



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 19-03402
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Jeff A. Nagel, Esq., Department Counsel  
For Applicant: *Pro se*

07/29/2020

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**Decision**

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MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant has a long history of using marijuana, including while he held a secret clearance. He asserts that he stopped using marijuana more than six months ago, but it is not enough to overcome the drug involvement and substance misuse and personal conduct security concerns. Clearance eligibility is denied.

**Statement of the Case**

On January 31, 2020, 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, applicable to all adjudications for national security eligibility or eligibility to hold a sensitive position.

Applicant responded to the SOR on March 19, 2020, and requested a decision on the written record in lieu of a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. On April 22, 2020, the Government submitted a File of Relevant Material (FORM), including three items consisting of its documentary evidence. DOHA forwarded a copy of the FORM to Applicant, and instructed him that any response was due within 30 days of receipt. Applicant received the FORM on May 26, 2020. He submitted a response dated June 17, 2020, which was received by DOHA on June 22, 2020, without any objection.

On July 7, 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 July 10, 2020.

### **Evidentiary Rulings**

Department Counsel submitted as Item 3 to the FORM a summary report of a personal subject interview (PSI) of Applicant conducted on February 20, 2019. The summary report was included in the DOD report of investigation (ROI) in Applicant's case. Under ¶ E3.1.20 of the Directive, a DOD personal background ROI may be received in evidence and considered with an authenticating witness, provided it is otherwise admissible under the Federal Rules of Evidence. The summary report did not bear the authentication required for admissibility under ¶ E3.1.20.

In ISCR Case No. 16-03126 decided on January 24, 2018, the DOHA Appeal Board held that it was not error for an administrative judge to admit and consider a summary of a PSI where the applicant was placed on notice of his or her opportunity to object to consideration of the summary; the applicant filed no objection to it; and there is no indication that the summary contained inaccurate information. In this case, Applicant was provided a copy of the FORM and advised of his opportunity to submit objections or material that he wanted the administrative judge to consider. In a footnote to the FORM, Applicant's attention was directed to the following important notice:

The attached summary of your Personal Subject Interview (PSI) (Item 3) is being provided to the Administrative Judge for consideration as part of the record evidence in this case. In your response to this File of Relevant Material (FORM), you can comment on whether the PSI summary accurately reflects the information you provided to the authorized OPM investigator(s) and you may make any corrections, additions, deletions, and updates necessary to make the summary clear and accurate. Alternatively, you can object on the ground that the report is unauthenticated by a Government witness and the documents may not be considered as evidence. If no objections are raised in your response to the FORM, or if you do not respond to the FORM, the Administrative Judge may determine that you have waived any objections to the admissibility of the summary and may consider the summary as evidence in your case.

Concerning whether Applicant understood the meaning of authentication or the legal consequences of waiver, Applicant's *pro se* status does not confer any due process rights or protections beyond those afforded him if he was represented by legal counsel. While the Directive does not specifically provide for a waiver of the authentication requirement, Applicant was placed on sufficient notice of his opportunity to object to the admissibility of the PSI summary, to comment on it, and to make any corrections, deletions, or updates to the information in the PSI summary. Applicant did not file any objections in his response to the FORM. In the absence of any comment or objections, it is reasonable to infer that he did not object to consideration of the summary or the other documents relied on by the Government. Accordingly, items 1-3 are accepted into evidence as Government exhibits (GEs). Applicant's response to the SOR is admitted as Applicant exhibit (AE) A.

### **Findings of Fact**

The SOR alleges under Guideline H (SOR ¶ 1.a), and cross-alleges under Guideline E (SOR ¶ 2.a), that Applicant used marijuana with varying frequency from about January 1972 to at least February 2019, including while holding a security clearance. When Applicant responded to the allegations, he admitted the use of marijuana, but clarified that most of his marijuana use occurred during his 20s and 30s; that he used marijuana occasionally, perhaps once every six months, during his 40s and 50s; and that he "only started using marijuana in the last few years right before bed to help [him] sleep." He admitted that he held a security clearance but claimed that he never worked on sensitive information. He asserted that he stopped using marijuana with no intention of future use and is willing to undergo drug testing to prove his abstention. Applicant denied the personal conduct security concerns, indicating that he did not attempt to conceal his marijuana use in any way and that he did not intend to use marijuana in the future. (GE 1.)

After considering the FORM, which includes Applicant's answer to the SOR allegations (GE 1), and AE A, I make the following findings of fact:

Applicant is a 66-year-old information technology specialist, who has worked for his current employer, a defense contractor, since August 2018. He earned a bachelor's degree in June 1995 and a master's degree in June 2002. He has been married to his current wife since May 1993, and they have a son age 25 and a daughter age 22. Applicant also has a 42-year-old son from his first marriage and a 30-year-old daughter from another relationship that did not result in marriage. As of December 2018, Applicant and his current spouse's two children were still living at home. (GE 2.)

