



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



In the matter of: )  
)  
) ISCR Case No. 19-01992  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Daniel O’Reilly, Esq., Department Counsel  
For Applicant: *Pro se*  
01/31/2020

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**Decision**

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MURPHY, Braden M., Administrative Judge:

Applicant has a 20-year history of marijuana use, and he used marijuana after submitting his security clearance application. Security concerns under Guideline H, drug involvement and substance misuse, are not mitigated. Applicant’s 2007 arrest for marijuana possession is dated, but mitigation of the security concern under Guideline J, criminal conduct, is not established, due to his subsequent marijuana use. Applicant’s eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on October 6, 2016. On July 26, 2019, 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 J, criminal conduct. DOD CAF took the action under Executive Order 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 Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective on June 8, 2017.

Applicant answered the SOR on August 29, 2019 and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on November 20, 2019. On December 3, 2019, DOHA issued a notice scheduling the hearing for December 18, 2019. Applicant's hearing occurred as scheduled. Government Exhibits (GE) 1 and 2 were marked and admitted without objection. Applicant had provided three documents with his Answer. They were marked as Applicant's Exhibits (AE) A, B, and C, and admitted without objection. He also testified. DOHA received the transcript (Tr.) on January 24, 2020.

### **Evidentiary Issues**

First, *sua sponte*, I amended SOR ¶ 2.a during the hearing by adding the word "with" so that the allegation is grammatically correct. The parties did not object. (Tr. 28-29) SOR ¶ 2.a now reads, "You were arrested in about July 2007 in [name of state], and charged **with** possession of marijuana." (Emphasis added).

Second, Applicant did not object to the admission of GE 2, the unauthenticated summary of his May 2018 background interview, and it was admitted. However, he also drew attention to a specific sentence in GE 2 that he did not adopt. That sentence was therefore stricken from GE 2 without objection, and I have not considered it. (GE 2 at 6; Tr. 21-22, 38-42)

### **Findings of Fact**

Applicant admitted SOR ¶¶ 1.a-1.d, all with explanations. He denied SOR ¶ 2.a, but only as to the date of the arrest. His admissions and statements are incorporated into the findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 38 years old. He and his wife have been married for about three and a half years. They have two young children. Applicant earned his bachelor's degree in 2004, his master's degree in 2007, and his Ph.D. in 2013. He then spent about two years in a post-doctorate fellowship in Europe, until December 2015. He was unemployed for most of 2016, until beginning his current job with a defense contractor in the United States, in October 2016. He has a \$135,000 annual salary. (Tr. 29-33, 44-46; GE 1; GE 2)

During his years in school, Applicant was in a band. During the summer of 2007, the band was on tour in a large U.S. city several hundred miles from his home. One night, before a performance, Applicant was sitting in the back of the band's van, reading. Two others got into the front seats and began to smoke marijuana. This drew the attention of a nearby police officer, and all of the occupants of the van were pulled out and arrested. (Tr. 34-35, 56-58; GE 2 at 5)

Applicant spent about 20 hours in jail and was arraigned in court the next day on a charge of possession of marijuana. He said he was advised by legal counsel to plead

no contest so he would not have to return to court, in a city far from his home, to dispute the charge. He was placed on unsupervised probation for a year, after which the charge would be dismissed. (Tr. 33-37; Answer; GE 2) Applicant testified that he did not use marijuana during his period of probation. (Tr. 79)

Applicant reported the arrest on his SCA, giving an estimated date of July 2007 (as alleged in SOR ¶ 2.a). (GE 1 at 68) In his Answer and at hearing, he gave the date as June 2007. (Tr. 34) He has had no subsequent arrests or offenses. (Tr. 73-74)

Applicant denied using marijuana on that particular occasion. (Tr. 35) He provided a character letter from a friend of his who was there that night. In the letter, the friend also provided factual details that largely comport with Applicant's explanation of what happened. (AE C) The record does not include police or court documents about the offense. In the letter, the friend also vouches for Applicant's character.

