



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



In the matter of: )  
 )  
 REDACTED ) ISCR Case No. 19-02577  
 )  
 Applicant for Security Clearance )

**Appearances**

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

03/31/2020

**Decision**

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant is a longtime marijuana user who continued to use the drug while holding a security clearance. He was not candid about his marijuana use on security clearance applications completed in February 2008 and February 2018. While he now indicates that he would stop using marijuana for his job, his drug use in violation of his clearance obligations and his lack of candor about his marijuana use continue to cast doubt about his judgment, reliability, and trustworthiness. Clearance eligibility is denied.

**Statement of the Case**

On November 15, 2019, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a Statement of Reasons (SOR) to Applicant, detailing a security concern under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. The SOR explained why the DCSA CAF was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DCSA 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.

Applicant responded to the SOR on December 2, 2019, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On January 29, 2020, Department Counsel indicated that the Government was ready to proceed to a hearing. 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 February 3, 2020, I scheduled a hearing for March 6, 2020.

The hearing was held as scheduled. Three Government exhibits (GEs 1-3) were admitted in evidence without objection. At the Government's request, and without objection from Applicant, SOR ¶ 2.b of the SOR was amended to correct a typographical error as to the date of an Electronic Questionnaires for Investigations Processing (e-QIP). Applicant testified, as reflected in a transcript (Tr.) received on March 17, 2020.

### **Findings of Fact**

The amended SOR alleges under Guideline H that Applicant used marijuana from approximately 2004 to approximately September 2019, including after being granted access to classified information in April 2008 (SOR ¶ 1.a), and that during a December 4, 2018 interview with an authorized investigator for the Department of Defense (DOD), Applicant expressed his intent to continue to use marijuana, despite knowing it is illegal under federal law and prohibited by his employer (SOR ¶ 1.b). Under Guideline E, Applicant is alleged to have deliberately falsified his February 12, 2018 e-QIP by denying that he had illegally used any drugs or controlled substances in the last seven years, and by denying that he had ever illegally used or been involved with a drug or controlled substance while possessing a security clearance (SOR ¶ 2.a). Additionally under Guideline E, Applicant is alleged to have also falsified his February 15, 2008 e-QIP by denying any illegal drug use in the last seven years (SOR ¶ 2.b). Applicant answered the SOR before the amendment to correct the date of the e-QIP in SOR ¶ 2.b from February 15, 2018, to February 15, 2008. He admitted the allegations without comment. (Answer.) After considering the pleading, exhibits, and transcript, I make the following findings of fact:

Applicant is 36 years old and unmarried. Shortly after graduating from high school he took a three-month class in web design. He was employed outside the defense industry as a machinist from August 2003 until February 2008, when he began working for his defense-contractor employer as an assembler. (GEs 1-2.)

On February 15, 2008, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) incorporated within an e-QIP. He responded negatively to an inquiry concerning any illegal use of a controlled substance, including marijuana, within the preceding seven years. (GE 1.) He disclosed no issues of potential security concern and was granted a DOD secret clearance in approximately April 2008. (Answer; GE 2.)

Applicant began using marijuana in 2004. He passed a pre-employment drug screen, and abstained from using marijuana for about seven to eight months after he was hired by his current employer because he knew marijuana was illegal both under federal and his state's laws (Tr. 43), and he should not use it. He resumed using marijuana recreationally, despite holding a DOD secret clearance. (GEs 1-3.)

On February 12, 2018, Applicant completed an e-QIP for a periodic reinvestigation for his security clearance eligibility. He responded negatively to SF 86 inquiries concerning whether he had illegally used any drug or controlled substance in the last seven years, and whether he had ever illegally used or otherwise been illegally involved with a drug or controlled substance while possessing a security clearance. (GE 2.)

On December 4, 2018, Applicant was interviewed for his background reinvestigation by an authorized investigator for the Office of Personnel Management (OPM). When asked if he had ever illegally used any drugs or controlled substances, Applicant initially responded negatively before admitting that he had smoked marijuana by choice on and off since the age of 18 with family and friends. He described the current frequency of his marijuana use as a couple of times per week "in a responsible manner" because he enjoys it. He denied ever being impaired by marijuana while driving or working. He expressed no plan to cease his marijuana use, while asserting that he would be able to stop, adding that he would do what he needed to do to pass a drug test, but then would resume using marijuana. He had never failed a drug screen and had never had any counseling or treatment for his drug use. Applicant admitted that he purchased his marijuana from a friend, spending up to \$100 or \$200 per month on occasion. Applicant initially explained that he had not disclosed his marijuana use on his security clearance application because he knew that marijuana use is illegal under federal law. After the state in which he works but not resides decriminalized recreational use of marijuana, his employer posted on its website that marijuana remains illegal under federal law. When asked whether he intentionally concealed his drug use, Applicant responded that he would not say that. However, he later acknowledged that he did not disclose his drug involvement on his clearance application because of fear of losing his job and being regarded as a criminal or as someone who is always high. (GE 3.)

