DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 20-01456
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Kelly M. Folks, Esq., Department Counsel
For Applicant: *Pro se*

03/22/2021

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Decision

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MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used marijuana on a few occasions between June 2013 and August 2018, in violation of Federal law. He denies any use of marijuana while holding a position requiring security clearance eligibility and intends no future use of marijuana. Yet, his failure to comply with Federal drug laws continues to cast doubt about his judgment, reliability, and trustworthiness. Clearance eligibility is denied.

Statement of the Case

On September 22, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H, drug involvement and substance misuse. The DCSA CAF explained in the SOR why it 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; Department of Defense (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 October 5, 2020, and he requested a decision on the written record in lieu of a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. On November 23, 2020, the Government submitted a File of Relevant Material (FORM), including the pleadings (Items 1 and 2), three documentary exhibits (Items 3 through 5), and legal statutes and Director of National Intelligence (DNI) policy guidance for administrative notice. DOHA forwarded a copy of the FORM to Applicant, and instructed him that any response was due within 30 days of receipt. Applicant submitted a response on January 25, 2021. Department Counsel filed no objection to his response.

On February 25, 2021, 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 March 4, 2021.

Evidentiary Rulings

Department Counsel submitted as Item 5 in the FORM a summary report of a personal subject interview (PSI) of Applicant conducted on February 22, 2019, by an authorized investigator for the Office of Personnel Management (OPM). The summary report was included in a 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 the FORM, Applicant's attention was directed to the following important notice regarding Item 5:

> The attached summary of your PSI is being provided to the Administrative Judge for consideration as part of the record evidence in this case. In your response to this [FORM], you can comment on whether the PSI [summary] accurately reflects the information you provided to the authorized OPM investigator and you can 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 document 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 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. He was advised in ¶ E3.1.4 of the Directive that he may request a hearing. In ¶ E3.1.15, he was advised that he is responsible for presenting evidence to rebut, explain, or mitigate facts admitted by him or proven by Department Counsel and that he has the ultimate burden of persuasion as to obtaining a favorable clearance decision. 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 interview summary report, to comment on the interview summary, and to make any corrections, deletions, or updates to the information in the report. Applicant did not object to the FORM or indicate that the PSI summary contained inaccurate information.

Although *pro se* applicants are not expected to act like lawyers, they are expected to take timely and reasonable steps to protect their rights under the Directive. ISCR Case No. 12-10810 at 2 (App. Bd. Jul. 12, 2016). *See* ADP Case No. 17-03252 (App. Bd. Aug. 13, 2018) (holding that it was reasonable for the administrative judge to conclude that any objection had been waived by an applicant's failure to object after being notified of the right to object). Applicant has a college degree. He can reasonably be held to have read the PSI summary, and there is no evidence that he failed to understand his obligation to file any objections to the summary if he did not want the administrative judge to consider it. Accordingly, I find that he waived any objections to the PSI summary. Government officials are entitled to a presumption of regularity in the discharge of their official responsibilities. *See e.g.*, ISCR Case No. 15-07539 (App. Bd. Oct. 18, 2018). There is nothing in the record to doubt the accuracy of the summary.

Moreover, some of the information in the summary is mitigating, and Applicant may have benefitted from some consideration of the summary. For example, Applicant indicated during his interview that he did not intend to use marijuana in the future. Applicant may have relied on the admissibility of the summary, and it would violate due process for me to exclude it from consideration without a timely objection. *See* ISCR Case No. 15-05252 at 3 (App. Bd. Apr. 13, 2016).

The SOR (Item 1) and Answer (Item 2) are incorporated in the record as the pleadings. Items 3 through 5 are accepted into evidence as Government's exhibits. Applicant's rebuttal to the FORM is admitted as Applicant Exhibit (AE) A.

In evaluating Applicant's security clearance eligibility, I also agree to take administrative notice of Title 21 Sections 802, 812, and 813 of the United States Code (U.S.C.) and the policy guidance of the then DNI issued on October 25, 2014, requiring adherence to Federal laws prohibiting marijuana use by those holding or seeking access to

classified information or a sensitive position. Federal laws and official pronouncements of U.S. government policy are proper matters for administrative notice.

