



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



In the matter of: )  
 )  
 [Name Redacted] ) ISCR Case No. 18-00682  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Rhett E. Petcher, Esq., Department Counsel  
For Applicant: *Pro se*

03/13/2019

**Decision**

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used marijuana from November 2012 to at least December 2017. He purchased marijuana from 2012 through at least September 2016. He denies any intention of using marijuana in the future, but he continues to associate with friends who use marijuana, including at times in his presence. The risk of Applicant using marijuana in the future cannot be discounted. Clearance is denied.

**Statement of the Case**

On May 23, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct, which explained 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 National Security Adjudicative Guidelines (AG) effective June 8, 2017, to all adjudications for national security eligibility or eligibility to hold a sensitive position.

On June 11, 2018, Applicant answered the SOR allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On July 18, 2018, 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 August 6, 2018, I scheduled a hearing for September 17, 2018.

Applicant failed to show for his hearing. On subsequent contact with Applicant, he indicated that he had not received the notice scheduling the hearing. He explained that he had moved, but also that he had failed to inform the DOD of his current address. On September 26, 2018, I notified Applicant that I would not default him for failure to appear under the circumstances and that his hearing would be heard on a date yet to be determined.

On January 15, 2019, I scheduled a hearing for February 12, 2019. With the agreement of the parties, on February 6, 2019, I issued an Amended Notice of Hearing changing the start time for the hearing. At the hearing on February 12, 2019, two Government exhibits (GEs 1-2) were admitted into evidence. A June 25, 2018 letter forwarding discovery of the GEs and a list of the Government exhibits were incorporated in the record as hearing exhibits (HE I-II), but not admitted as evidence. Applicant testified, as reflected in a transcript (Tr.) received on February 27, 2019.

### **Findings of Fact**

Applicant is alleged under Guideline H (SOR ¶ 1.a) and cross-alleged under Guideline E (SOR ¶ 2.a) to have used marijuana with varying frequency from approximately November 2012 to at least December 2017, and to have purchased marijuana with varying frequency from approximately November 2012 to at least December 2017 (SOR ¶¶ 1.b, 2.a). When he answered the SOR allegations, Applicant admitted that he had used marijuana as alleged and that he had purchased marijuana, but that his last purchase was in 2016 or perhaps January or February 2017. After considering his response to the SOR, the exhibits, and the hearing transcript, I make the following findings of fact:

Applicant is a 25-year-old systems engineer. He has Bachelor's and Master's degrees in mechanical engineering, and has been employed by a defense contractor since June 2017. (GE 1; Tr. 21-22.) He has never held a DOD security clearance. (Tr. 25.)

Applicant started college in September 2012. He began using marijuana in November 2012 because he wanted to try it. He performed well on his mid-terms, and so he decided to continue to use a drug that he enjoyed, even though he knew that it was illegal. He used marijuana throughout college until January 2017, at a frequency that "varied quite a bit." At one point during his freshman year, he may have used marijuana "five times a week." Other times, he went five to six months without using marijuana. He used marijuana primarily while socializing with close friends, and the marijuana was usually provided to him at no cost. He used marijuana in all kinds of forms—joints, bong, pipes, and edibles—depending on what his friends had. He purchased marijuana in small

quantities at a cost of less than \$50 on a handful of occasions, about once a year, to at least September 2016. Applicant purchased the marijuana from friends of friends. He estimates that he spent \$200 to \$300 for marijuana over five years. He shared with friends some of the marijuana he purchased. He drove a vehicle after smoking marijuana only once, which was either during his junior or senior year of college. (GEs 1-2; Tr. 26-33, 45.)

After earning his Master's degree in May 2017, Applicant began working for his current employer. He passed a pre-employment drug screen, and received training about his employer's policies, including that illegal drug use is prohibited. (Tr. 23.) On July 12, 2017, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) on which he disclosed that he had used and purchased marijuana. He indicated that he was an "infrequent user" of marijuana between November 2012 and January 2017, but he had stopped using the drug. He denied any intention to use marijuana in the future but then explained:

The state of [name omitted] has made it legal despite it currently being illegal under federal law. I do not have any plans to smoke in the near future. I, however, might if it is made legal under federal law.

Applicant also responded affirmatively to an inquiry concerning any illegal purchase of a drug or controlled substance in the last seven years. He indicated that he bought marijuana between February 2013 and September 2016 in small amounts, "less than \$50 worth, on a handful of occasions throughout college." He denied any intention to purchase marijuana in the future. (GE 1; Tr. 26.) Applicant understood that his use of marijuana could be an issue for his security clearance eligibility. (Tr. 26.)

