



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



In the matter of: )  
)  
) ISCR Case No. 19-01547  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Daniel Crowley, Esq., Department Counsel  
For Applicant: *Pro se*

01/12/2021

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**Decision**

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MURPHY, Braden M., Administrative Judge:

Applicant used marijuana on several occasions between 2013 and 2017, including with a security clearance. Security concerns under Guideline H, drug involvement and substance misuse, are not mitigated. Applicant's eligibility for continued access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on February 15, 2017. On October 2, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement and substance misuse. The DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective on June 8, 2017.

Applicant answered the SOR on November 21, 2019, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on June 26, 2020. On August 7, 2020, DOHA issued a notice scheduling the hearing for September 9, 2020. On August 13, 2020, I issued a Case Management Order to the parties by e-mail. It largely concerned procedural matters relating to the health and safety of the hearing participants due to the COVID-19 pandemic.

On September 8, 2020, Applicant requested and received a continuance of the next day's hearing because he was not feeling well. After a conference call with the parties, a hearing notice was issued on September 11, 2020, rescheduling the hearing by mutual agreement for October 6, 2020.

Applicant's hearing then occurred as scheduled. Government Exhibits (GE) 1 and 2 were marked and admitted without objection. Applicant testified but provided no documents. I left the record open after the hearing to allow Applicant the opportunity to submit additional evidence. After requesting and receiving an extension, Applicant submitted a narrative statement (Applicant's Exhibit (AE) A) and four reference letters (AE B). AE A and AE B were admitted without objection and the record closed on November 13, 2020. DOHA received the hearing transcript (Tr.) on October 28, 2020.

### **Findings of Fact**

Applicant admitted SOR ¶ 1.a and he denied SOR ¶ 1.b. His admission is incorporated into the findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 51 years old. He is divorced and has no children. (Tr. 40-41) He has a high school diploma and vocational training. He has worked for the same employer in the defense industry for about 20 years, since January 2001. He is a network administrator. He works at his employer's computer "help desk." (Tr. 39, 47, GE 1) Applicant has had a clearance for his whole career. (Tr. 11-12, 27, 40; GE 1) He has an annual salary of about \$85,000 or \$90,000. (Tr. 63)

The SOR concerns Applicant's history of marijuana use and his alleged future intentions. SOR ¶ 1.a reads, "You used marijuana with varying frequency from about March 2013 to about July 2017, while granted access to classified information." Applicant offered no clarification or additional explanation when he admitted SOR ¶ 1.a. In denying SOR ¶ 1.b, regarding his future intentions, he also made no further comment.

The basis of both SOR ¶¶ 1.a and 1.b is set forth in Applicant's December 2017 SCA and in the summaries of his background interviews of December 2017 and January 2018, both of which he authenticated, with some corrections, in an August 2019 interrogatory response. (GE 1, GE 2) The details of what Applicant reported and

said in these two documents about his drug involvement are addressed at length, followed by his hearing testimony.

On his February 2017 SCA, Applicant answered “Yes” to the question, “In the last seven (7) years, have you illegally used any drugs or controlled substances?” He stated,

I have smoked pot and experimented with Dope again. I put down the dope even though it was more than 7 years ago because I was asked this question before, when I was asked why I did not put that down I replied it was more than 7 years ago. (GE 1 at 26)

When asked to provide the type of drug or controlled substance used, Applicant listed:

THC (Such as marijuana, weed, pot, hashish, etc.) Also codeine, Morphine and Vicodin when I was in a sickle cell crisis. For medical reasons. The pot was about a year ago and I had a SC [sickle cell] crisis last year also. The experiment with dope was more than 7 years ago but [I am] being honest in case it comes up.” (GE 1 at 26)

Applicant listed a month of first use as “03/2013 (Estimated)” and most recent use as “11/2016 (Estimated).” He then stated, “I used the pot on my birthday and at a cookout, other drugs when I was sick.” (GE 1 at 26) Applicant’s birthday is in November. (GE 1 at 5)