Findings of Fact

The SOR alleges under Guideline H that Applicant used marijuana with varying frequency from approximately October 2013 to about August 2018, while he was "granted access to classified information" (SOR ¶ 1.a). (Item 1.) When Applicant answered the SOR, he admitted that he had used marijuana, but denied that he used marijuana while having any access to classified information. He explained that on the few occasions where he "made the poor decision to use marijuana, [he] was working for companies [and] that [he] had no sponsored clearance." (Item 2.)

After considering the pleadings (Items 1-2), Government exhibits (Items 3-5), and AE A, I make the following findings of fact:

Applicant is a 41-year-old principal security consultant employed by a company that supports offensive engagements for both commercial and U.S. government clients. He has been married to his current spouse since March 2014. A previous marriage ended in divorce in February 2013. He has an 18-year-old daughter and a 12-year-old son from that marriage. (Item 3.)

Applicant worked as a senior information systems technician for a company in the commercial sector from January 1998 to January 2001. He then served on active duty as an infantryman in the U.S. Army from February 2002 to May 2007, when he was honorably discharged at the rank of staff sergeant due to a service-related disability. During his time on active duty, he was deployed to Kuwait and Pakistan from August 2002 to November 2002 and to Iraq from January 2003 to June 2003, and January 2005 to January 2006. For exceptional meritorious service during combat operations in support of Operation Iraqi Freedom III, he was awarded the Army Commendation Medal in November 2005. (AE A.)

Following his discharge, Applicant worked part time in sales until October 2007, when he became employed as a security specialist for a U.S.-government contractor. From October 2007 to January 2009, he ensured the safety and security of U.S. government personnel and U.S. Embassy support personnel in Afghanistan. (AE A.) He held a secret clearance for his duties, which was issued by the U.S. State Department in December 2007. (Items 3-4; AE A.) In April 2008, then U.S. Vice President Cheney expressed his appreciation for Applicant's professionalism and dedication during the Vice President's trip to Afghanistan. (AE A.) For medical reasons, Applicant was unable to continue in his position, and in February 2010, he took a position as a recruiter for the company. He left that job in August 2011 to pursue his college studies full time. (AE A.)

Applicant worked full time as a recruiter with a U.S. government contractor from January 2012 to May 2014 while continuing to pursue his college degree online and night and weekend classes. There is no evidence that he held an active security clearance at

that time. He used marijuana in October 2013. (Item 3; AE A.) The circumstances of that drug involvement are not detailed in the record.

Applicant earned his bachelor's degree in computer and information science in April 2014. (AE A.) In June 2014, he began working as a "cyber security penetration tester" for another government contractor. To support a cyber-security program for the Department of Homeland Security, he applied for security clearance eligibility. He asserts that he disclosed his "recent use of marijuana." (AE A.) In August 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) granted Applicant a Secret clearance for his duties. (Item 4.)

From January 2017 to June 2017, Applicant worked for a commercial company in cyber security. (Item 3.) He denies he was sponsored for a security clearance at that time (AE A), and there is no evidence that he accessed classified information at that time, although a JPAS entry indicates that he held a Secret clearance based on the 2014 grant of clearance eligibility. (Item 4.) Sometime during that employment, he used marijuana on one occasion with his wife and a friend (hereafter friend X). (Item 5.)

Between June 2017 and February 2018, Applicant was employed by a U.S.-government contractor to conduct penetration tests for a non-DOD U.S.-government entity. He asserts that he was sponsored for security clearance eligibility. (Item 3; AE A.)

From April 2018 to October 2018, Applicant worked as an instructor and conducted testing on commercial contracts. (Items 3, 5; AE A.) Applicant does not believe that his employer had any government contracts. He used marijuana during this time frame on three occasions, i.e., once in his home and twice while with friend X during trips to Seattle and Las Vegas. (Item 5; AE A.)

