



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



Appearances

For Government: John G. Hannink, Esq., Department Counsel,
For Applicant: *Pro se*

03/06/2025

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant did not mitigate the drug involvement and substance misuse security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On August 31, 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 September 15, 2023, and she requested a hearing before an administrative judge. The case was assigned to me on April 1, 2024. The Defense Office of Hearings and Appeals (DOHA) issued a notice on April 8, 2024, scheduling the matter for a video conference hearing on May 8, 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-G and admitted in evidence without objection. At Applicant's request, I kept the record open until May 22, 2024, to enable her the opportunity to submit additional documents. By that date, she submitted documentation that I marked as AE H and admitted in evidence without objection. DOHA received the hearing transcript (Tr.) on May 20, 2024.

Findings of Fact

Applicant admitted the sole SOR allegation in her Answer. She is 51 years old. She earned a bachelor's degree in 1996. She married in 1996, divorced in 2004, and remarried in 2017. She has an adult stepchild. She has worked as a self-employed writer since 1996. She also worked for non-defense contractors from 2004 to 2013 and briefly in 2021. She has never held a security clearance. In June 2021, she received an offer of employment in a customer service position from a defense contractor contingent on obtaining a security clearance. She resides in state A, in the home she has owned since May 2010. (Tr. 5-9, 32-39, 65, 78-79, 82; GE 1; AE G)

Applicant used marijuana with varying frequency from about January 1986 to September 2023. She disclosed information regarding her marijuana use on her September 2022 security clearance application (SCA), during her October 2022 background interview, and in her August 2023 response to interrogatories. She first used marijuana in 1986, at age 12, when a sibling 11 years her senior introduced her to it to ensure she understood the consequences of using marijuana. She recalled next using it at age 13, with the same sibling. She continued to use it sporadically with the same sibling until age 15, when she began using it with friends through age 17. She did not purchase marijuana during this time, as someone else usually obtained it. At age 17, she began using it more frequently, sometimes alone, and she began to purchase it for her personal use from a friend of a friend. (SOR ¶ 1.a; Tr. 24-26, 39-40, 53-65, 71-77; GE 1-2)

In college at age 18, Applicant used marijuana daily. She used it primarily alone, to relax at night and fall asleep. She continued to use it daily for insomnia and to manage pain related to a chronic disorder. She liked it, it relaxed her, relieved some of her pain, and helped her sleep. She used it primarily alone at home, but she also used it with others at social gatherings. She stated in her SCA and response to interrogatories she never used marijuana during work or when she needed to drive, and she was not addicted to it. She also stated in her response to interrogatories she has been to social functions where marijuana and other drugs are likely being used, and she probably associates with people who use illegal substances. She testified her spouse, sisters, and father are aware of her marijuana use. (Tr. 24-26, 39-40, 53-65, 72, 78-79, 88-90; GE 1-2)

When Applicant first began purchasing marijuana, she spent approximately \$150 to \$200 for a quarter to half an ounce of marijuana around monthly. In college, she spent at most \$300 for one ounce of marijuana approximately monthly. In approximately 2020 or 2021, she began purchasing marijuana for her personal use from a medical dispensary in state B, where marijuana is legal, because it was more convenient and less costly. She indicated during her background interview she did not have a medical marijuana card, she used marijuana illegally in state A where she resides, and she was aware marijuana

is illegal in state A and federally. At the hearing, she testified she became aware that marijuana is federally illegal around the time she completed her SCA. Up until then, she believed federal law “had like qualifiers, or you could use [marijuana] medicinally.” (Tr. 65) She acknowledged she continued to use marijuana until September 2023, despite becoming aware around the time she completed her SCA that marijuana was federally illegal. (Tr. 24-26, 44-45, 61-71, 79, 83-88, 94-98; GE 1-2; AE B-D)

Applicant marked “Yes” to the question in Section 23 of her SCA that asked whether she intended to use marijuana in the future. She stated therein, “If allowed, I will continue. I am willing to quit if it is a condition of employment.” (Tr. 40-41; GE 1) During her background interview and in her response to interrogatories, she stated she would immediately stop using marijuana because of her new job, and she had no intent to use illegal drugs in the future. (Tr. 41-44; GE 2)

Applicant stated in her SCA, during her background interview, and in her response to interrogatories that she quit marijuana use several times. She stated in her SCA, “I smoked only rarely while married to a cop. He had knowledge, but I kept him away from it.” (GE 1) She testified at the hearing, “In 1996, I married a police officer, and I did not smoke at all during our eight-year marriage because if I can’t, I don’t.” (Tr. 28) She later testified, “As far as my former husband is concerned, I think in the eight years we were together, I smoked four times maybe.” (Tr. 41) She continued, “And especially when I lived in Florida and when I went home to visit my sisters and he was in Florida and didn’t know about it, I did -- I did smoke. I misspoke when I said that I didn’t.” (Tr. 41)

Applicant also testified that when she was suffering from health issues, “[i]n 2012, I quit smoking tobacco, and due to the association with smoking marijuana, I quit again easily until roughly 2016.” (Tr. 30) After she received the employment offer from a defense contractor in June 2021, she continued to use marijuana when she believed the offer was no longer valid. She also enjoyed using marijuana. She purchased marijuana the day before meeting with her recruiter in October 2022 and learning that the offer was still active, and she continued to purchase and use marijuana until mid-December 2022. She stated she did not use marijuana until March 2023, after there was a fire in half of her new kitchen. She used it “for a few more months and then quit again.” (Tr. 26) She used marijuana during this period because her pain, anxiety, depression, and nausea worsened, and “there was no word about the job.” (Tr. 73-74, 77; GE 2) She stopped using marijuana in July 2023 “after speaking with the recruiter” and decided to stop using illegal substances because it is a requirement for her job. (Tr. 71-77; GE 2)