Applicant answered “Yes” to the question, “Was your use while possessing a security clearance?” As to the question, “Do you intend to use this drug or controlled substance in the future?,” he answered “Yes,” and explained:

I answered yes because of my sickle cell but I am trying other drugs prescribed by my Dr. to try and not to. For now this seems like the only thing that helps SC. [I] don’t have crises all the time, maybe once or twice a year.” (GE 1 at 26)

Applicant discussed his history of illegal drug use during his first background interview, in December 2017. He said he first used THC when he was 17. (GE 1 at 26; Tr. 45) He said he believed he started using it again in March 2013. Then he said words to the effect of:

Within the last 7 years, [Applicant] has used 4-6 times. [Applicant] does not purchase THC and only uses when it is available and offered to him. [Applicant] last used in 7/17 with his cousin, while possessing a security clearance. [Applicant] has used with ex-girlfriends, and friends at cookouts, fishing trips, and people’s houses. . . . [Applicant] uses THC medically for his sickle cell anemia. Outside of this, [Applicant] generally

takes 1-2 hits of the THC socially and obtains it from other people, mainly his cousin. . . . (GE 2 at 10)

Applicant also stated words to the effect of, “[w]ith regard to future intentions, [he] does not intend to seek out THC but if he it [sic] is offered to him, he does not plan to turn it down.” (GE 2 at 10) Applicant acknowledged that he had used THC with a clearance. Applicant also acknowledged in his interview that he used heroin about 20 years ago. He relapsed about 15 years ago (in about 2005) and went to treatment. (GE 2 at 11)

In his second interview, in January 2018, Applicant clarified the details of his prior drug use. He said he never used THC medically, only socially. He also clarified that his use of codeine, morphine, and Vicodin was not illegal, as he was given those drugs intravenously in hospitals. (GE 2 at 16; Tr. 41)

With respect to his use of THC, Applicant clarified that he put March 2013 as his start date on his SCA because “prior to 3/13, his use was *much less frequent*.” GE 2 at 16 (emphasis added) Since March 2013, Applicant “has used THC approximately 4-6 times. [Applicant] most recently used THC in 7/17.” (GE 2 at 16) Applicant stated in his interview that he “is aware that the use of THC is illegal and that usage could jeopardize his clearance. [Applicant] does not use THC regularly and has no intentions [of] seeking out the drug to use it.” (GE 2 at 16) Applicant also addressed his prior use of heroin, most recently in 2005. (GE 2 at 16)

Applicant was given the opportunity to review, edit, and correct the OPM agent’s summaries of his two interviews in an interrogatory response that he returned to DOHA in August 2019. (GE 2) In reviewing the interview summaries, Applicant corrected the status of certain financial matters, his father’s citizenship, and the name or location of his high school. Applicant did not make any corrections to the portions of the interview summaries concerning his THC use. (GE 2 at 2-3; Tr. 55)

In a separate section, the DOHA interrogatory also asked about Applicant’s drug use. To a question asking “Have you engaged in any additional drug use since July 2017?,” he answered “No” and wrote, “I don’t recall.” To a question asking “Have you EVER used ANY illegal drug in addition to marijuana?,” (emphasis in original) he answered, “Yes” and reported his prior heroin use, noting that he had previously indicated the dates to the best of his knowledge. (GE 2 at 4)

Applicant began his hearing testimony by acknowledging that he had made a mistake. He asserted that he is an honest person. He has worked for his employer for 21 years and does not get into trouble. (Tr. 25-26, 31)

Applicant denied using any marijuana between 2006 and 2013. (Tr. 46) He repeatedly asserted during his testimony that during the timeframe in question (March 2013 to July 2017, as alleged), he had used marijuana twice. Once was on a fishing trip, in 2013, and once was at a cousin’s wedding in another state, in 2016 or 2017. (Tr. 27-