Applicant worked as an information technology specialist for a large defense contractor from January 1974 to April 2014. He held a DOD security clearance at the secret level from about January 1976 while in that job. (GE 2.) Applicant, who had begun using marijuana in January 1972, continued to use the drug at a frequency not specifically delineated in the evidentiary record other than that most of his marijuana use occurred during his 20s and 30s. He naively believed that marijuana was harmless and did not affect anyone else. (GEs 2-3; AE A.) Applicant asserts that the sensitive work for which he held a security clearance "never materialized." (GE 1.) During his 40s and 50s (from about late

1993 through 2013), Applicant asserts that he used marijuana occasionally, “maybe once every 6 months,” at times with a friend. (GE 3; AE A.)

When medical marijuana became available in his state, Applicant “deemed it acceptable to use [marijuana] to relax before sleep,” and he began using marijuana on occasion for that purpose. (AE A.) A review of pertinent state law shows that medical marijuana use was decriminalized in 1996. See California’s Health and Safety Code § 11362.5. With the passage of Proposition 64 at the November 8, 2016 statewide general election, adults age 21 and over could legally consume and possess up to one ounce (28.5 grams) of marijuana for recreational purposes. See California’s Civil Code § 1550.5. Applicant did not provide a specific date for when he began using marijuana as a sleep aid. He indicated in response to the SOR that he “only started using marijuana in the last few years right before bed to help [him] sleep.” There is no evidence that he ever held a medical marijuana card.

Applicant worked as an information technology manager for a satellite television company from September 2014 to March 2016; was unemployed from March 2016 to February 2017; and worked as a systems and programming manager for a candy manufacturer from February 2017 to February 2018, when he was fired for work-related issues. (GE 2.)

Applicant asserts, albeit without corroboration, that he had stopped using marijuana after he left his job of 40 years in 2014, but resumed his occasional use after he was hired by his current employer in August 2018. During the job application process, Applicant was informed that he would need a security clearance for the position and asked whether that would be a problem for him. Applicant asked his future managers what type of behavior could pose a problem and was given no guidance. His employer did not require that he take a drug test, which he thought was “very odd” since drug tests were required for other jobs that did not require a security clearance. He “wrongly thought that marijuana usage was not a concern, and felt comfortable with resuming [his] occasional marijuana use.” (AE A.)

On December 6, 2018, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86). Applicant disclosed on his SF 86 that he had used marijuana in the last seven years; that he first used it in approximately January 1972 and most recently in November 2018. As to the nature, frequency, and extent of his marijuana use, Applicant stated, “I use it socially and as a sleep aid. I used it on and off and most recently 2 or 3 times a week.” Applicant responded affirmatively to whether he used marijuana while possessing a security clearance. He answered “Yes” to whether he intends to use the drug in the future and explained, “A proper night’s sleep is very important to [his] health.” (GE 2.)

On February 20, 2019, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Applicant explained that he was currently using marijuana by pipe a couple of times per week on average to help him sleep and that he purchases marijuana legally from a dispensary, spending less than \$100 per quarter for

the drug. He added that since the 1970s, he has used marijuana once every couple months to every few months socially with a friend. Applicant denied any use of marijuana before work or during the daytime, any dependency on the drug, and ever testing positive for the drug. Applicant expressed his intention to continue to use marijuana, but also his willingness to stop “if asked by federal law in order to maintain a security clearance.” He indicated that he would resume using marijuana after he retires. (GE 3.)

On January 31, 2020, the DCSA issued an SOR to Applicant because of his history of marijuana use, including while holding a security clearance. Applicant explained in response that most of his marijuana use occurred some 35 to 45 years ago and was “at best occasional (maybe once every 6 months) in [his] 40’s and 50’s; that he only started using marijuana in the last few years before bed to help him sleep; that while he held a clearance many years ago, he never worked on any project that required a clearance; and that he had ceased using marijuana and had no plan to use the drug in the future. He indicated that he was using over-the-counter medications to regulate his sleep and expressed willingness to undergo drug testing to prove his abstention. In response to personal conduct security concerns raised by his use of marijuana, Applicant admitted that he knew his marijuana use might cause a problem, but he did not conceal his involvement. (GE 1.)

Applicant denies that he was ever a habitual user of marijuana. He asserts that he stopped using marijuana more than six months ago and plans not to use marijuana in the future. (AE A.)

## **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 began using marijuana in approximately January 1972, and he continued to use the drug with varying frequency while working for a defense contractor for some 40 years and holding a DOD secret clearance granted to him around January 1976. During his February 2019 PSI, he did not report a significant period of abstention from drug involvement. He now asserts that he stopped using marijuana in April 2014 but resumed his marijuana use when he returned to work in the defense industry in August 2018. He was using marijuana two to three times a week as of his December 2018 SF 86 and February 2019 PSI. Marijuana is a Schedule I controlled substance and possession of marijuana is a federal criminal offense. His drug involvement clearly establishes disqualifying conditions AG ¶ 25(a), “any substance misuse (see above definition),” and ¶

25(f), “any illegal drug use while granted access to classified information or holding a sensitive position.”