At DOHA's request, Applicant reviewed a copy of the summary report of his interview with the OPM investigator. On September 18, 2019, Applicant attested that the summary was accurate, but he also stated:

Re-evaluated from previous answer. I would stop and not start again. My job is more important. Usage has also changed primarily too [sic] a sleep aid at this point. Usage around others even less than before. Quantity consumed down greatly. (GE 3.)

In response to an interrogatory asking him to report his drug use, Applicant indicated that he used marijuana between 2004 and September 5, 2019. As to its frequency, Applicant responded that he previously used marijuana several times a week, but "stopped on reception of this." He denied any intention to use marijuana in the future. (GE 3.)

At his March 2020 hearing, Applicant admitted that he had intentionally failed to disclose his marijuana use when he completed his February 2008 e-QIP because he knew of several people who had passed drug screens for employment with his employer but then were not hired for failure to receive a clearance because of self-reported cannabis use. (Tr. 17-18, 36.) Applicant also admitted that he had falsified his February 2018 e-QIP because he wanted to retain his job. (Tr. 36.) Applicant expressed regret for failing to disclose his drug use, adding that the possibility of him having to answer for it has been at the back of his mind for the past 12 years of his employment. Applicant testified that he made a “conscious effort to disclose” his marijuana use during his December 2018 personal subject interview because he never wanted to hide the information. He felt guilty about hiding it and wanted to “remedy that and not hide something that [he] should never have hidden to begin with.” Applicant expressed his agreement with those states in the United States who have legalized or decriminalized some form of marijuana use, and described the federal government’s prohibition as “a bit wonky.” Applicant acknowledged his “really poor decision in an attempt to try and keep [his] clearance.” (Tr. 17-21.)

Applicant refrained from marijuana use for a month or two after he told DOHA in September 2019 that he did not intend to use marijuana in the future. Suffering from insomnia to where his lack of sleep and exhaustion was beginning to affect his job performance, Applicant resumed using marijuana as a sleep-aid. He smoked “joints” or through a pipe, and purchased his marijuana from the same friend who has supplied him for the last 10 to 12 years. (Tr. 40-41.) Applicant tried a couple of different drugs, including Ambien and melatonin, four to six years ago, but cannabis relaxed his mind without the negative effects he felt from other drugs. (Tr. 25-28.) Applicant used marijuana as a sleep aid when needed, sometimes two or three times a week. (Tr. 29.) He used marijuana as a sleep aid as recently as March 2, 2020. (Tr. 24.) He used marijuana recreationally with his girlfriend within a few weeks of March 2020. Applicant described his recreational use as “pretty minimal at this point,” and limited to his girlfriend’s apartment. He testified that he “never touches the stuff” before work or driving a vehicle. Half of his job is spent on lifts and using a crane, so he has to ensure that he can operate safely. (Tr. 31-32.) Applicant now maintains that he would be willing to cease using marijuana to keep his clearance so that he can retain his job. He testified it would make things difficult for him as far as his sleep issues, but he is willing to go back to doctors or try additional homeopathic remedies. (Tr. 37-38.)

Applicant likes his job and states that he has excelled at every task. (Tr. 36-37.) He worked his way up to the top of the labor grade in his union before recently being laid off from that position and returned to his previous job in the middle of the labor grades. (Tr. 18-19, 22.) His current job as an assembler requires clearance eligibility at the secret level. (Tr. 22.) Applicant understands that should he lose his clearance, he could possibly be transferred to another department where a clearance is not required. He enjoys his present work and would like to stay in his department. (Tr. 23.)

## 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 from 2004 to at least March 2020. He continued to purchase and use marijuana after being granted a secret clearance and while working for a defense contractor, knowing that marijuana use is illegal under federal law and his state's law, and prohibited by his employer. During his personal subject interview in December 2018, he expressed an intention to continue using marijuana. Four 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;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; 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 his marijuana from a friend over the years. He has had the same supplier for the past 10 to 12 years. 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 he was in possession of marijuana when he used it, including as recently as March 2, 2020.

