



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



In the matter of:	)	
	)	
	)	ISCR Case No. 18-01541
	)	
Applicant for Security Clearance	)	

**Appearances**

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

01/04/2019

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**Decision**

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MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used marijuana from January 2010 to at least November 2018, since July 2018 with a state-issued medical marijuana card. He is not committed to abstention despite knowing that marijuana remains illegal under Federal law. Clearance is denied.

**Statement of the Case**

On June 20, 2018, 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 substance misuse, 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DOD on June 8, 2017.

On July 17, 2018, Applicant answered the SOR allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On September 7, 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 October 5, 2018, I scheduled a hearing for November 16, 2018.

I convened the hearing as scheduled. Two Government exhibits (GEs 1-2) were admitted in evidence. An August 9, 2018 letter forwarding the proposed GEs to Applicant and a list of the GEs were marked as hearing exhibits (HEs I and II) for the record but not admitted in evidence. Six Applicant exhibits (AEs A-F) were admitted in evidence. Applicant testified, as reflected in a transcript (Tr.) received on November 29, 2018. I held the record open for three weeks after the hearing for additional evidence from Applicant. No documents were received, and the record closed on December 7, 2018.

### **Findings of Fact**

The SOR alleges under Guideline H that Applicant used marijuana with varying frequency (SOR ¶ 1.a) and purchased marijuana (SOR ¶ 1.b) from January 2010 to at least March 2018, and that during a March 6, 2018 interview with a DOD authorized investigator he stated an intention to continue using marijuana (SOR ¶ 1.c). When he responded to the SOR, Applicant admitted the allegations without comment. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 57-year-old mechanical designer with post-high school certifications in mechanical drafting technology and computer-aided drafting. His first marriage ended after only two years. He was married to his second wife from July 1989 to February 2008. Applicant has a 27-year-old son and a 23-year-old daughter. An innovative mechanical designer, Applicant spent much of his career in the medical device industry, and he holds patents involving medical methods and devices. Applicant has worked for his defense-contractor employer in computer-aided design since March 2015. He seeks a security clearance for his position, although he understands that he can continue to work for his employer without a clearance. (GEs 1-2; AEs B, E-F; Tr. 26-29.)

In 2007, Applicant was diagnosed with a degenerative eye disease. (AE C; Tr. 36.) At the suggestion of his godson, Applicant began using marijuana in January 2010, initially for degenerative discs and to relieve pressure in his eyes. (GE 1; Tr. 25-26, 55.) Applicant continued to use marijuana approximately twice weekly as needed for pain or to sleep to at least November 2018. He traveled to Asia for his then employer for seven weeks in April 2012. He did not use any marijuana during that trip. (GEs 1-2; Tr. 35, 64.) Applicant purchased marijuana from his friends until July 2018. (GE 2; AE D.)

In January 2015, Applicant began outpatient psychotherapy with a licensed clinical social worker for diagnosed depression and anxiety. He was honest with his therapist about his use of marijuana. He advised her that he used marijuana at times when experiencing

heightened anxiety or depression not adequately addressed by his psychiatric medications.<sup>1</sup> (AE A.)

Applicant took a pre-employment drug screen to work for his employer in early 2015. He refrained from using marijuana before the test because he knew he would be drug tested, and “because every now and then, it’s nice to give [himself] a little break.” He passed the drug screen. (Tr. 30-31.) Applicant understands that his employer has a policy prohibiting illegal drug use by its employees, although the company has publicized that medical marijuana use would be handled akin to alcohol abuse. (Tr. 30-32.)

Two years into his job with his current employer, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) on November 8, 2017. He responded affirmatively to an inquiry concerning whether he had illegally used any drugs or controlled substances in the last seven years, and disclosed that marijuana “was and is sometime used” to control pain and stomach issues and relieve pressure in his eyes. He gave estimated dates of January 2010 for his first use and September 2017 for his most recent use. He answered “No” to whether he intended to use marijuana in the future, but then stated “depends on the level of pain and discomfort I experience. I always use this as a last resort because I cannot take vicoden [sic] for pain or discomfort because it tears my stomach apart.” Applicant responded negatively to an inquiry into whether he had been involved in the illegal purchase, manufacture, cultivation, trafficking, production, transfer, shipping, receiving, handling or sale of any drug or controlled substance in the last seven years. (GE 1; Tr. 33.)