Although Applicant stated in her response to interrogatories she last purchased marijuana from a dispensary in July 2023, she testified her last purchase of marijuana was in August 2023. She stated, “And that probably lasted about, I don’t -- I don’t remember what I bought at that point. But it usually lasted two or three weeks. And then once it was done, I stopped again.” (Tr. 46) She attributed her “sporadic” use of marijuana in August 2023 “more due to circumstances than it was to pain” and “my anxiety was so bad that I said I don’t care, I’m going to smoke, I don’t care. And that was the last time.” (Tr. 45-46) She then stated she last used marijuana in September 2023. (Tr. 24-26, 28, 31, 41-44, 52-53, 61, 71-77, 80-81; GE 1-2; AE H) She testified she does not need

marijuana and, "If I can't, I don't." (Tr. 25-26, 28, 31, 53) She testified she did not definitively stop using marijuana earlier, "Because I thought I had time. I thought I didn't have to stop until I started working." (Tr. 81-82) She also testified she did not understand the severity of her marijuana use and its impact on her security clearance eligibility and her prospective employment until she spoke with Department Counsel around the time she responded to the Government's interrogatories in August 2023. (Tr. 41-42, 70-71, 93-96; GE 2).

Applicant also referenced the December 21, 2021, Director of National Intelligence Security Executive Agent 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) in her May 9, 2024, letter. (Tr. 24; AE E, H) She stated:

I argue that my misunderstandings were the result of 2 and a half years of no contact or explanation from anyone at . . . (except a recruiter who had no information on the progress) was both frustrating and interpretable as failure to receive a denial in the mail (because I also wasn't informed whether the denial would come via US Mail or email). The actual adjudication process was never fully explained to me, and I was not informed to cease marijuana use immediately upon the beginning of the vetting process. (AE H)

In an April 21, 2024, affidavit, Applicant stated, "I, [Applicant] have ceased all marijuana use and will continue to do so as [sic] long as I maintain security clearance. Additionally, I have disposed of all paraphernalia associated with marijuana use." (AE F) She testified she disposed of all marijuana-related paraphernalia when she stopped smoking marijuana. (Tr. 30-31, 44, 90-94) In her May 2024 letter, she also stated, "I am offering this statement of intent to refrain from marijuana use going forward." (AE H) She further stated, "I will abstain from any drug use in the future and remove myself from situations where cannabis is being used. I am not a security risk." (AE H) She maintained, "I have no association with drug dealers, and contact with users is limited. I can walk away if I need to." (Tr. 52-53, 63-64, 79-80; AE H) She did not explicitly state, in either her April 2024 Affidavit or her May 2024 letter, that her failure to abstain from all drug involvement and substance misuse would result in the revocation of her clearance. (Tr. 91; AE F, H) However, she referenced the attestation of intent discussed in the Clarifying Guidance in her May 2024 letter and noted, "This is that attestation." (Tr. 100-101; AE H)

Applicant testified at the hearing:

Well, as I stated in my affidavit, I have quit. I intend to stay like that for as long as I am employed or as long as I have security clearance. In the future, I can't tell you one way or another. But I will not smoke while I am a government employee. (Tr. 40-41)

Applicant stated she understood marijuana use is incompatible with holding a security clearance. She stated she was taking medication to manage her anxiety,

insomnia, pain from her chronic disorder, and her mental health. She was also seeing a chiropractor, exercising, and meditating. She was not subject to pre-employment drug testing by her prospective employer, and she was unaware whether she would be subject to random drug testing by her prospective employer. She did not believe she would be subject to drug testing until she commenced working. She acknowledged she stopped using marijuana around the times she was offered employment and understood the offer remained valid, and self-administered drug tests to ensure she tested negative, on the chance she might be drug tested by her prospective employer. (Tr. 43, 46-53, 72, 90-94; GE 1-2)

Applicant cited to her performance at her previous places of employment, to include at a family-owned dry cleaners, a horse racing track, as a student advisor at her college, as an overnight residential counselor at a children's home, and as an administrative assistant for a medical equipment company, and to her church involvement, as indicators of her honesty, reliability, trustworthiness, and judgment. She asked for them to be factored into her "whole person" analysis, as instructed by the Clarifying Guidance. (Tr. 26-31; AE E) Two individuals, with whom Applicant worked from 1994 to 1996 as a teller at the horse racing track referenced above, stated that Applicant "handled large amounts of cash at a fast pace" and described her as an exemplary employee. (Tr. 26-31, 33-34; AE A, E)

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 from approximately January 1986 through September 2023. 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 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 the 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 SecEA's 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 her marijuana use on her SCA, during her background interview, and in her response to interrogatories. She stated she does not associate with individuals who use illegal drugs. Although she understood that marijuana was illegal in the state in which she resides, she maintained she did not truly understand that marijuana was federally illegal and would impact her security clearance eligibility until approximately August 2023. In April 2024 and May 2024, she 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 daily since approximately age 18, she last purchased marijuana in August 2023, and she last used marijuana in September 2023, after she understood that marijuana was federally illegal. She has not yet established a pattern of abstinence, especially considering her previous efforts to abstain from marijuana use. Her marijuana use did not happen so long ago, was not so infrequent, and did not happen under such circumstances that are unlikely to recur. Her drug involvement continues to cast doubt about her current reliability, trustworthiness, and judgment. More time is necessary to establish her 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 her performance at her previous places of employment. 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