



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



In the matter of: )  
)  
) ISCR Case No. 19-03795  
)  
Applicant for Security Clearance )

**Appearances**

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

January 11, 2022

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**Decision**  
\_\_\_\_\_

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns arising under Guidelines H (drug involvement and substance misuse) and E (personal conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

On January 29, 2019, Applicant submitted a Questionnaire for National Security Positions (SF-86). On March 12, 2020, the Defense Counterintelligence and Security Agency, Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H and E. The SOR detailed reasons why the CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On April 14, 2020, Applicant submitted his Answer to the SOR through counsel. When Applicant submitted his SOR Answer, he was represented by counsel, but he was no longer represented by counsel at his hearing. On November 27, 2020, Department Counsel was ready to proceed. On December 15, 2020, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On February 18, 2021,

DOHA issued a notice of hearing scheduling the hearing for March 23, 2021. The hearing was convened as scheduled. Department Counsel submitted Government Exhibits (GE) 1 through 4, which were admitted without objection. Applicant testified, called one witness to testify on his behalf, and submitted Applicant Exhibit (AE) 1, a three-ring binder containing Tabs A through Q, which was admitted without objection. On April 2, 2021, DOHA received the hearing transcript (Tr.).

## **Findings of Fact**

### **Background Information**

Applicant is a 37-year-old program manager employed by a defense contractor since December 2006. (GE 1; Tr. 11-12) He seeks to retain his security clearance, which he has held since March 2009. (Tr. 12-14)

Applicant received his high school diploma in June 2002. He was awarded a Bachelor of Science degree in mechanical engineering in December 2006. (AE 1(H); Tr. 14-17) Applicant married in January 2014, and has an 18-year-old stepdaughter and a 9-year-old daughter. Applicant's wife is not employed outside the home. (GE 1; Tr. 17-19)

### **Drug Involvement and Substance Misuse**

Applicant self-reported past marijuana use on his January 29, 2019 SF-86 during his periodic security clearance renewal. (GE 1) He was subsequently interviewed on May 23, 2019, by an Office of Personnel Management (OPM) investigator regarding his marijuana use. (GE 2) He elaborated on his marijuana use in his April 14, 2020 SOR Answer as well as during his testimony. The following summarizes that drug use.

SOR ¶ 1.a alleged that from approximately June 2003 through at least December 2018, Applicant purchased and used marijuana with varying frequency; and SOR ¶ 1.b alleged that Applicant continued to purchase and use marijuana after he had been granted a DOD security clearance in March 2009.

In his SOR Answer, Applicant stated that he did not remember exactly what year he first used marijuana. His best estimate is that he first used marijuana sometime between 2003 and 2005, which was between 15 and 17 years from the time he submitted his SOR Answer. He used marijuana approximately two or three times per year, if that, until 2018 when his marijuana use increased to approximately one to two times per month for a short period. His increased marijuana use in 2018 came about when recreational marijuana use became legal in his state of residence. He stated that he was under the mistaken belief that its use was acceptable at the federal level as well. Applicant acknowledged his marijuana use was "extremely improvident" and added that he has no intention to ever use marijuana or any other drug again. Applicant's testimony was consistent with his January 29, 2019 SF-86 and his SOR Answer. (SOR Answer; Tr. 19-22; GE 1; AE 1(Q))

Applicant used marijuana for “recreational use” and for its “relaxing capabilities every now and then.” Applicant added that he used marijuana about 20 times while holding a clearance from March 2009 to December 2018, further adding that that number was “just a guess.” He acknowledged that his marijuana use was a violation of state and Federal law, security clearance regulations, and his employer’s drug-free workplace policy. Applicant volunteered that his marijuana use was a “poor choice.” (Tr. 24-26)

The driving force behind Applicant’s decision to quit using marijuana occurred when he was renewing his security clearance application in December 2018. He stated, “it really dawned on me I shouldn’t have done it, and it was a poor choice.” Applicant has used marijuana with his wife. His wife still uses marijuana, which is legal in their state of residence. Applicant stated that even though he has been around individuals to include his wife who use marijuana, he is not tempted to use it anymore. (GE 2; Tr. 26-29, 33-35) Applicant stated, “trustworthiness is one of the most important parts of having a Security Clearance. You don’t want someone that lies. . . . You make mistakes, you’ve got to own up to it. So, that’s why I’m here.” (Tr. 57)

During Applicant’s March 2, 2009 OPM interview, he told the investigator that he “stopped (using marijuana) in 2007 because the use no longer appealed to him and he wanted to start a career.” (GE 4; Tr. 29-30)

## **Personal Conduct**

The concerns identified under this Guideline are listed as two separate allegations and discussed in order as indicated in the SOR.