On March 6, 2018, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). He admitted that he used marijuana since January 2010 for pain related to his medical issues and for a sleep aid because his stomach does not tolerate prescription medications. He expressed an intention to continue to use marijuana for pain, and a high likelihood that he would use marijuana in the future due to the pain associated with his medical conditions. He disclosed that he obtained his marijuana illegally through friends who legally cultivate marijuana. He obtained a half ounce of marijuana every other month at a cost of \$70 each time. Applicant denied socializing with any individuals who use drugs illegally. (GE 2.)

Applicant now acknowledges that he used marijuana probably a couple of times a week since 2010. (Tr. 47.) He attempted to reduce or cease his marijuana use over the past year, but he continued to use the drug to at least November 14, 2018. (Tr. 34-35.) On July 20, 2018, he obtained a state-issued medical marijuana card authorizing him to use marijuana legally in the state for the next year under its medical marijuana program.<sup>2</sup> (AE

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<sup>1</sup> Applicant’s medications are currently being monitored by a psychiatry practice. He has been in treatment with that provider since May 2016. (AE B.)

<sup>2</sup> The state’s medical marijuana act was passed in 2005. Section 21.-28.6-4 of state law provides in part:

(a) A qualifying patient cardholder who has in his or her possession a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or

D.) Since obtaining his medical marijuana card, Applicant has purchased his marijuana from an authorized dispensary. (Tr. 42.) He acknowledged that he had previously purchased the drug illegally in half-ounce quantities every two months for \$70 from friends that grow marijuana for “compassion science.” (Tr. 48.) Applicant obtained his medical marijuana card because after he applied for a security clearance, he wanted “to try to do everything as legally as [he] can.” (Tr. 46.) As to why he waited to late July 2018 to obtain a medical marijuana card given he applied for a clearance in November 2017, Applicant responded:

Because it wasn't—I think the dispensaries may have just come around at that point. I probably didn't have the extra \$300. And it really wasn't an issue. I was so low-keyed and I try to keep everything under wraps that—I just didn't see a need for it. But now that I'm here and everything, I want everything to be—lay it out—I want to be honest. I want to be as legal as I can. And that's part of my problem is I'm way too honest. (Tr. 46-47.)

Applicant understands that marijuana use is still illegal under Federal law, and that he had used marijuana illegally. The state in which he lived from December 2004 to May 2017 did not legalize recreational use of marijuana until December 2016.<sup>3</sup> Applicant's current state of residency has not legalized recreational use of marijuana. Applicant looked into the laws governing marijuana, but he did not see the illegality as an issue because he was using marijuana for medical reasons in his home “to control things that [he has] no control over.” (Tr. 52-53.) Applicant intends to continue to use marijuana, but not at great frequency. He has never used marijuana at work. (Tr. 59-60.)

Applicant has not advised anyone at work about his marijuana use (“It's used for medical purposes. I don't tell them all my medicines I take.”). (Tr. 32-33.) Applicant continues to take medications for his eyes, but they create a burning sensation. (AE C; Tr.

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occupational or professional licensing board or bureau, for the medical use of marijuana; provided, that the qualifying patient cardholder possesses an amount of marijuana that does not exceed twelve (12) mature marijuana plants that are accompanied by valid medical marijuana tags, two and one-half (2.5) ounces of usable marijuana, or its equivalent amount, and an amount of wet marijuana to be set by regulations promulgated by the departments of health and business regulation. Said plants shall be stored in an indoor facility.

(b) An authorized purchaser who has in his or her possession a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the possession of marijuana; provided that the authorized purchaser possesses an amount of marijuana that does not exceed two and one-half (2.5) ounces of usable marijuana, or its equivalent amount, and this marijuana was purchased legally from a compassion center for the use of their designated qualifying patient.

