



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



In the matter of:	)	
	)	
[Name Redacted]	)	ISCR Case No. 18-01948
	)	
Applicant for Security Clearance	)	

**Appearances**

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

05/28/2019

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**Decision**

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MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant suffers from a mental health condition that could impair his judgment, reliability, and trustworthiness. He intends to continue to use medical marijuana knowing that such drug use is illegal under federal law. Psychological conditions, drug involvement and substance misuse, and personal conduct security concerns are not adequately mitigated. Clearance is denied.

**Statement of the Case**

On September 4, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline I (psychological conditions), Guideline H (drug involvement and substance misuse), and Guideline E (personal conduct). The SOR explained why the DOD CAF 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.

Applicant responded to the SOR on September 27, 2018, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On March 12, 2019, Department Counsel was ready to proceed to a hearing. On March 18, 2019, I scheduled a hearing for April 9, 2019, to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

At the hearing, four Government exhibits (GEs 1-4) were admitted in evidence. Applicant and his spouse testified, as reflected in a transcript (Tr.) received on April 19, 2019.

I held the record open for two weeks after the hearing for post-hearing submissions from Applicant. No documents were received by the deadline, and the record closed on April 23, 2019.

### **Summary of SOR Allegations**

The SOR alleges that under one or more of the AGs I (SOR ¶ 1), H (SOR ¶ 2), and E (SOR ¶ 3) the following:

- Applicant attempted suicide in about 2010 (SOR ¶ 1.a);
- Applicant experienced a year-long episode of depression with some inability to function in 2014 (SOR ¶ 1.b);
- Applicant was diagnosed with depression in 2014 (SOR ¶ 1.c);
- Applicant was diagnosed with moderate depressive disorder and general anxiety disorder with a poor prognosis in December 2014 (SOR ¶ 1.d);
- Applicant was diagnosed with major depressive disorder, recurrent; general anxiety disorder; and unspecified cannabis-related disorder in February 2016 (SOR ¶¶ 1.e and 2.d);
- Applicant had suicidal thoughts because of financial difficulties in 2018 (SOR ¶ 1.f);
- Applicant was diagnosed with major depressive disorder, recurrent, severe; generalized anxiety disorder; and cannabis use disorder, mild in March 2018 with a guarded prognosis (SOR ¶¶ 1.g and 2.d);
- Applicant continues to experience symptoms of depression, including recurrent suicidal ideation, despite his treatment (SOR ¶ 1.h);

- Applicant has used marijuana twice weekly since about 2015 and intends to continue to use marijuana in the future (SOR ¶¶ 2.a and 3.a);
- Applicant has purchased marijuana illegally since about 2015 and intends to purchase marijuana illegally (SOR ¶¶ 2.b and 3.a); and
- During a March 2018 evaluation, Applicant expressed uncertainty regarding his willingness to discontinue marijuana use (SOR ¶¶ 2.c and 3.a).

When Applicant answered the SOR, he admitted the allegations, but with some explanations. He indicated that his depression in 2014 was exacerbated by his physical condition that caused him chronic pain and compromised his ability to function with regularity. He acknowledged that he had thoughts of suicide in 2014, but asserted that a distinction should be drawn between suicidal thoughts, which he has on a regular basis as a symptom of his depression, and suicidal urges, which do not regularly occur and he was not currently experiencing. Applicant contested the diagnosis of a cannabis-related disorder and explained that his use of cannabis was always medicinal. He added that he currently holds a state-issued medical marijuana card. Applicant admitted that he had purchased marijuana illegally in the past, but asserted that all of his purchases are now from a medical dispensary with his medical marijuana card.

### **Findings of Fact**

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

Applicant is a 30-year-old senior software engineer, who has been employed by a defense contractor since January 1, 2015.<sup>1</sup> He previously worked as a subcontractor for the company. Applicant began cohabiting with his spouse in approximately October 2013. They married in October 2017. In May 2011, Applicant was awarded a bachelor's degree in computational mathematics and an "All but Thesis" master's degree in applied mathematics. (GEs 1-2; Tr. 20-21.)

