



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 19-01131
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Eric C. Price, Esq., Department Counsel  
For Applicant: *Pro se*

02/12/2020

\_\_\_\_\_

**Decision**

\_\_\_\_\_

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used marijuana two to four times per week from August 2014 to December 2016, and once in October 2017 and January 2018. Although he no longer associates with individuals who use marijuana, he has failed to convincingly commit to abstaining from marijuana in the future. Clearance eligibility is denied.

**Statement of the Case**

On June 11, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing a security concern under Guideline H, drug involvement and substance misuse. 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 (AG) effective June 8, 2017, to all adjudications for national security eligibility or eligibility to hold a sensitive position.

On July 11, 2019, Applicant answered the SOR allegation and requested a decision on the written record in lieu of a hearing. On November 29, 2019, the Government submitted a File of Relevant Material (FORM), including documents identified as Items 1 through 4. The Government forwarded a copy of the FORM to Applicant on December 3, 2019, and instructed him that any response was due within 30 days of receipt. Applicant received the FORM on December 11, 2019, and he responded on January 6, 2020. On January 13, 2020, Department Counsel indicated that the Government had no objection to Applicant's response to the FORM. On January 24, 2020, the case was assigned to me to determine whether it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant. I received the case file on February 3, 2020. I accepted Items 1 through 4 into the record as exhibits for the Government. Applicant's response to the FORM was admitted as Applicant exhibit (AE) A.

### **Findings of Fact**

The SOR alleges that Applicant used marijuana with varying frequency from about August 2014 to at least January 2018, and that he intends to use marijuana in the future (SOR ¶ 1.a). When Applicant answered the SOR, he admitted the allegation without comment. After considering the FORM, including Applicant's response to the SOR (Item 2), and Applicant's response to the FORM (AE A), I make the following findings of fact:

Applicant is 31 years old and unmarried. He was in a cohabitant relationship as of his July 2017 application for a DOD clearance. He earned an associate's degree in August 2010 and a bachelor's degree in December 2016. He has been employed as a proposal analyst with a defense contractor since April 2017. There is no evidence that he has ever held a DOD security clearance. (Items 3-4.)

On July 10, 2017, Applicant completed and certified to the accuracy of a security clearance application (SCA) on which he disclosed that he had used marijuana recreationally in college at a frequency of two to four times a week, primarily on the weekends, between approximately August 2014 and December 2016. He responded affirmatively to an inquiry concerning whether he intended to use marijuana in the future and stated, "Accounting for its trend toward legalization I will most likely use it when it can be done in a way that does not violate state law." Applicant also responded "Yes" to an inquiry concerning whether he had been involved in the last seven years in the "illegal purchase, manufacture, cultivation, trafficking, production, transfer, shipping, receiving, handling or sale of a drug or controlled substance." He disclosed that he had purchased marijuana every three to four weeks between August 2014 and December 2016 "to support consumption during college." He denied any intention to purchase marijuana in the future. (Item 3.)

On April 12, 2018, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). He indicated about his drug involvement that he had purchased marijuana through a previous girlfriend's drug-dealing contacts about twice a week between August 2014 and December 2016. He consumed marijuana two to four times a week in his residence or at his ex-girlfriend's residence with his ex-girlfriend and

her roommate. Applicant volunteered that, after completing his SCA, he ate cookies containing marijuana while alone in his home on October 4, 2017, and again on January 1, 2018. He also smoked some marijuana on the latter occasion. Applicant admitted that he knew his use of marijuana was illegal. He purchased the marijuana that he used in October 2017 and January 2018 from a drug dealer in October 2017. Regarding his future intentions, Applicant told the OPM investigator that he has thought about using marijuana in the future in a state where it is legal. He acknowledged knowing that he should not do so, but also stated that it is tempting to use marijuana in a store where it can be purchased legally, and that he might use marijuana again. Applicant denied any current association with any individuals who use illegal drugs, and he claimed marijuana had no adverse impact on his personality, judgment, reliability, or ability to hold a confidence. Applicant also denied that his use of illegal drugs could be a source of blackmail or coercion because his cohabitant girlfriend knows about his drug use. On April 16, 2018, the OPM investigator re-interviewed Applicant by telephone. There is no indication that Applicant's drug use was discussed during that contact. (Item 4.)

By way of interrogatories, the DOD provided Applicant with summarized reports of his April 12, 2018 and April 16, 2018 interviews with the OPM investigator. Applicant affirmed on May 10, 2019 that the summarized reports were accurate without any comment or corrections. (Item 4.)