The Government cross-alleged the drug involvement and substance misuse concern alleged in SOR ¶¶ 1.a and 1.b under SOR ¶ 2.a. Additionally, the SOR alleged that Applicant falsified his December 29, 2008 SF-86 when he disclosed marijuana use from November 2005 through July 2007, and purportedly failed to disclose his continuing use of marijuana as set forth in SOR ¶ 1.a.

Applicant denied falsifying his December 2008 SF-86. He explained that when he completed his December 2008 SF-86, he was not using marijuana and had not done so since July 2007. He emphasized the information he provided on his December 2008 SF-86 was accurate, as he was not using marijuana at that time. (SOR Answer; Tr. 22-24) Apparently, the confusion over the “continuing use” question arose when Applicant submitted his January 29, 2019 SF-86 and estimated his marijuana use as June 2003 to June 2017. (GE 1; Tr. 24)

## **Character Evidence**

Applicant called one character witness (CW) to testify on his behalf, a technical director and co-worker he has known since 2013. CW has held a clearance since approximately 1985. CW provided a favorable professional and personal assessment of Applicant. She stated among other things that Applicant is trustworthy, loyal, and she

has no reason to question his ability to hold a security clearance. CW did concede on cross-examination that following the law, rules, regulations, and company policy is an important part of holding a security clearance. CW acknowledged that Applicant made mistakes and errors in judgment. That said, she noted that he self-reported his marijuana use and based on her first-hand knowledge of him believes that he will not repeat those mistakes. CW also submitted a reference letter. (AE 1(P); Tr. 36-48)

Applicant submitted performance reviews covering the years 2017 to 2020, numerous professional certificates and awards, and six reference letters. The cumulative nature of this evidence documents that Applicant has excelled in his professional capacity and in that capacity has contributed to the national defense. He is technically competent, well liked, trusted, and respected by his peers and management. (SOR Answer; AE 1(A) – 1(P); Tr. 50-56)

### **Policies**

This case is adjudicated 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 adjudicative guidelines (AG), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing 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."

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable clearance 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.

Section 7 of EO 10865 provides that adverse 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**

### **Drug Involvement and Substance Misuse**

AG ¶ 24 provides the security concern arising from drug involvement and substance misuse stating:

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.

AG ¶ 25 provides three conditions that could raise a security concern and may be disqualifying in this case: “(a) any substance misuse (see above definition);” “(c) illegal possession of a controlled substance, including . . . purchase. . . ;” and “(f) any illegal drug use while granted access to classified information or holding a sensitive position.” From about 2003 to December 2018, Applicant purchased and used marijuana with varying frequency. He continued to purchase and use marijuana after he was granted a security clearance in March 2009. He possessed marijuana before he used it. Further review is required.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substances. See Drug Enforcement Administration listing at <https://www.deadiversion.usdoj.gov/schedules/marijuana/index.html>. See *also* Gonzales v. Raish, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

AG ¶ 26 lists four conditions that could mitigate security concerns:

(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;

(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 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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2, [App. A] ¶ 2(b).

None of the mitigating conditions fully applies; however, Applicant provided some important mitigating information. He voluntarily disclosed his marijuana use on his

January 2019 SF-86, during his May 2019 OPM interview, in his SOR response, and during his hearing. He ended his marijuana use around December 2018. He promised not to use marijuana in the future.

The evidence against mitigation is more persuasive at this time. In ISCR Case No. 16-03460 at 4 (App. Bd. May 24, 2018), the applicant had a history of marijuana use, and the Appeal Board said:

A clearance adjudication is aimed at determining if an applicant has the requisite judgment and reliability to abide by rules designed to protect classified information. . . . [Security concerns arise if] there is doubt as to whether he [or she] will follow the regulatory requirements for handling classified information, which might, in the event, appear burdensome. Access to national secrets entails a fiduciary duty to the U.S. A person who enters into such a fiduciary relationship is charged with abiding by legal and regulatory guidance regardless of whether he or she believes that guidance to be wise.