Applicant began suffering from depression as a teenager. He attempted suicide in 2006. (Tr. 22-23.) At age 18, he had suicidal thoughts that led to some psychotherapy and medication management. He found the psychotherapy unhelpful and did not continue after some initial contacts. (GE 2.)

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<sup>1</sup> Applicant testified that he worked as a subcontractor for his employer "right out of college in 2011 or 2012." (Tr. 20.) He provided dates for that employment on his SF 86 of February 2012 to December 2013, and indicated that he started at another company (company X) in January 2014. At his hearing, he testified that he worked for company X for about a year before becoming a direct hire of his current employer on January 1, 2014. The dates on his SF 86 would indicate a start date instead of January 2015 for his current employment. The SF 86 of record was signed on January 6, 2015. (GE 1.)

While in college from August 2007 to August 2011, Applicant experienced depression that went untreated. In 2010, he attempted suicide while stressed because of school demands. He did not pursue mental health treatment at that time. It was a wake-up call for him. He left college in August 2011 before finishing his thesis, and he voluntarily sought psychiatric treatment from December 2011 to March 2012. He took medication for his depression for about six months with some improvement in his condition. Apparently in consultation with his then treating psychiatrist, Applicant stopped taking the medication with no apparent adverse impacts on his mental health for the next two years. (GEs 1-2; Tr. 22-23.)

Applicant worked as an online sales manager for a computer hardware reseller and then as an associate software developer, where he was placed as a subcontractor with his current employer starting in February 2012. (GE 2.) In approximately 2014, Applicant was diagnosed with a medical condition that can cause chronic pain. In May 2014, he purchased his current residence. Stressed financially, often in a great deal of pain, and very depressed, Applicant had impaired functionality and was unable to work for approximately one year. (Tr. 24.) He was not yet on appropriate medications. (Tr. 19, 25.) He attempted suicide one time in 2014, but he has not had any suicide attempts since then. (Tr. 29.) Applicant attributes his poor mental health at that time to his physical illness. (Tr. 25.) His spouse held the household together while he spent much of the year in bed. She had a small business. She paid the bills, purchased the groceries, and took care of him. (GE 2.)

In mid-May 2014, Applicant began treatment from his primary care physician for diagnosed depression and for some medical conditions, including a longstanding seizure disorder, well controlled with medication. Applicant was placed on Zoloft to be reevaluated in one month. He experienced moderate improvement in his depression by mid-June 2014, and reported no substance abuse or suicidal ideation, but he continued to lack energy and enthusiasm. He complained of some fatigue over the summer, and recurrent seizures led to changes in his anti-depressant medication. By late August 2014, his depression had increased to where he had some passive suicidal thoughts. Several medication changes led to some improvement in his mood, but he continued to experience fatigue and pain. As of late September 2014, his anxiety was interfering with his concentration, and he had moderate depression but no substance abuse or suicidal ideation. By November 2014, he was able to work from home. His depression was stable, and he had moderate control of his medical condition that causes him chronic pain. (GE 3.)

Applicant experienced increased anxiety in late 2014 and early 2015 related to his return to work. (Tr. 26.) From December 3, 2014, through March 24, 2015, Applicant had nine counseling sessions with a licensed psychologist for treatment of diagnosed moderate depressive disorder and generalized anxiety disorder. Applicant presented as moderately to severely depressed, chronic and recurrent, and he described overwhelming panic attacks that became debilitating and compromised his functionality. In the opinion of the psychologist, Applicant's symptoms were serious and interfered with his productivity at work and home. His concentration and decision-making ability were impaired, and he was

at ongoing risk of suicide. Throughout their sessions, Applicant's progress and prognosis were assessed as poor. (GE 4.)

On December 22, 2014, Applicant completed and electronically certified to the accuracy of a Questionnaire for National Security Positions that he signed on January 6, 2015. He disclosed that he had mental health counseling from December 2011 to March 2012 and was currently in treatment with his primary care physician and the licensed psychologist. (GE 1.)