Applicant began working for his present employer in October 2018. He was approached for the position and "jumped at the opportunity to support the federal government and DOD spaces again." (AE A.) On December 2, 2018, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) for a Top Secret clearance. In response to an SF 86 inquiry into whether he had illegally used a drug or controlled substance in the last seven years, Applicant reported that he used marijuana between approximately June 2013 (not October 2013 alleged in the SOR) and August 2018, "on a few occasions. Such as in Las Vegas or on a trip to Seattle." He responded negatively to an inquiry into whether he intended to use the drug in the future and stated, "I have never smoked pot while holding a security clearance and have no intentions of changing that. I have never failed a urinalysis for any employer." (Item 3.)

On January 9, 2019, the OPM opened a T5 background investigation on Applicant. (Item 4.) On February 22, 2019, Applicant was interviewed by an authorized investigator for the OPM. Applicant described his marijuana use as very infrequent and never while he held a security clearance. He indicated that he used marijuana with his wife and friend X at his home in 2017; in Las Vegas with friend X in August 2018; with friend X in Seattle in 2018; and once in his home in 2018. Applicant stated that he would not use marijuana

again because he has been re-sponsored for security clearance eligibility and has no intention of using marijuana while possessing a security clearance. He denied socializing with individuals who use marijuana, but he also admitted that he has contact with friend X once a week online or one the phone. They speak while playing computer games online. He admitted that he had contact with friend X the day before his OPM interview through online chatting. (Item 5.)

On September 22, 2020, the DCSA CAF issued an SOR to Applicant, alleging that he used marijuana between October 2013 and August 2018 "while granted access to classified information." (Item 1.) In his October 5, 2020 response to the SOR, Applicant admitted that he had "made the poor decision to use marijuana" a few times, but he asserted that when he used marijuana, he "had no sponsored clearance." He added that, at no time, had he compromised his integrity while holding a security clearance. (Item 2.)

In response to the FORM, Applicant reiterated on January 25, 2021, that while he had used marijuana on a few occasions during the period from October 2013 to about August 2018, when he used the marijuana, he did not have access to classified information and was not working for entities where he was sponsored for security clearance eligibility. Applicant stated that he has "disassociated with those whom [he] used marijuana with on the trips to Las Vegas and Seattle." He indicated that he is fully aware of his obligations to the United States while working with a clearance and that he would abstain from any use of any controlled substances. (AE A.)

Marijuana is a Schedule I controlled substance under Federal law pursuant to 21 U.S.C. § 812. Schedule I drugs are those which have a high potential for abuse; have no currently accepted medical use in treatment in the United States; and lack accepted safety for use of the drug under medical supervision. On October 25, 2014, the then DNI issued guidance that changes to laws by some states and the District of Columbia to legalize or decriminalize the recreational use of marijuana do not alter existing Federal law or the National Security Adjudicative Guidelines, and that an individual's disregard of Federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations.

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.

Despite some states' legalization or decriminalization of small amounts of marijuana for recreational use, marijuana remains a Schedule I controlled substance, and its use is illegal under Federal law and contrary to the obligations of security clearance eligibility. Applicant reported on his SF 86 that he used marijuana on a few occasions between June 2013 and August 2018. During his OPM interview, he provided no details about his reported use before 2017. He admitted at that time that he used marijuana with his wife and a friend in his home in 2017; with this friend on trips to Las Vegas and Seattle in 2018; and once in his home in 2018. His illegal use of marijuana establishes disqualifying condition AG ¶ 25(a), "any substance misuse." AG ¶ 25(c), "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," is shown only in that Applicant had physical possession of marijuana when he used it. There is no information in the record about how Applicant acquired the marijuana that he used.