On January 30, 2018, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM), primarily to discuss his marijuana use and purchase. Applicant explained that he smoked marijuana in college with friends, but he also experimented with edibles. Most of the time, he obtained his marijuana free of charge from friends who had it, but that once a year, he purchased marijuana from friends of friends. Applicant stated that he stopped using marijuana because he got bored of it, but he also volunteered that he used marijuana at the party hosted by four of his former roommates on December 31, 2017. He took some puffs from a marijuana joint passed to him by friends of friends.<sup>1</sup> Applicant acknowledged that he knew using marijuana was illegal under federal law and that his employer had a policy prohibiting illegal drug involvement. However, he expressed his belief that marijuana should be legalized. Reminded by the investigator that drug use violates not only federal law but also his employer's policy, he expressed a belief that his employer should not be able to infringe on his personal use. Applicant stated that he has no current intentions of using marijuana but he may in the future. He reportedly acknowledged that he still associated with persons involved with marijuana and named nine individuals, including one of the character references he named on his SF 86 and a friend from college (friend X) with whom he smoked marijuana in the past. Applicant explained that his friends knew of his marijuana

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<sup>1</sup> At his hearing, Applicant admitted that he used marijuana at the party but not with his former roommates. He denied ever using marijuana with the friends who hosted the party. (Tr. 35-36.)

use but his family did not. Applicant admitted that he had not notified security officials at work about his recent marijuana use. (GE 2.)

DOHA sent interrogatories to Applicant in March 2018 about his drug use. Asked to detail his use of marijuana from November 2012 to date, Applicant responded that he used cannabis from November 2012 to December 2017. He denied ever purchasing marijuana. Regarding his future intentions, Applicant stated, "Not interested in smoking. Does not provide me any benefits. My friends don't smoke. Impacts my workouts. Waste of money." Applicant was given the summary of the OPM investigator's report of his January 2018 interview and was advised he could make corrections to the report. With regard to his reported continued association with drug users, Applicant indicated on March 21, 2018,<sup>2</sup> that the names listed "do not reflect people involved in drug activity." Instead, he named those persons with whom he socializes on a regular basis and he added, "All of them currently have no drug activity to the best of my knowledge. Some have never taken a drug illegally." In a separate handwritten statement, he listed eight of the nine persons identified in the interview summary (including the four former roommates that hosted the December 2017 party at which he used marijuana but not college friend X) and expressed his belief that they would all pass a drug test today. Applicant explained that he omitted friend X because he lives outside the area, and indicated that he was unaware about friend X's current relationship with marijuana. Applicant added, "I have not smoked marijuana since the year 2017. I do not intend to [use marijuana] in the future." (GE 2.)

Applicant has not told security officials at work about his marijuana use. He testified that the OPM interviewer told him security would be notified through the security process. (Tr. 24, 40-41.) Applicant briefly discussed with his co-workers and managers the issue of his drug use "but not in maybe a full disclosure kind of sense." He is not currently required to possess a security clearance to maintain his employment. (Tr. 23-24.)

Applicant last used marijuana at the party held on December 31, 2017, perhaps during the early hours of January 1, 2018. (Tr. 27.) To his recollection, he last purchased marijuana in September 2016. (Tr. 28.) As to why he used marijuana at the New Year's Eve party, Applicant testified that he was frustrated that he had not heard back about his clearance eligibility, particularly where he knew of some co-workers who had either lied on their clearance forms or continued to smoke marijuana while employed, and he had been "honest and upfront" about his marijuana use. Also he was considering leaving his job with the defense contractor because he did not have very interesting work, and he had "a carefree attitude" in that he "felt as though it would not matter and it wouldn't come back to bite [him]." (Tr. 33-34.) Applicant disagrees with his employer's prohibition against illegal drug use by its employees, but he has followed it since his last use at the New Year's Eve party. (Tr. 38.)

Applicant has friends who smoke marijuana. In the six months preceding his February 2018 hearing, Applicant has been in the presence of others using marijuana approximately six times to as recently as late 2018 or early 2019. Some of the friends who

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<sup>2</sup> Applicant's response was returned to him on April 4, 2018, to obtain a notarized signature. Applicant signed the document before a notary on May 3, 2018. (GE 2.)

used marijuana in his presence were named in his March 2018 response to interrogatories as persons who he claimed would pass a drug screen because they were not then using marijuana. When asked to explain the discrepancy, Applicant indicated that those friends had not used marijuana in several months as of March 2018, but that he knows them to have used marijuana since then. He then indicated that it was “probably not accurate” for him to have stated in March 2018 that he was not associating with any known drug users. He meant to state that the friends with whom he spent most of his time were not using drugs. He denied knowing whether they currently use marijuana but acknowledged that the friends have used marijuana in his presence in the last six months; that he continues to socialize with them; and that they have offered him some marijuana, including after he had told them that he cannot smoke marijuana because of his job. He indicated that he has made it clear to them that he is “not looking to smoke.” (Tr. 41-45, 48-49.) When asked why he continued to associate with known drug users while a hearing was pending for his clearance eligibility, Applicant responded:

So oftentimes, I do leave the room, if there’s a specific room. I would say I now have family members that grow marijuana, a cousin of mine,<sup>3</sup> you know, that they’ve been—I would say, they’re—it’s—if I had to disassociate myself entirely, where there was any possibility that someone smoked weed, I would have to have significant social change. (Tr. 48.)

### **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

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<sup>3</sup> Applicant denied ever being around a family member that was smoking marijuana, however. (Tr. 50.)