On June 11, 2019, an SOR was issued to Applicant alleging that he used marijuana and that he intends to use it in the future. Applicant admitted the allegation without comment on July 11, 2019. In the Government's FORM, Applicant was informed that marijuana remains illegal under federal law, despite its legalization in some states. In response, Applicant asserted on January 6, 2020, that he is not an unacceptable security risk. He could not be coerced into providing any privileged information; that his previous and current employers can attest to his character as hardworking and team-oriented; and that he has received numerous awards as well as a promotion due to his work ethic and moral fiber. With respect to the conflict between some state laws and the federal government regarding the use of marijuana, Applicant stated:

The current legal and cultural status of marijuana is baffling. This substance is currently enjoyed recreationally in an ever-increasing number of states and utilized medicinally in even more. Despite being legal at the state level, the federal government maintains a schedule one status for marijuana. However, the federal government has elected to not enforce these laws in states which have allowed for legal/decriminalized use. The mixed message that is being sent by the federal government indicates that the current law is now outdated. Therefore, it is questionable that my past use shows a willful disregard for complying with laws, rules and regulations; as current federal policy doesn't comply with the law itself, which serves to undermine its authority. (AE A.)

Applicant's response to the FORM is silent on the issue of whether he intends to use marijuana in the future. He presented no documentation of his work performance or any

character references to corroborate his assertions of his value to his past or present employer.

## **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.

Applicant illegally used marijuana two to four times per week with an ex-girlfriend and her roommate in college between August 2014 and December 2016. Since earning his bachelor's degree, he used marijuana at least twice alone in his residence. He ate cookies containing marijuana on October 4, 2017, and used marijuana by smoking and by ingesting marijuana in an edible on January 1, 2018. On his SCA, Applicant indicated about any future marijuana use that he "will most likely use it when it can be done in a way that does not violate state law." During his April 2018 interview, he told an OPM investigator that he finds it tempting to use marijuana in a store where it can be purchased legally, and so he might use it again. Three disqualifying conditions under AG ¶ 25 apply. They are:

- (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; and
- (g) expressed intent to continue drug involvement in substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Concerning AG ¶ 25(c), Applicant illegally purchased marijuana from a drug dealer twice a week between August 2014 and December 2016, and again in October 2017. His purchases of marijuana cannot be considered as a separate basis for disqualification because marijuana purchase was not alleged in the SOR. However, I cannot ignore the circumstances of his marijuana use, and the evidence shows that that he had illegal possession of marijuana from October 2017 to January 2018. In January 2018, Applicant used the remainder of the marijuana he had purchased in October 2017.

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. Regarding AG ¶ 26(a), Applicant's use of marijuana was limited to two occasions after college. Even so, it occurred after he applied for a DOD security clearance, after he started working for a defense contractor, and in knowing disregard of its illegality. He purchased marijuana in October 2017 after he had stated on his July 2017 that he did not intent to purchase marijuana in the future. Moreover, as recently as April 2018, Applicant admitted to an OPM investigator that he might use marijuana in the future in a state where marijuana has been legalized. It cannot reasonably be concluded that his marijuana use is unlikely to recur.

Applicant is credited under AG ¶ 26(b) with acknowledging his marijuana use and purchases. He disclosed his marijuana use and purchases when he completed his SCA and detailed the circumstances of his marijuana use during his April 12, 2018 interview with an OPM investigator. However, while he no longer associates with the ex-girlfriend or her roommate involved in his drug use in college, his disassociation with them carries little weight in mitigation, given he purchased marijuana in October 2017 for his personal consumption and then used it alone in his home in October 2017 and January 2018. Applicant has not submitted a signed statement of intention to abstain from future use of

marijuana. Instead, he expresses disagreement with marijuana being a Schedule I prohibited drug under federal law; considers the current federal law as “outdated;” and believes that the federal government undermines its own authority by not enforcing the law against use of marijuana in states where it has been legalized or decriminalized.

The decriminalization or legalization of limited recreational marijuana use by some states does not alter existing federal drug laws. Selective enforcement by the federal government because it may not be the most effective use of time and resources to prosecute a person whose involvement with marijuana would not be criminal in his or her state does not alter existing adjudicative guidelines. An individual’s disregard of federal law pertaining to the use of marijuana remains relevant in adjudicating his or her eligibility for occupying a sensitive national security position. Applicant’s knowing disregard of federal law regarding the use of marijuana raises doubts about his willingness to comply with laws, regulations, and policies concerning the protection of classified information with which he may disagree. He has not demonstrated a clear and convincing commitment to abstain from marijuana in the future. He has repeatedly expressed that he might use marijuana in the future if he is in a state where he can do so legally. 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>1</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. Applicant has not demonstrated that he is willing to comply with the federal law and the DOD’s prohibition against any marijuana use. By using marijuana in knowing disregard of federal law, 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 to their personal interests. Applicant’s history of marijuana use and his failure to commit to

---

<sup>1</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.