<sup>3</sup> Effective January 2, 2009, that state decriminalized possession of an ounce or less of marijuana and imposed a civil penalty of \$100 and forfeiture of the marijuana. Effective January 1, 2013, the state established a medical marijuana program. Applicant's eye disease is one of the covered conditions under the program. The state legalized possession of one ounce of marijuana for recreational use by persons age 21 and older effective December 15, 2016, but .

38.) He shared with his optometrist during an appointment one Saturday that he had smoked marijuana three hours before his appointment. She advised him that the relief in eye pressure from marijuana was only temporary. His optometrist is not licensed to prescribe medical marijuana. (Tr. 39-40.) She corroborates his eye condition, which is stable and currently being managed with topical medications. (AE C.)

Applicant's outpatient psychotherapist indicated that, to her knowledge, Applicant's use of marijuana, "about once a week," has not interfered with his work performance. She has not seen any behavior by Applicant that makes her concerned. He has always been trustworthy, stable, and responsible, and she has not identified anything about his marijuana use that, in her opinion, contributes to any security concerns. (AE A.)

Applicant's psychiatric provider also attested to Applicant primarily using marijuana for relief of pain and pressure related to his eye disease, and she added that the medical literature supports use of marijuana for the condition. She also noted that Applicant finds marijuana helpful with anxiety but that it was not the primary reason why Applicant uses marijuana. She considers Applicant's mood to be stable and his psychiatric symptoms well managed. (AE B.)

### **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.

With the exception of a seven-week business trip to Asia in 2012, Applicant used marijuana approximately twice a week and purchased marijuana once every two months from January 2010 to at least November 2018. His use and purchase after July 20, 2018, was with a medical marijuana card obtained legally in his state.<sup>4</sup> Disqualifying conditions AG ¶¶ 25(a), “any substance misuse (see above definition),” and 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;” apply. Moreover, Applicant has candidly admitted that he intends to continue to use medical marijuana in the future, albeit not at great frequency, to cope with his medical conditions. AG ¶ 25(g), “expressed intent to

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<sup>4</sup> 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.

continue drug involvement and substance misuse, or failure to clearly and convincingly commit to continue such misuse,” also applies.

Applicant bears the burden of establishing that matters in mitigation apply. AG ¶ 26 provides for mitigation as follows:

(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 an individual’s current reliability, trustworthiness, or good judgment;

(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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended: and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of the mitigating conditions apply. Applicant used marijuana with the same consistency for almost nine years in knowing violation of Federal law. For all but the last few months, his use and purchase was also illegal under state law. Applicant candidly admits that he intends to use and purchase marijuana with his medical marijuana card in the future, fully aware that state laws permitting medical marijuana do not alter the federal prohibition or existing national security guidelines concerning marijuana use. Applicant denies any dependency on marijuana. Both his therapist and his psychiatric provider are aware of and are not concerned about his marijuana use to alleviate pain and pressure from his eye disease and other medical conditions. However, Applicant cannot satisfy AG ¶ 26(b) as long as he intends to continue to use marijuana. The drug involvement and substance misuse security concerns are not mitigated.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of his conduct and

all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(d).<sup>5</sup> In that regard, Applicant's marijuana use is troubling because of his mature age and knowing disregard of the drug laws for several years. He rationalized his illegal drug use as necessary to avert the negative side-effects of his medications. He knew that he could have obtained a medical marijuana card that would have legalized his use and purchase in the state, but he saw no need for it until the SOR was issued. Even now, he continues to act in self-interest. The Government must be able to rely on the persons entrusted with the Nation's secrets to comply with their clearance obligations, which include following Federal law and DOD policy against marijuana use, including medical marijuana. Applicant has raised considerable doubts in that regard. Although his candor about his marijuana involvement weighs in his favor, for the reasons noted, I find that it is not clearly consistent with the national interest to grant security clearance eligibility for Applicant.

### **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.c:	Against Applicant

### **Conclusion**

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

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Elizabeth M. Matchinski  
Administrative Judge

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<sup>5</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;
- (9) the likelihood of continuation or recurrence.