During an office visit with his primary care physician in mid-March 2015, Applicant reported less pain on his medication regimen. His fatigue issues were in moderate control, but his depression was in poor control. He was placed on Cymbalta to address his depression primarily with a hoped for positive effect on his chronic pain and fatigue. As of June 2015, the Cymbalta was no longer effective in controlling Applicant's depression. He complained of more fatigue and worsening musculoskeletal pain with no relief from narcotics. His primary care physician referred him to a psychiatrist. (GE 3.) Applicant began seeing a psychiatrist monthly, although he did not follow through on her recommendation that he obtain psychotherapy because he did not have the time, money, or energy. (GE 2.)

At the recommendation of a friend, Applicant began smoking marijuana in 2015 to treat his chronic pain. Over the next three years, he smoked a bowl of marijuana twice weekly. He found marijuana to be an effective pain medication, and he continued to use it, knowing that it was illegal. After six months of using the drug illegally, he informed his primary care physician about his marijuana use. His physician provided him information about how to obtain medical marijuana in the state. Applicant did not apply for a medical marijuana card at that time because it was cost prohibitive for him. He continued to purchase marijuana illegally from an acquaintance. Applicant did not use any marijuana at work. (GE 2; Tr. 17-18, 32-33.)

In early 2016, Applicant experienced debilitating pain from his medical condition. At the suggestion of his psychiatrist, Applicant received treatment at a psychiatric hospital from February 24, 2016, through March 18, 2016, for diagnosed major depressive disorder, recurrent; generalized anxiety disorder; and unspecified cannabis-related disorder. He was treated initially in a partial hospitalization program and then at the intensive outpatient level of care. At discharge, he was referred to a psychiatric practice and prescribed medications, including Lithium for suicidal thoughts, Nortriptyline for his depression, and Buspar and Xanax (as needed) for anxiety. Nortriptyline improved his depression and pain sufficiently so that he could return to work. (GE 2; Tr. 26-27.)

Applicant began psychotherapy for "severe depression and severe anxiety" with a licensed clinical social worker (LCSW) in December 2017 after his psychiatrist told him that he had to participate in psychotherapy if he wanted to continue in treatment with her. For financial reasons, Applicant took a break from his psychotherapy sessions with the LCSW from January 2018 until late February 2018. (GE 2.)

Applicant was denied interim security-clearance eligibility in February 2018. It had no impact on his present duties. He discussed the declination of his interim clearance with his current supervisors, and they want to retain him if he is denied security-clearance eligibility, but it could have future impacts as to project assignments. (Tr. 21-22.) Applicant did not indicate to what extent, if any, he discussed the issues that generated security concern with his supervisors.

At the request of the DOD CAF, Applicant had a psychological evaluation by a licensed psychologist on March 4, 2018. Applicant's diagnosis was complicated by his medical problems and multiple medications, but his depression and anxiety appeared to be prominent issues. Applicant disclosed his illegal marijuana use for pain, and he expressed a plan to continue his marijuana use. He expressed uncertainty about whether he would stop using marijuana, even if required for his security clearance. The psychologist diagnosed Applicant with major depressive disorder, recurrent, severe; generalized anxiety disorder; and cannabis use disorder, mild, and concluded that Applicant has a condition that could negatively impact his judgment, reliability, stability, and trustworthiness. In his clinical opinion, Applicant's condition is being partially treated, but Applicant's "chronic suicidal thoughts and recent ultimatum from his prescriber about starting psychotherapy are concerns." (GE 2.) He gave Applicant a guarded prognosis, despite finding it likely that Applicant would continue in treatment with his present providers. The psychologist opined that should Applicant discontinue mental health treatment, his reliability, judgment, and stability would be negatively impacted. (GE 2.) Applicant had suicidal thoughts in 2018 because of financial issues, which have since been resolved with some financial help from family members. (Tr. 19, 28, 47.)