Applicant began using marijuana in 1997, when he was in high school. He reported his marijuana use on his October 2016 SCA. He reported daily use of marijuana from 1997 to 2000. He also said, "I smoke marijuana on occasion" with a frequency of "monthly or less." (GE 1 at 70) (SOR ¶ 1.b)

Applicant also used marijuana while he was living in Europe. He knew it was illegal to possess marijuana in the country where he lived. (Tr. 59-61, 69) He also knew that his use and possession of marijuana was illegal in the U.S. under federal law. (Tr. 70-71)

Applicant testified that he used marijuana about three times after filling out his SCA. His use was confined to his home. (Tr. 71) His last use of marijuana was in December 2017. (Tr. 76-77, 80) He acknowledged that engaging in illegal activity (by continuing to use marijuana) while applying for a clearance was "a bit of a contradiction." (Tr. 73) Applicant testified that it became clear to him during his background interview (May 2018) that his marijuana use might negatively impact his eligibility for access to classified information. (Tr. 80-81) He testified, however, that he thought he might not be granted a clearance, not because of the drug use, but because of his foreign ties. (Tr. 39, 61-62)

Applicant used hallucinogenic mushrooms from January 1999 to May 2014, about 10 times. (SOR ¶ 1.d)(Tr. 50-51) He used the prescription medication oxycodone, without a prescription, a few times between May 2005 and May 2014. (SOR ¶ 1.c) (Tr. 52-54, 66-67) Applicant disclosed his use of these substances on his SCA, and discussed his use in his background interview. (GE 1; GE 2) Applicant testified that if he were offered such substances again, he would not accept them.

Applicant also disclosed on his SCA that he used poppy tea, from January 2007 to May 2013, about 50 times. (GE 1)(SOR ¶ 1.a) Applicant's practice was to purchase the poppy seeds legally from a flower store, and then grind the seeds up and steep

them in tea. The physiological effect upon consuming the tea was like a sedative or an opiate. (Tr. 54-55, 68-69)

In mitigation, Applicant testified that he is older and now has a family, as well as a job he enjoys. He recognizes that holding a clearance is important to him. His current circumstances are “incompatible with any drug use.” He said his desire to use marijuana has disappeared. He has found the effects of the drug to be physically taxing, and “not compatible with [the] responsibilities I have as a parent or as an employee.” (Tr. 43-44, 69-70) He cited having children as the biggest change in his lifestyle. (Tr. 77-78)

Applicant testified that he no longer attends parties or associates with people who use marijuana. His last use, in December 2017, was with a friend who now lives in another part of the state. They are no longer in regular contact. Applicant’s wife does not use marijuana, though she did rarely use it in the past. (Tr. 48-49, 65, 75-77) Applicant has never been diagnosed with a substance abuse disorder. He has never participated in drug treatment or counseling. (Tr. 80-81)

Applicant provided a statement of intent to abstain from all drug involvement and substance misuse. He acknowledged that any future such involvement would be grounds for revocation of his national security eligibility. (AE A) He intends to abstain from illegal drugs entirely. (Tr. 87)

Applicant’s supervisor wrote a cover letter to convey his “absolute trust” in Applicant’s character and judgment. He has known Applicant for many years. He regards Applicant as trustworthy and reliable, and an excellent performer and a leader at work. Applicant is responsible and credible, and is well qualified to hold a clearance. (AE B)

## **Policies**

It is well established that no one has a right to a security clearance. As the Supreme Court has held, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of Navy v. Egan*, 484 U.S. 518, 531 (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 used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as

the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

## **Analysis**

### **Guideline H: Drug Involvement**

AG ¶ 24 expresses the security concern for drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any “controlled substance” as defined in 21 U.S.C 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

The following disqualifying conditions under AG ¶ 25 are potentially applicable:

(a) any substance misuse (see above definition); and

(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

When he was a student, Applicant used a variety of illegal substances and misused substances that were otherwise legal. This included hallucinogenic mushrooms, poppy tea, and prescription oxycodone that was not prescribed to him. Applicant's use of those substances ended in 2013 or 2014. He also has a 20-year history of marijuana use, from 1997 to December 2017. AG ¶ 25(a) applies to SOR ¶¶ 1.a-1.d. SOR ¶ 25(c) would apply to Applicant's 2007 arrest for marijuana possession, but that offense was not alleged under Guideline H.