AG ¶ 25(g), “expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse,” warrants some discussion. Applicant indicated on his December 2018 SF 86 that he intended to continue to use marijuana in the future as a sleep aid. As of his February 2019 PSI, he planned to continue using marijuana, but expressed a willingness to stop “if asked by federal law in order to maintain a security clearance.” He asserted in March 2020 that he had stopped using marijuana. In June 2020, he stated that he had not used any marijuana in more than six months and did not intend to use marijuana in the future. Applicant did not explain what led to his decision to forego future drug involvement. The SOR may well have been a significant factor in his decision to cease using marijuana, but I cannot speculate in that regard. In any event, his candid disclosures on his SF 86 and during his PSI of his marijuana involvement and intention of future use against self-interest allow me to find credible his change of heart with respect to future marijuana consumption. AG ¶ 25(g) no longer applies.

Regarding AG ¶ 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia,” Applicant purchased marijuana in recent years from a dispensary and used marijuana in a pipe. His state’s decriminalization of medical marijuana in 1996, and legalization in 2016 of recreational use and possession of up to once ounce of marijuana by adults 21 and over, does not alter existing federal laws and regulations prohibiting the use and possession of marijuana. However, Applicant’s possession of marijuana and drug paraphernalia (pipe) and his purchases cannot provide separate bases for disqualification because they were not alleged in the SOR. However, I cannot ignore the circumstances of his marijuana use, including his reliance on marijuana regularly as a sleep aid in 2019, when evaluating the risk of future drug involvement.

Applicant bears the burden of establishing that matters in mitigation apply, and given his decades of marijuana use, he bears a heavy burden. AG ¶ 26 provides for mitigation as follows:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on an individual’s current reliability, trustworthiness, or good judgment;
- (b) the individual acknowledges his or drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:
  - (1) disassociation from drug-using associates and contacts;
  - (2) changing or avoiding the environment where drugs were used; and

(3) providing a signed statement of intent to abstain from all illegal drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility;

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

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

None of the mitigating conditions apply. Applicant's recreational use of marijuana may well have declined since the 1970s, and been occasional in recent years, but his regular use of marijuana as a sleep aid in 2018 and 2019 is too recent and recurrent to favorably consider AG ¶ 26(a).

Regarding AG ¶ 26(b), the extent to which security concerns may have been attenuated by the passage of time is a question resolved in light of the evidence as a whole. See *e.g.*, ISCR Case No. 14-01847 at 3 (App. Bd. Apr. 9. 2015). Applicant has not established a sufficient period of abstinence when considering his decades of marijuana use and his reliance on the drug as a medication to bring about sleep two or three times a week in 2018 and 2019 while working for a DOD contractor. Moreover, it is unclear whether he continues to associate with the friend with whom he used marijuana socially over the years. During his February 2019 PSI, he indicated that he had used marijuana every couple of months to every few months with the same friend since the 1970s. Marijuana was a significant part of Applicant's lifestyle within the past year or so. The drug involvement and substance misuse security concerns are not yet 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.

Concerning the Government's case for disqualification under the personal conduct guideline because of Applicant's marijuana use while he held an active security clearance (SOR ¶ 2.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. 13-01281 at 4 (App. Bd. Aug. 4, 2014). Applicant exercised “questionable judgment” within the general security concerns set forth in AG ¶ 15 when he repeatedly used marijuana while holding a secret clearance. He was granted a secret clearance in approximately January 1976 for his work with a defense contractor, and there is no evidence that his clearance was administratively terminated, suspended, or revoked over the next 38 years of his employment with the company. Applicant had an obligation as a clearance holder to comply with the federal law and DOD policy prohibiting illegal drug use, whether or not he handled sensitive matters.

It may reasonably be inferred from the limited evidence of record that Applicant knew marijuana use was inconsistent with his security clearance and federal drug laws, even while he “deemed it acceptable” to use marijuana as a sleep aid after his state decriminalized medical marijuana use. He indicated during his PSI that he would be willing to stop using marijuana “if asked to by federal law in order to maintain a security clearance.” Moreover, when he responded to the SOR allegations, he stated in response to the personal conduct concerns “I knew that my marijuana usage may cause a problem.”

Applicant exhibited some reform under AG ¶ 17(d) by admitting his marijuana use, including in the past while holding a DOD clearance and by resolving not to use any illegal drug in the future. AG ¶ 17(d) provides:

(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.

However, it is difficult to find adequate reform in this case. Applicant has yet to express remorse for his years of disregard of the federal drug laws and policies prohibiting marijuana possession and use. Applicant either does not understand or is unwilling to acknowledge that his obligation to comply with federal restrictions on marijuana possession and use did not depend on whether he was given classified work when he had a clearance or whether he had to take a pre-employment drug test for his current job. The personal conduct security concerns are not fully 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). 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.

Security clearance decisions are not intended to punish applicants for past transgressions, and Applicant's candor about his drug involvement weighs in his favor. 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, including for many years while holding a secret clearance, raises 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 SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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