In May 2018, Applicant and his spouse obtained medical marijuana cards authorizing them to use marijuana legally in their state.<sup>2</sup> (Tr. 17-18, 40.) The drug alleviates Applicant's insomnia and acute anxiety attacks. (Tr. 31.) Since obtaining his medical marijuana card, Applicant has used marijuana "pretty much on a daily basis," although not before reporting to work or before driving a vehicle. (Tr. 33, 41.) He used marijuana the night before his security clearance hearing, knowing that marijuana is illegal under federal law. Before obtaining their medical marijuana cards, Applicant and his spouse discussed the possible impact on his job. Applicant suspected, but did not know for certain, that medical marijuana use is against DOD policy. Applicant admitted at his hearing that he is "probably not" willing to stop using marijuana to obtain a security clearance. Applicant has tried alternative therapies to marijuana, including dietary changes, legal medications, tobacco, exercise, and cannabidiol, but they have not been as effective as marijuana in addressing his pain or his anxiety. (Tr. 34-36, 45-46.) Since acquiring their medical

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<sup>2</sup> On October 1, 2012, Applicant's state passed an act concerning the palliative use of marijuana, allowing a licensed physician to certify an adult patient's use of marijuana after determining that the patient has a debilitating medical condition as defined by the act or subsequently approved by the state's Department of Consumer Protection and that the potential benefits of the palliative use of marijuana would likely outweigh its health risk. Patients are required to have a written certification by a physician, which is valid for one year, and are required to obtain their marijuana from a state-licensed dispensary. A qualifying patient who has a valid registration certificate from the state's Department of Consumer Protection is not authorized to possess an amount of usable marijuana in quantity exceeding that reasonably necessary to ensure uninterrupted availability for one month.

marijuana cards, Applicant and his spouse have obtained their marijuana solely from state-licensed dispensaries. (Tr. 41.)

Applicant did not have any suicidal thoughts in the six months preceding his April 2019 hearing, but suicidal thoughts have been a recurring issue for him his entire adult life. (Tr. 30.) He has been taking a new medication in the past few months that has been helpful. (Tr. 28.) Applicant has been under the care of his current psychotherapist since January 2019. (Tr. 31.)

Applicant's spouse testified that she has seen a marked improvement in Applicant's mental health in the last year. (Tr. 38.) In her opinion, his depression has lessened as he has been able to get his physical pain under control. (Tr. 39.)

Applicant showed his spouse his latest work performance evaluation, which was very positive. He obtained a raise and a promotion in January 2019 to senior software engineer. (Tr. 42-43.)

### **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 I: Psychological Conditions**

The security concerns about psychological conditions are articulated in AG ¶ 27:

Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (e.g. clinical psychologist or psychiatrist) employed by, or acceptable and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline and an opinion, including prognosis, should be sought. No negative inference concerning the standards in this guideline may be raised solely on the basis of mental health counseling.

Applicant has a history of moderate to severe depression and anxiety exacerbated by stress. He attempted suicide in 2006, 2010, and 2014, and suicidal thoughts have been a recurring issue throughout his adult life. In his favor, Applicant recognized that he needed psychiatric treatment after college, and with professional help and medication, his condition remained stable until 2014. His mental health deteriorated so significantly in 2014 that he was unable to work for about one year. Under the monitoring of his primary care physician and his psychiatrist, Applicant has taken several medications over the years with varying relief to address his diagnosed depression and anxiety disorders. During his partial hospitalization program in 2016, Applicant was started on a tricyclic anti-depressant, which brought about some improvement in his mental health. Yet, he continued to experience depression, anxiety, and suicidal ideation. He failed to follow through with his psychiatrist's recommendation that he obtain psychotherapy until December 2017, after his psychiatrist conditioned her continued treatment of him on him obtaining psychotherapy. In March 2018, a duly-qualified psychologist diagnosed Applicant with major depressive disorder, recurrent, severe; generalized anxiety disorder; and cannabis use disorder, mild. The clinician concluded that Applicant has a condition that could negatively impact his judgment, reliability, stability, and trustworthiness, and he assessed Applicant's prognosis



as guarded. Applicant's mental health has improved over the past year. Even so, he continued to have suicidal thoughts to as recently as autumn 2018.

