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant indicated during his subject interview in September 2016 that he had tested positive for marijuana in a drug screen administered by his then employer between June 2015 and September 2015, and he did not deny a positive drug result when he answered the SOR. At his hearing, he testified that he took a drug screen, which he assumed was positive for marijuana. However, he was not told of the result, and there is no confirmation of a positive drug screen. The evidence is inconclusive on whether AG ¶ 25(b), “testing positive for an illegal drug,” applies.

None of the mitigating conditions under AG ¶ 26 are established. Applicant’s decision to continue to use marijuana, after being reminded that it is against federal law and clearance obligations, raises serious doubts about his judgment and willingness to comply with DOD requirements and regulations. While Applicant testified that he would seek alternatives to marijuana if he is allowed to retain his security clearance, such a conditional willingness to abstain falls considerably short of establishing the reform required. Applicant cannot satisfy AG ¶ 26(b) as long as he intends to continue to use marijuana. AG ¶ 26(b) provides:

- (b) the individual acknowledges his or 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 illegal drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Although Applicant denies any dependency on marijuana, he appears to enjoy getting high from the drug. He testified that topical creams alleviate his pain. When asked why he does not then use the cream more often in lieu of smoking marijuana, he indicated that smoking is a lot stronger. He has made little effort to find alternative treatments for pain. All indications are that his marijuana use is likely to continue.

Guideline E: Personal Conduct

The concerns about personal conduct are set forth in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

Concerning the Government's case for disqualification under the personal conduct guideline because of Applicant's marijuana use while he held an active security clearance (SOR ¶ 2.a), the Appeal Board has held that security-related conduct can be considered under more than one guideline, and in an appropriate case, be given independent weight under each. See ISCR Case No. 11-06672 (App. Bd. Jul. 2, 2012). Applicant exercised "questionable judgment" within the general security concerns set forth in AG ¶ 15 when he used and purchased marijuana illegally while holding a secret clearance. Separate from the risk of physiological impairment associated with the use of a mood-altering substance, which is a Guideline H concern, Applicant had an obligation as a clearance holder to comply with the DOD's and his employer's policies prohibiting illegal drug use. AG ¶ 16(d) provides:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself of an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(3) a pattern of dishonesty or rule violations.

Applicant testified that he did not think his marijuana use was serious, given that recreational marijuana use had been decriminalized in his state. However, he admitted at his hearing that he knew his marijuana use was illegal under federal law. He lied several times about his marijuana use during his OPM interview, and he did not report his marijuana use without a medical marijuana card to his FSO because he was concerned that it could affect his defense-contractor employment. While he may not have understood

that state laws permitting medical marijuana do not alter existing national security guidelines concerning marijuana use, Applicant understood that his use of marijuana before he obtained his medical marijuana card was inconsistent with his security clearance and defense-contractor employment. Applicant's false denials of any illegal drug use and then of any illegal drug use beyond one time before he obtained his medical marijuana card implicate AG ¶ 16(b):

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

As a clearance holder, Applicant had a duty to self-report adverse information accurately to security officials. His intentional concealment of his marijuana use from his FSO implicates AG ¶ 16(e), which states:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant eventually detailed his marijuana use and purchases between June 2013 and October 2014 during his September 2016 interview, but his rectification came too late to qualify for mitigation under AG ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." When asked whether he had engaged in any illegal drug use other than with his medical marijuana card, Applicant denied any drug use. After then being reminded of his obligation to tell the truth under Title 18, Section 1001 of the United States Code, he persisted in claiming that he had used marijuana only one time. Applicant had to be asked three or four more times about his marijuana use before he was forthcoming with the details. His repeated lack of candor during his September 2016 subject interview is too recent for mitigation under AG ¶ 17(c), "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." Deliberate false statements of facts relevant and material to a DOD security clearance background investigator are clearly serious, for they undermine the very integrity of the security clearance process. The Government must be able to rely on the representations of those persons entrusted with access to classified information. AG ¶ 17(c) cannot reasonably apply. It provides:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely

to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Applicant exhibited some reform under AG ¶ 17(d) by eventually disclosing in detail his marijuana use and purchases to the OPM investigator. AG ¶ 17(d) provides:

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factor that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

However, Applicant undermines his case in reform of the drug use while possessing a security clearance by continuing to use marijuana on a daily basis in contravention of DOD policy and federal law. He appears unwilling to conform his behavior to DOD requirements. Moreover, he has not completely mitigated the trustworthiness concerns when he blames nervousness and feeling intimidated for his repeated falsifications to the OPM investigator, and he has yet to report his drug use to his FSO. Concerns persist about his personal conduct.

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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(d).⁶ In making the overall commonsense determination required under AG ¶ 2(c), Applicant's youth likely played a role in his use of marijuana while he held a security clearance in 2013 and 2014. His chronic pain is a factor outside of his control that led him to obtain a medical marijuana card sometime between October 2014 and March 2015. Even so, Applicant's decision to continue to use marijuana against federal law is inconsistent with the sound judgment and reliability that must be demanded of persons with access to classified information or classified areas. Applicant clearly enjoys the effect of smoking marijuana. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). The Government must be able to rely on those persons holding security clearance eligibility to fulfill their responsibilities consistent with laws, regulations, and policies, and without regard to their personal interests. For the reasons discussed, Applicant has raised considerable

⁶ The factors under AG ¶ 2(d) 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.

doubt in that regard to where I am unable to conclude that it is clearly consistent with the national interest to grant or continue his 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
Subparagraphs 1.a-1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.c:	Against Applicant

Conclusion

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

Elizabeth M. Matchinski
Administrative Judge