I have considered the mitigating conditions under AG ¶ 26. The following are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(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 is grounds for revocation of national security eligibility.

SOR ¶¶ 1.a, 1.c, and 1.d all concern Applicant's use of illegal substances, or misuse of otherwise legal substances, that ended in May 2014, more than five years ago. Those allegations are mitigated by the passage of time, under AG ¶¶ 26(a) and (b).

Applicant's marijuana use is a different matter. He began using marijuana in high school, in 1997. He used it daily until 2000, and used it less frequently after that. Along with his other disclosures, he disclosed his marijuana use on his October 2016 SCA. He described his marijuana use in the present tense: "I smoke marijuana on occasion" with a frequency of "monthly or less." Applicant used marijuana three more times, at home. His last use was in December 2017 -- before his May 2018 background interview, but also well after his October 2016 SCA.

Applicant testified that his job is important to him and he would like to be granted a clearance because of the professional opportunities that would become available as a result. Through the clearance application process, he realized, if belatedly, that drug use is “incompatible” with his current circumstances.

Applicant has undergone significant changes in recent years. He has completed his education, including his Ph.D., and finished his post-doctoral fellowship. He has left the world of academia and entered the defense industry. He has also married and is now the father of two young children. All of this, particularly fatherhood, has understandably had an impact on his lifestyle and outlook, and it weighs heavily in Applicant’s favor.

However, Applicant also has a 20-year history of marijuana use, beginning in high school and continuing well into adulthood. His use continued after his 2007 arrest and probation period. He used marijuana despite knowing that it was, and remains, illegal under U.S. federal law, as well as in the country where he lived overseas.

Most troubling, Applicant used marijuana after submitting his SCA, in October 2016. He recognizes now that his illegal use of marijuana while in the security clearance application process is “a bit of a contradiction,” as he put it. The DOHA Appeal Board has held that “drug involvement after having completed an SCA draws into serious question the applicant’s judgment, reliability, and willingness to follow rules and regulations, insofar as it placed the applicant on notice of the consequences of such misconduct.” (ISCR Case No. 16-02877 at 3 (Oct. 2, 2017); ISCR Case No. 15-01905 at 2 (App. Bd. Apr. 19, 2017).

Applicant testified that he has no desire to use marijuana again and does not intend to do so. He provided a statement of intent not to use marijuana in the future. He has also disassociated from those who use drugs. AG ¶ 26(b) therefore has some application. However, particularly when balanced against Applicant’s 20-year-history of knowingly illegal marijuana use, his two years of abstinence from marijuana is simply not enough to warrant full mitigation under either AG ¶¶ 26(a) or (b).

### **Guideline J: Criminal Conduct**

AG ¶ 30 expresses the security concern for criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant was arrested in June 2007 and charged with possession of marijuana. He disputes that he was using marijuana at the time. He pled no contest, choosing not to dispute the charge, which would have required him to return to the court, in a city far from home. Nonetheless, the fact of the arrest is sufficient to apply AG ¶ 31(b).

AG ¶ 32 sets forth the potentially applicable mitigating conditions:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant's single arrest occurred 12 years ago, when he was a graduate student. In subsequent years, he continued to pursue higher education, eventually earning a Ph.D. He has an excellent employment record. He married and has two young children. Applicant has had no further arrests or offenses. However, he continued to use marijuana on a fairly regular basis until December 2017, and did so knowing it was illegal. This constitutes subsequent criminal activity, even though it did not lead to additional arrests. Applicant's subsequent involvement with marijuana precludes application of AG ¶¶ 32(a) and (d).

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.



Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and J in my whole-person analysis.

Applicant is clearly intelligent and hardworking, and he has earned significant academic and professional success. He has married and started a young family, as well as a new career. His assertions that he has changed and matured are sincere. However, he still has a 20-year track history of marijuana use. He regarded himself as a current and regular marijuana user as recently as October 2016, when he prepared his SCA, and he kept using marijuana, if less frequently, until December 2017. Given his history, Applicant needs to establish a longer track record of abstinence from illegal drug use and compliance with rules, regulations, and the law before he can be trusted with access to classified information. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability 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.c, 1.d:	For Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2: Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

### **Conclusion**

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

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Braden M. Murphy  
Administrative Judge