Applicant has had the same primary care provider for the past five years. He has had a consistent therapeutic relationship with a psychiatrist since 2015. He resumed psychotherapy in December 2017, and after a break for insurance reasons, he returned to psychotherapy in late February 2018. Mental health counseling is regarded favorably, and no negative inferences are raised solely on the basis of counseling. However, security concerns are raised under Guideline I when the conditions for which a person is in counseling can impair judgment, reliability, or trustworthiness with regard to handling or safeguarding classified information. Applicant's suicide attempts implicate disqualifying condition AG ¶ 28(a), which provides:

(a) behavior that casts doubt on an individual's judgment, stability, reliability, or trustworthiness, not covered under any other guideline and that may indicate an emotional, mental, or personality condition, including, but not limited to, irresponsible, violent, self-harm, suicidal, paranoid, manipulative, impulsive, chronic lying, deceitful, exploitative, or bizarre behavior.

AG ¶ 28(b), "an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness," is established. Available clinical records from Applicant's primary care provider show that he has been treated for diagnosed depression. At the suggestion of his psychiatrist, Applicant received treatment in a partial hospitalization program at a psychiatric hospital from February 24, 2016, through March 18, 2016, for diagnosed major depressive disorder, recurrent; generalized anxiety disorder; and unspecified cannabis-related disorder. A DOD-approved licensed psychologist diagnosed Applicant with major depressive disorder, recurrent, severe and with generalized anxiety disorder in March 2018. The psychologist indicated that Applicant's condition could cause impaired judgment, stability, and reliability, and that it would cause impairment if Applicant discontinued his treatment. The records of Applicant's partial hospitalization were not provided in evidence, so it is unclear how many days Applicant spent as an inpatient that would trigger AG ¶ 28(c), "voluntary or involuntary hospitalization."

For some time, Applicant did not comply with his psychiatrist's recommendation that he participate in psychotherapy. He has acknowledged that he put off psychotherapy due to not having the time, money, or energy. He began psychotherapy in December 2017 only after his psychiatrist gave him an ultimatum. AG ¶ 28(d) also has some applicability, although there is no evidence that Applicant has failed to comply with his treatment plan in the past year or so. AG ¶ 28(d) states:

(d) failure to follow a prescribed treatment plan related to a diagnosed psychological/psychiatric condition that may impair judgment, stability, reliability, or trustworthiness, including, but not limited to, failure to take prescribed medication or failure to attend required counseling sessions.

Applicant has the burden of establishing one or more of the following mitigating conditions under AG ¶ 29:

- (a) the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;
- (b) the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional;
- (c) recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by, the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation;
- (d) the past psychological/psychiatric condition was temporary, the situation has been resolved, and the individual no longer shows indications of emotional instability; and
- (e) there is no indication of a current problem.

None of the mitigating conditions fully apply. Regarding AG ¶ 29(a), Applicant's major depressive disorder and his anxiety disorder are conditions that are controllable with treatment. However, his mental health condition is complicated because of his medical issues, including the illness that has caused him debilitating pain. His depression has been recurrent, and his anxiety has been exacerbated by stress. Applicant and his spouse testified credibly to a considerable improvement in his mental health over the past year, which they attribute to successful pain management with prescribed medications and marijuana. There is no evidence of any suicide attempts by Applicant since 2014. However, Applicant continued to experience suicidal thoughts until autumn 2018. Applicant lacks the favorable prognosis by a duly-qualified mental health professional that is required under AG ¶ 29(b). There is no recent medical opinion in evidence that Applicant is not at risk of relapse into such depression or anxiety that could cause impairment of his judgment or reliability. Given Applicant's guarded prognosis in March 2018, it cannot reasonably be concluded that his situation has been resolved under AG ¶ 29(d) or that there is no indication of a current problem under AG ¶ 29(e). Applicant showed good judgment by participating in treatment, but his treatment has not prevented recurrence of symptoms. The psychological conditions security concerns are not fully mitigated.