Regarding AG ¶ 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position," Applicant denies that he used marijuana while he held a security clearance or was being sponsored for a clearance by his employer. Available information (Item 4) reflects that Applicant was granted a Secret clearance by the DOD CAF on August 26, 2014. He provided no documentation showing that his clearance eligibility was withdrawn, but there is also no conclusive evidence that he used marijuana while he held a sensitive position or had access to classified information. Applicant resigned from the position where he held clearance eligibility in January 2017. He asserts without any evidence to the contrary that his duties were in the commercial sector from January 2017 to June 2017. Some of his duties as a penetration tester with his next employer from June 2017 to February 2018 were for a U.S.-government entity, yet it was not clearly established that he held a sensitive position that required clearance eligibility. When Applicant used marijuana in 2018, he was working for a company that he asserts had no government contracts to his knowledge, and his clients were in the commercial sector. There is no evidence that he has used marijuana since commencing his employment in October 2018 with the company currently sponsoring him for security clearance eligibility. The evidence falls short of establishing AG ¶ 25(f).

Even so, Applicant knew or can reasonably be held to have known that his marijuana use was against Federal law. He had served honorably in the U.S. military and worked for contractors in service of U.S.-government entities. He responded affirmatively on his SCA to having used marijuana illegally. He did not present any evidence of his employer's policy regarding the use of marijuana. Applicant's decision to forego future marijuana use, which he expressed on his SF 86, during his interview, in response to the SOR, and in rebuttal to the FORM, is viewed favorably, but it does not necessarily dispel the security concerns raised by his drug involvement in knowing contravention of Federal law.

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.

AG ¶ 26(a) cannot reasonably apply in mitigation. Applicant's marijuana involvement to at least August 2018 was very recent as of his December 2018 SCA. Neither AG ¶ 26(c) nor AG ¶ 26(d) was shown to apply. Applicant has a case for some mitigation under AG ¶ 26(b) (3) because of the passage of more than two years since his last use of marijuana, and his intention to forego any future involvement. While I did not have the opportunity to assess Applicant's demeanor in person, his disclosure on his SCA of then very recent marijuana use weighs in his favor in assessing whether his stated intention to refrain from using marijuana while holding a DOD security clearance can be accepted as credible. His candor about his drug involvement is not in and of itself mitigating of his illegal marijuana use. However, his self-report of negative information that could cost him clearance eligibility is important evidence of compliance with DOD requirements.

Some concern arises because of the limited information in the record about the circumstances of Applicant's drug involvement. Applicant did not indicate how he came to possess the marijuana that he used, although it is also not clear that the OPM investigator asked him. Applicant told the investigator that he used marijuana in his home in 2017 with his wife and friend X; in 2018 in Las Vegas and Seattle with friend X; and in 2018 at his home. He did not indicate whether his spouse continues to use marijuana or whether there is currently some marijuana in his residence. He denied socializing with persons who use marijuana, although he also told the investigator that he and friend X had ongoing contact

once a week online or on the phone. In rebuttal to the FORM, Applicant stated that he has disassociated himself from "those whom [he] used marijuana with on the trips to Las Vegas and Seattle." Presumably, he was referring to friend X, although in that regard, he did not explain when he ended their association other than that it occurred "since working for [his current employer]." Friend X was involved in Applicant's drug use in 2017 and 2018, but so was Applicant's wife. Too many unanswered questions exist about her role in Applicant's drug use to apply either AG ¶ 26(b) (1) or AG ¶ 26(b) (2).

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's marijuana use was too intermittent to support the Government's characterization of a longstanding history of marijuana use over many years, before and after obtaining a Secret-level security clearance. That being said, even his limited involvement was in disregard of Federal law. It occurred when Applicant was in his mid to late 30s, so immaturity was no excuse. His motivation for using marijuana is unclear, and his drug use in violation of Federal law is difficult to reconcile with his record of decorated military service and his subsequent contractor employment in support of U.S. - government entities. 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 (9th 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. For the reasons previously discussed, doubts persist as to whether it is clearly consistent with the national interest to grant him eligibility for a security clearance.

Formal Finding

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

Paragraph 1, Guideline H:	AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Conclusion

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

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Elizabeth M. Matchinski
Administrative Judge