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 recreational use of marijuana may well have declined over the years, but he used marijuana with his girlfriend as recently as a few weeks before his March 2020 hearing. He used marijuana as a sleep aid only four days before his hearing. Under Appendix B of the AGs, the grant or renewal of a security clearance is prohibited for any covered individual who is an unlawful user of a controlled substance. Applicant's illegal use of marijuana to within four days of his security clearance hearing triggers that prohibition. Although he testified that he would be willing to cease his drug use, he can reasonably be considered "an unlawful user of a controlled substance" as of the adjudication of his security clearance eligibility.

Regarding AG ¶ 26(b), Applicant has established no significant period of abstinence. He continues to associate with his girlfriend, who uses marijuana. As to his willingness to abstain from marijuana going forward if required to maintain his clearance, Applicant told the DOD on September 18, 2019, that he did not intend to use any marijuana in the future. He apparently abstained from marijuana for only a month or two before resuming his use of marijuana, not only as a sleep aid but also recreationally with his girlfriend. Applicant has used marijuana for the past 15 years, and has known for 12 of those years that it could cost him his job. He has had an ample opportunity to cease using marijuana, as required by his clearance eligibility, and failed to do so. It shows the extent to which marijuana is part of his lifestyle. There is a very real risk if not reasonable expectation that Applicant will continue to use marijuana. The drug involvement and substance misuse security concerns are not mitigated.

## Guideline E: Personal Conduct

The security concern about personal conduct is articulated in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

Applicant admits that he falsified his initial security clearance application completed on February 15, 2008, and on his security clearance application completed on February 12, 2018, to update his security clearance eligibility. He deliberately did not disclose his use of marijuana in February 2008 because he feared he would not obtain the security clearance needed for his current employment. He concealed his drug use in February 2018 because he wanted to keep his job and clearance, and because he did not want to be regarded as a criminal or as someone habitually high on marijuana. Disqualifying conditions AG ¶¶ 16(a) and 16(e) apply. They provide:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility, or award fiduciary responsibilities; and

(e) personal conduct, or concealment of information about one's conduct, that creates 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.

One or more of the following mitigating conditions under AG ¶ 17 could apply in whole or in part:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;



(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant is credited with disclosing his marijuana use to the OPM investigator in December 2018, but that correction comes too late for a prompt rectification under AG ¶ 17(a). Applicant was granted a secret clearance in approximately April 2008 based on information that he knew was false. He concealed his marijuana use again in February 2018 because he knew that it was contrary to his obligations as a clearance holder employed by a defense contractor and in violation of federal as well as his state's law. Moreover, with respect to his disclosure of his drug use during his subject interview, he initially responded negatively when asked about any illegal drug involvement.

AG ¶ 17(b) was not shown to apply. Applicant chose to conceal his marijuana use out of self-interest and not in response to professional advice. By falsely certifying to the accuracy of his security clearance applications in 2008 and 2018, Applicant twice committed felonious conduct. His lack of candor on forms relied on by the government in conducting his background investigations is serious, repeated, and because of the 2018 falsification, too recent for mitigation under AG ¶ 17(c).

AG ¶ 17(d) and AG ¶ 17(e) warrant some consideration. Applicant's disclosure of his drug involvement during his December 2018 interview and his candid testimony about his marijuana use, including that he used marijuana as recently as four days before his March 2020 hearing, show some reform under AG ¶ 17(d). At least as to the DOD, Applicant mitigated vulnerability concerns under AG ¶ 17(e). That being said, I have to evaluate whether his belated disclosures are enough to mitigate his 12 years of active concealment of his marijuana use from the DOD and his employer. As a clearance holder, Applicant was

obligated to report known adverse information that could potentially impact his clearance eligibility. His belated candor is not enough to mitigate the concerns about his personal conduct.

### **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). They 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 can disagree with federal drug law and policy without negative consequences for his security clearance eligibility provided he does not act to violate the law or policy. By using marijuana as recently as March 2020 in knowing violation of his clearance, after he had told the DOD that he did not intend to use marijuana in the future, Applicant casts 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 long history of marijuana use, his failure to demonstrate a commitment to abstinence in the future, and his years of concealment about his drug involvement, raised enough doubt in that regard to where I am unable to conclude that it is clearly consistent with the national interest to continue his eligibility for a security clearance.

### **Formal Findings**

Formal finding for or against Applicant on the allegations set forth in the amended SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant

**Conclusion**

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

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Elizabeth M. Matchinski  
Administrative Judge