#### **Guideline H: Drug Involvement and Substance Misuse**

The security concerns about drug involvement and substance misuse are articulated 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 twice a week from 2015 until May 2018 to cope with chronic pain when prescribed narcotics proved ineffective. He illegally used and purchased marijuana while employed by a defense contractor, knowing that it was against federal law. While in a partial hospitalization program primarily for his mental health issues in February 2016, Applicant was diagnosed in part with unspecified cannabis-related disorder. In March 2018, a DOD-approved psychologist diagnosed him in part with cannabis use disorder, mild. Applicant expressed uncertainty in March 2018 whether he would discontinue his marijuana use even if his use negatively impacted his security clearance eligibility. When it was no longer unaffordable for him, Applicant obtained a medical marijuana card in May 2018. He has used marijuana daily since then, including the night before his hearing. He or his spouse have purchased it from state-licensed dispensaries. His use and purchase since May 2018 has been legal in his state, but not under federal law or DOD policy.<sup>3</sup> During his April 2019 hearing, Applicant admitted that he would probably not stop using medical marijuana. The following disqualifying conditions under AG ¶ 25 apply:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (d) diagnosis by a duly-qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of substance use disorder; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

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<sup>3</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.

AG ¶ 26 provides for mitigation of drug involvement and substance misuse security concerns, 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 has used and purchased marijuana regularly since 2015 in knowing violation of federal law. Until May 2018, his use and purchase was also illegal under state law. Applicant cannot commit to discontinue his marijuana use, despite knowing that state laws permitting medical marijuana do not alter the federal prohibition or existing national security guidelines concerning marijuana use. Applicant's primary care physician and psychiatrist are aware of his use of marijuana, and apparently are not concerned about his use to alleviate medical issues. 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.

#### **Guideline E: Personal Conduct**

The concerns about personal conduct are 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.

Regarding the Government's case under Guideline E because of Applicant's illegal drug involvement and his failure to convincingly commit to discontinue his marijuana use (SOR ¶ 3.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). 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 to comply with federal law and DOD policy prohibiting illegal drug use. Applicant exercised "questionable judgment" within the general security concerns set forth in AG ¶ 15. Applicant's illegal use of marijuana occurred after he applied for a DOD security clearance, and it is conduct that could trigger disqualifying condition AG ¶ 16(e)(1), which provides:

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

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

It is unclear if Applicant's employer is aware of his illegal marijuana use. Applicant reports that he discussed the potential loss of his security clearance with supervisory personnel, although he did not provide any specifics about what they know about the security concerns. However, Applicant has been candid with the DOD about his marijuana use and future intentions. Potential issues of vulnerability are mitigated under AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." However, his candor about his marijuana use does not justify his ongoing disregard of the federal prohibition against marijuana use, even if it is for medicinal purposes and is legally prescribed. The personal conduct security concerns are not mitigated.

### **Whole-Person Concept**

In the whole-person evaluation, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d).<sup>4</sup>

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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.

Applicant is credited with recognizing the deterioration of his mental health and seeking treatment as needed. He has made considerable strides in managing his mental health. As evidenced by his recent positive work performance evaluation and promotion, Applicant is valued by his supervisors. Even so, I cannot ignore the opinion of a duly-qualified clinical psychologist that Applicant's mental health is only partially treated and that his judgment and reliability will be impaired if he discontinues treatment. Applicant's prognosis was guarded as of March 2018. His present treatment regimen may be effective in managing his psychological conditions long term, but that remains to be seen. His marijuana use may be condoned by his medical providers, but it is inconsistent with federal law and DOD policy. Given Applicant is not willing to commit to abstinence, I am unable to conclude that it is clearly consistent with the national interest to grant Applicant a security clearance at this time.

### **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 I:	AGAINST APPLICANT
Subparagraphs 1.a-1.h:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a-2.d:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

### **Conclusion**

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

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Elizabeth M. Matchinski  
Administrative Judge