29, 38, 49-51) Both times he was offered marijuana by someone else. (Tr. 29-30) He denied using marijuana more frequently, such as on weekends or “every day.” (Tr. 28, 30) Under questioning, he specifically denied using marijuana four to six times between 2013 and 2017. “I remember two,” he said several times. (Tr. 42, 43)

When confronted at his hearing about what he reported on his SCA about his prior drug use (“I used the pot on my birthday and at a cookout. . .”), Applicant testified, “I don’t remember.” (Tr. 52) When pressed further about whether he might have used marijuana at least four times (the birthday, the cookout, the fishing trip and the wedding), Applicant acknowledged, “I think that that’s accurate.” (Tr. 53)

Applicant testified that “I can’t hardly remember what happened, you know, last year, last month.” (Tr. 53) He asserted several times more that he had a poor memory for dates and other specifics. (Tr. 55, 56, 57)

With respect to the timing of his most recent use, Applicant denied using marijuana or THC since filling out his SCA in February 2017. (Tr. 57) He said his interview statements that he used marijuana as recently as July 2017 were not accurate. (Tr. 57) He later said, “And, like I said, it could have been before that . . . .”(Tr. 67)

Applicant denied any prior use of marijuana for medicinal purposes. (Tr. 36, 48-49) He denied any intention to use marijuana in the future (Tr. 33-34, 60) He is aware that he could get a doctor to prescribe medical marijuana to treat the pain from his sickle cell anemia, but “because of my job, because of my clearance, I can’t do that.” (Tr. 33-34, 35-36) Applicant is subject to drug testing at work, though he said he has never been tested. (Tr. 36-37, 63) He has never had counseling concerning his marijuana use. (Tr. 46)

Applicant said he is no longer in regular contact with his cousin who gave him the marijuana. Applicant testified that he no longer socializes with people who use marijuana. He does not really socialize with anyone. Some of this is attributable to his personal habits; he said he is a “workaholic” and has no real hobbies. He acknowledged that some of this is also due to the ongoing pandemic, which limits everyone’s interest and ability to socialize with others. (Tr. 43-44, 47, 68)

Applicant’s post-hearing materials included a letter in which he expressed “sincere remorse for my irresponsible actions.” He offered “no excuse” and accepted “full responsibility.” He further stated, “I know for a fact I will never take illegal substances, for I don’t associate with those people who provided it anymore.” (AE A)

Applicant also provided four recommendation letters from professional references. All of the references praise Applicant’s technical and professional skills, as well as his responsiveness, positive attitude, and value as a “team player.” (AE B)

## Policies

It is well established that no one has a right to a security clearance. As the Supreme Court has held, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

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

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

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

## Analysis

### Guideline H: Drug Involvement

AG ¶ 24 expresses the security concern for drug involvement:

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

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

- (a) any substance misuse (see above definition);
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse or failure to clearly and convincingly commit to discontinue such misuse.

Applicant has held a security clearance for most of the last 20 years. He acknowledged using marijuana on at least two occasions since 2013, and most likely used a few times more than that, on social occasions. AG ¶¶ 25(a) and 25(f) both apply to Applicant's use of marijuana or THC, as alleged in SOR ¶ 1.a. Applicant's older drug use, including heroin, is not alleged in the SOR. I therefore did not consider that drug use as disqualifying conduct.

SOR ¶ 1.b, which Applicant denied, alleges that he intends to continue using marijuana in the future. If established by the record evidence, AG ¶ 25(g) would apply. SOR ¶ 1.b is arguably based on Applicant's SCA, on which he answered, "Yes" to the question, "Do you intend to use this drug or controlled substance in the future?" A reading of what he reported on his SCA suggests that he had used THC to treat his sickle cell anemia and would continue to do so in the future. However, Applicant clarified both in his second OPM interview and in his hearing testimony that he had never used THC medicinally and would not do so in the future.