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 used marijuana with varying frequency while in college and graduate school from November 2012 to January 2017. After going to work for his employer in June 2017, and completing an SF 86 in July 2017 on which he indicated that he did not intend to use marijuana in the future, Applicant used marijuana at least once, on December 31, 2017, or January 1, 2018. Applicant purchased marijuana on occasion, spending about \$200 to \$300 total, between November 2012 and September 2016. Disqualifying conditions AG ¶ 25(a), “any substance misuse (see above definition),” and AG ¶ 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” are established. Moreover, during his subject interview on January 30, 2018, Applicant indicated that he had no current intention of using marijuana, but that he may use it in the future. He expressed his disagreement with the federal government’s and his employer’s

prohibitions of marijuana use. He used marijuana at least once after he expressed an intention not to use it in the future. Under the circumstances, I find that AG ¶ 25(g), “expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such use,” also applies.

AG ¶ 26(a) provides for mitigation when the drug involvement and substance misuse “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.” Applicant’s marijuana use was part of his recreational lifestyle in college and, by his own admission, something that he enjoyed while socializing with friends. He used marijuana with friends of friends on December 31, 2017, or January 1, 2018. His marijuana use was too recurrent and too recent for mitigation under AG ¶ 26(a).

AG ¶ 26(b) provides for mitigation when an individual acknowledges his or her drug involvement and has no intention of future drug activity:

(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.

Applicant indicated in response to DOHA interrogatories in March 2018 and at his hearing in February 2019 that he does not intend to use any marijuana in the future. His statement in that regard does not include an acknowledgement of revocation of any security clearance eligibility for any violation, but he clearly understands the consequences for any future illegal drug use. There is no evidence that he has used any marijuana since December 31, 2017, or January 1, 2018, and his forthright disclosure of his marijuana use at that party is viewed favorably. However, AG ¶ 26(b) cannot reasonably apply because Applicant continues to associate with some friends who use marijuana. He claims he has made it abundantly clear to his friends that he cannot use marijuana for his job, and yet six times in the last six months or so, some friends smoked marijuana in his presence. Applicant acknowledged that, to completely disassociate himself from the possibility of someone smoking marijuana, he would need significant social change. The risk of Applicant using marijuana in the future cannot be adequately discounted. The drug involvement and substance misuse security concerns are not sufficiently mitigated.

## Guideline E: Personal Conduct

The security concern about personal conduct is articulated 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 uses and purchases (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 repeatedly used marijuana and purchased it in knowing disregard of its illegality. 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 defense-contractor employee seeking a security clearance to comply with the DOD's and his employer's policies prohibiting illegal drug use, and he used marijuana at least one time after he had applied for a DOD clearance. 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 admitted to an OPM investigator in January 2018 that he was aware that his marijuana use only thirty days or so prior was contrary to his employer's policy prohibiting illegal drug use. His explanation for that drug use is that he was frustrated that he had not obtained his clearance, and he was dissatisfied with his job duties. Even assuming that he knew of co-workers who had lied about their drug use on their security clearance applications or continued to use drugs in contravention of federal law and their employer's policy, it does not excuse or mitigate his own disregard of law and policy.

Applicant exhibited some reform under AG ¶ 17(d) by volunteering to the OPM investigator that he had used marijuana while a defense-contractor employee after he submitted his SF 86. 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 factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

The government has a reasonable expectation of candor from those persons who seek to be granted access to the Nation's secrets, and in that regard, his voluntary disclosure against self-interest does not entitle him to a clearance. In assessing his reform of his drug involvement, I cannot ignore that he continues to socialize with some persons who use marijuana. Applicant may have no control over his friends' decisions to use marijuana, but he chooses his own associates and recreational activities. He may never have used marijuana with two of his closest friends, but on at least six occasions in the last six months or so, he has been in the presence of other friends while they were smoking marijuana. Some of those friends were named by him in March 2018 as persons not currently involved in drug activity to his knowledge. Applicant has expressed his belief that marijuana should be legalized under federal law. He testified that to eliminate "any possibility that someone smoked weed, [he] would have to have significant social change." Under the circumstances, it is difficult to find under AG ¶ 17(d) that his marijuana use is unlikely to recur. The personal conduct security concerns are not fully 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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(d).<sup>4</sup> Applicant can disagree with federal drug law and policy without negative consequences for his security clearance eligibility provided he does not act to violate the law or policy. By using marijuana in knowing disregard of federal law and the DOD's and his employer's policies, Applicant cast serious doubt about whether he can be counted on to comply with the requirements for handling classified information.

Security clearance decisions are not intended to punish applicants for past transgressions. Yet 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 (9<sup>th</sup> Cir. 1990). The Government must be able to rely on those persons granted security clearance eligibility to fulfill their responsibilities consistent with laws, regulations, and policies, and without regard

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<sup>4</sup> 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.

to their personal interests. For the reasons discussed, Applicant has raised enough doubt in that regard to where I am unable to conclude that it is clearly consistent with the national interest to grant him eligibility for a security clearance.

### **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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

### **Conclusion**

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

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Elizabeth M. Matchinski  
Administrative Judge