Applicant's marijuana use occurred after Applicant completed his December 2008 SF-86, after his March 2009 OPM interview, and after being granted a security clearance in March 2009. "An applicant who uses marijuana after having been placed on notice of its security significance, such as using after having completed a clearance application, may be lacking in the qualities expected of those with access to national secrets." ISCR Case No. 17-03191 at 3 (App. Bd. Mar. 26, 2019) (citing ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019) ("An applicant's misuse of drugs after having been placed on notice of the incompatibility of drug abuse with clearance eligibility raises questions about his or her judgment and reliability").) Applicant's spouse and some of his friends are marijuana users, and it is likely that he will be in the vicinity of marijuana in the future. It is too soon after his abstinence from marijuana use beginning in December 2018, to rule out the likelihood of his future marijuana use. Guideline H security concerns are not mitigated at this time.

## **Personal Conduct**

AG ¶ 15 provides the security concern arising from personal conduct:

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.

AG ¶ 16 provides two conditions that could raise a security concern and may be disqualifying in this case:

(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 trustworthiness, or award fiduciary responsibilities; and

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

Applicant denied deliberately falsifying his December 2008 SF-86 regarding his past drug use. As noted, the apparent confusion arose when Applicant submitted his January 2019 SF-86 and estimated his marijuana use as June 2003 to June 2017. In light of Applicant's explanation, discussed above, I accept his explanation as credible and find for him with regard to SOR ¶ 2.b. However, Applicant continued to use marijuana after completing his December 2008 SF-86, his March 2009 OPM interview, and after being granted a security clearance in March 2009. The general concern under AG ¶ 15 and specific concern under AG ¶ 16(e) apply. Further review is required.

AG ¶ 17 lists seven conditions that could mitigate security concerns:

(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 activity 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.

None of the mitigating conditions fully apply. Applicant continued to use marijuana after his initial disclosure of marijuana use on his December 2008 SF-86, followed by his assurances to an OPM investigator in March 2009 that he stopped using marijuana in 2007 and wanted to pursue his career. Following these representations, he was granted a security clearance in March 2009 and used marijuana intermittently for a ten-year period while hold a security clearance. He used marijuana knowing that it violated state and Federal law as well as company policy. Applicant is to be commended for self-reporting his past marijuana use and his assurances that he stopped using marijuana in December 2018. However, those assurances ring hollow after ten years of infrequent recreational marijuana use while holding a security clearance.

### **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 the 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.

The ultimate determination whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). The discussion under Guidelines H and E is incorporated in this whole-person section. However, further comments are warranted.

Applicant is a 37-year-old program manager, who has been working for a defense contractor since 2006. In 2006, he was awarded a bachelor's degree in mechanical engineering. Applicant has enjoyed a highly successful career as a defense contractor. There is no evidence of security violations, improper disclosure of classified information, or that Applicant compromised national security. See ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020) (noting admissibility of "good security record," and commenting that security concerns may nevertheless not be mitigated).

Applicant disclosed his marijuana use on his January 2019 SF-86, and during his May 2019 OPM interview, SOR response, and hearing. An honest and candid self-report of drug abuse is an important indication that, if granted security clearance eligibility, the individual would disclose any threats to national security, even if the disclosure involves an issue that might damage his or her own career or personal reputation. However, the mitigating weight of Applicant's disclosures is undermined by his marijuana use after his March 2009 OPM interview. A 15-month period of abstinence from December 2018 to March 2021, the date of his hearing, is insufficient to overcome a ten-year period of marijuana use while holding a security clearance and continued his ongoing exposure to marijuana.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)). At the expense of being repetitive, Applicant's self-reporting of his marijuana use is commendable and shows considerable strength of character. If Applicant continues on his current path of remaining drug-free, he will in all likelihood establish a track record that will lead to a more favorable outcome should he reapply for a security clearance.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant mitigated the falsification concerns under personal conduct; however, he failed to mitigate a pattern of rule violations under personal conduct and drug involvement and substance misuse security concerns.

### **Formal Findings**

The formal findings on the allegations set forth in the SOR are as follows:

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

## **Conclusion**

In light of the record as a whole, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for access to classified information. National security eligibility for access to classified information is denied.

Robert Tuidor  
Administrative Judge