Applicant also stated in his background interview that "[w]ith regard to future intentions, [he] does not intend to seek out THC but if he it [sic] is offered to him, he does not plan to turn it down." (GE 2 at 10) AG ¶ 25(h) arguably applies to this

statement. However, Applicant did not renew this statement at hearing, or otherwise indicate an “expressed intent to continue” using THC or marijuana. I therefore cannot find that AG ¶ 25(h) currently applies. SOR ¶ 1.b is not established.

Nevertheless, even though Applicant did not state an express intention to continue using marijuana in the future, that does not end the analysis. Since SOR ¶ 1.a is established, the analysis turns to possible application of mitigating conditions.

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

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

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; and (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement is grounds for revocation of national security eligibility.

In examining the frequency and recency of Applicant’s marijuana use, I must look to his pre-hearing statements (on his SCA, in his background interviews, and in his Answer) and to his hearing testimony. At his hearing, Applicant steadfastly asserted that he had used marijuana twice, not more than that, since 2013. Once was on a fishing trip in 2013, and a second time was at a wedding in another state, in either 2016 or 2017. In his earlier statements, Applicant noted two other specific instances, on his birthday and at a cookout. He reported both those instances on his February 2017 SCA, with specific details. In his background interviews, Applicant said he used marijuana four to six times and gave a timeframe of between March 2013 and July 2017 (after his SCA). When he authenticated the interview summaries in his August 2019 interrogatory response, Applicant made no changes to the portion of the interviews concerning his history of THC use. Applicant also admitted SOR ¶ 1.a, (which alleged marijuana use as recently as July 2017) without making a correction or comment.

I find Applicant’s pre-hearing statements on the subject of his prior drug use to be more credible than his hearing testimony. I therefore find it more likely that he used marijuana as recently as July 2017, likely in a social setting. The exact frequency (four or six uses instead of two) matters less than the fact that I conclude that Applicant minimized his involvement. The recency matters as well, particularly the fact that Applicant not only used marijuana with a clearance (which he acknowledged), but also used marijuana after submitting his most recent SCA (use he did not acknowledge).



The DOHA Appeal Board has held that “drug involvement after having completed an SCA draws into serious question the applicant’s judgment, reliability, and willingness to follow rules and regulations, insofar as it placed the applicant on notice of the consequences of such misconduct.” (ISCR Case No. 16-02877 at 3 (Oct. 2, 2017); ISCR Case No. 15-01905 at 2 (App. Bd. Apr. 19, 2017)). Given my findings as to the timing of Applicant’s most recent use of marijuana, I cannot ignore this precedent.

Applicant also has a history of more serious drug use. He acknowledged prior heroin use, as well as treatment for it, and a relapse at some point, evidently many years ago. Applicant’s prior use of heroin is dated and is not alleged as a security concern, nor have I considered it as such. I can consider it, however, in weighing mitigation and changed circumstances. Applicant’s prior heroin involvement, even though it was many years ago, cuts against Applicant here, as it means his far more recent use of marijuana is not isolated.

Applicant’s use of marijuana is relatively recent. It also occurred while he held a security clearance, and, most recently, after he submitted his most recent SCA. These are circumstances that cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶ 25(a) therefore does not apply.

Applicant provided a statement of intent not to use marijuana in the future. He testified that he no longer regularly sees his cousin who gave him the marijuana. He disclosed his marijuana use on his SCA, including use with a clearance. But, as noted above, Applicant did not acknowledge using marijuana after submitting his SCA, despite record evidence that he used marijuana as recently as July 2017. AG ¶ 25(b) has some application, but does not fully apply to mitigate his drug involvement.

### **Whole-Person Concept**

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

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered the

potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and the record evidence, including Applicant's testimony and other statements, as well as the whole-person evidence from his work references. I have incorporated my comments under Guideline H in my whole-person analysis. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance.

### **Formal Findings**

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

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant

### **Conclusion**

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

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Braden M. Murphy  
Administrative Judge