



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



In the matter of:

Appearances

For Government: Andre Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

02/05/2025

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant mitigated the security concerns under Guideline H (drug involvement and substance misuse) regarding his past recreational and medicinal use of marijuana. Applicant's eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 12, 2022. On February 22, 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). 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 8, 2024. He did not attach any documents to his Answer. He requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. (Answer)

On November 15, 2024, the case was assigned to me. On November 25, 2024, DOHA issued a notice scheduling a hearing for January 9, 2025. The hearing was postponed by one day, due to the closure of the Federal government for the funeral of President Carter. The hearing proceeded as scheduled on January 10, 2025. The Government proffered three exhibits, which I admitted as Government Exhibits (GE) 1 through 3 without objection. Applicant testified and proffered four exhibits, which I admitted as Applicant Exhibits (AE) A through D, without objection. At Applicant's request, I held the record open until January 17, 2025, to provide him an opportunity to supplement the evidentiary record. Applicant submitted AE E through G, which I admitted without objection. DOHA received the hearing transcript (Tr.) on January 17, 2025.

Findings of Fact

In Applicant's answer to the SOR, he admitted SOR ¶¶ 1.a through 1.c in response to the alleged security concerns under Guideline H. The SOR alleged that Applicant used marijuana between January 2015 and August 2022 in ¶ 1.a; that he used and purchased marijuana from November 2020 to August 2022 while holding a sensitive position in ¶ 1.b; and that in September 2021, he tested positive for tetrahydrocannabinol (THC) on a preemployment drug screening. 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 27 years old. He graduated high school in 2016. He served on active duty in the U.S. military from September 2016 to February 2020. He was released from active duty under honorable conditions on January 29, 2020. His DD Form 214 reflects that he "completed his first full term of service" but was "subject to active-duty recall, muster duty, and/or annual screening." (AE E) As a member of the individual ready reserve (IRR), Applicant had no drill requirements and was not attached to any command or duty station. He surmised that his obligation to the IRR ended in June 2024 when his military identification expired. He has had no contact from the military about reserve obligations since his discharge from active duty in February 2000. He has been employed by a government contractor since March 2023 as a biomedical technician. (Tr. 20, 25-29, 38)

Applicant has used marijuana containing THC with varying frequencies and circumstances. From January 2015 to May 2016, he used marijuana while in high school. In June 2016, he submitted a security clearance application he completed prior to joining the military. He disclosed he had experimented with marijuana as a senior in high school. (GE 1) He obtained a secret security clearance while serving in the military, however, he

testified credibly that he was unaware that he had a clearance. In his 2022 security clearance application, he acknowledged that he had a DoD background investigation, but he listed the level of clearance as "None." He abstained from marijuana use from May 2016 through February 2020 while he served in the military. He understood that marijuana use was not permitted while serving in the military. He was subject to random urinalysis tests and always tested negative. (Tr. 23-30)

Nine months after he was discharged from active duty, Applicant obtained a medical marijuana card issued by his state. He was experiencing severe headaches and tinnitus, related to his military service. He tried over-the-counter drugs like Tylenol and ibuprofen, but it did not help. He then tried medical marijuana. He would purchase an eighth of a gram approximately every two weeks and use it when he had a headache. He approximated that he used it three times per week from November 2020 to August 2022. He thought it highly unlikely that he would be recalled back to active duty and was not aware that he had been granted a security clearance. (Tr. 30-33; AE C)

In August 2021, Applicant applied for a job as a technician at a medical care facility. As part of the preemployment qualifications, Applicant took a urinalysis to test for drug use. He explained prior to the test that he would test positive for THC because he was a medical marijuana user. The employer explained that as long as he had a medical marijuana card the positive drug test would not affect his employment. He reported testing positive but the positive test did not affect his employment. (Tr. 36-38)

Applicant inactivated his medical marijuana card in August 2022. He stopped using marijuana because he was hoping to get a security clearance. He also wanted to obtain a concealed carry firearms permit from his state and knew that drug use was inconsistent with that permit. In August 2022, Applicant was asked to complete a security clearance application. He did not list his marijuana use from November 2020 through August 2022, because he thought he was legally using it according to his state's laws. However, he listed his illegal use while in high school. He voluntarily disclosed his medicinal marijuana use to the background investigator. He later learned that he had a secret clearance while serving on active duty. He now receives treatment through the Department of Veterans Affairs (VA) for his headaches. They prescribe him medication and resources to help mitigate his pain. He is rated at 70% disabled. (Tr. 33-38, 42-44; GE 2, GE 3; AE A, AE D, AE F)

Applicant does not associate with anyone that uses illegal drugs. He now understands the difference between state and federal laws. He has obtained his firearms license and knows that use of illegal drugs could cause him to lose it. He presented a urinalysis dated January 2025 that was negative for all illegal substances. He also signed a statement of intent indicating he would not use marijuana again and acknowledged that future use could be grounds for automatic revocation of national security eligibility. (Tr. 42-44; GE 3; AE B, AE G)

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.

AG ¶ 25 provides conditions that could raise a security concern and may be disqualifying in this case: “(a) any substance misuse (see above definition)”; “(c) illegal possession of a controlled substance . . .”; and “(f) any illegal drug use while...holding a sensitive position.” The record and Applicant’s admissions establish AG ¶¶ 25(a), 25(c), and 25(f).

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.

Applicant used marijuana recreationally from January 2015 to May 2016 and medicinally from November 2020 to August 2022. He resumed marijuana use after his 2020 honorable discharge from active duty because he did not understand his IRR obligation. Further, he was unaware that he held security clearance eligibility even while he was on active duty. He applied for the clearance while he was still in high school as part of his processing into the military and his claim about his lack of knowledge of his

clearance was sincere. Since August 2022, he has matured, started a promising career with his current employer, and is receiving prescription medication to manage his headaches from the VA. He provided a signed statement of intent to abstain from all drug involvement and substance misuse, and he acknowledged that any future involvement or misuse is grounds for revocation of national security eligibility. He does not associate with drug users or go anywhere where illegal substances are used. He documented his commitment to abstain with a recent negative urinalysis. I am convinced his marijuana possession and use “happened under such circumstances that it is unlikely to recur [and] does not cast doubt on [his] current reliability, trustworthiness, [and] good judgment.” Guideline H security concerns are mitigated. AG ¶¶ 26(a) and 26(b) 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. Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility for a security clearance.

I have found Applicant's accounting sincere. The differing Federal and state laws concerning marijuana can be confusing. He is now educated about the difference between state laws and Federal laws. He can be trusted to abide by the law. I have carefully applied the law, as set forth in Egan, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant has mitigated 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: **FOR APPLICANT**

Subparagraphs 1.a-1.c: For Applicant

Conclusion

Considering all of the circumstances, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

Jennifer I. Goldstein
Administrative Judge