



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



In the matter of: )  
)  
) ISCR Case No. 21-00555  
)  
Applicant for Security Clearance )

**Appearances**

For Government: A. H. Henderson, Esq., Department Counsel  
For Applicant: *Pro se*

01/18/2022  
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**Decision**  
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RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana three or four times between 2012 and 2013 after he was granted eligibility for a position of public trust in 2010. He used marijuana at least 10 times between 2015 and 2018 while possessing a secret clearance granted in 2015. Drug involvement and substance misuse (Guideline H) security concerns are not mitigated. Clearance denied.

**Statement of the Case**

Applicant submitted his most recent security clearance application (SCA) on August 7, 2020. He was interviewed by government investigators on May 13, 2015, and September 23, 2020. He answered a set of interrogatories from the Defense Office of Hearings and Appeals (DOHA) on March 16, 2021. After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement and substance misuse) on July 30, 2021. Applicant answered the SOR on August 16, 2021, and requested a decision based on the written record in lieu of a hearing.

The Government's written case, containing the evidence supporting the security concerns, was submitted on September 17, 2021. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on September 29, 2021. By emails dated October 22, 2021, he indicated he had no objections to the FORM and no additional evidence to submit. The case was assigned to me on December 2, 2021. The Government exhibits included in the FORM are admitted in evidence.

### **Findings of Fact**

SOR ¶ 1.a alleged that Applicant used marijuana with varying frequency, from about 2012 to 2013, after he was granted eligibility for a public trust position. SOR ¶ 1.b alleged that Applicant used marijuana with varying frequency, between 2015 and 2018, after he was granted access to classified information. Applicant admitted both SOR allegations. His SOR admissions are incorporated as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 36-year-old employee of a federal contractor. He graduated from high school in 2003, received a bachelor's degree in 2007, and completed a master's degree in 2009. He has never been married and has no children.

Applicant has worked for federal contractors holding varied positions from January 2010 to present. He worked as a program analyst for a federal contractor between January 2010 and March 2015. While in that position, he applied for and was granted eligibility for a public trust position in March 2010. After holding the public trust position, he illegally used marijuana at least four times between June 2012 and August 2013. He stated that he smoked marijuana while visiting a long-time friend in another state.

During a May 13, 2015 interview with a government investigator, Applicant was questioned about his illegal use of marijuana. He indicated he was associating less with his marijuana-using friend because he had a girlfriend. He told the investigator that he did not intend to use marijuana in the future. (FORM, Item 3) following the background investigation, Applicant was granted eligibility for a secret clearance in August 2015.

Applicant worked for federal contractors as a senior program analyst between March 2015 and December 2019, and as a network data analyst between March 2020 and January 2021. He started working for his current employer in January 2021. He submitted his most recent SCA in August 2020.

During a September 23, 2020 interview with a government investigator, Applicant stated that he used marijuana between June 2012 and December 2018. He estimated using marijuana 10 times between 2015 and 2018 while possessing a security clearance. He used marijuana for recreational and experimental reasons. He claimed he has never purchased marijuana. He used marijuana with a long-time friend that

provided the marijuana. Applicant continued to associate with his marijuana-using friend. During his 2020 interview, Applicant told the investigator that he did not intend to use marijuana in the future. Applicant presented no documentary evidence to show that he sought or received any medical or psychological treatment or counseling for substance abuse.

### **Policies**

The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, § 2. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch 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).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.”

*Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

In reaching my decision, I specifically considered the following:

On October 25, 2014, the Director of National Intelligence Memorandum *Adherence to Federal Laws Prohibiting Marijuana Use*, made it clear that state laws do not authorize citizens to violate federal law, including the Controlled Substances Act (21 U.S.C. §§ 801-971 (1970)), which identifies marijuana as a Schedule I controlled drug.

Changes to state laws or the District of Columbia, pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines (Security Executive Agent Directive 4, effective June 8 2017). An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

The Intelligence Reform and Terrorism Prevention Act (IRTPA), as amended, 50 U.S.C. § 3343 (2008), specifically prohibits a federal agency from granting or renewing a clearance to an unlawful user of a controlled substance or an addict, and under federal law, use of marijuana remains unlawful. (See, SEAD 4, App. B)

Executive Order 12564, *Drug Free Federal Workplace* (September 25, 1985) mandates a drug-free workplace and drug-free federal workforce, and expressly states that use of illegal drugs on or off duty by federal employees in positions with access to sensitive information may pose a serious risk to national security and is inconsistent with the trust placed in such employees as servants of the public.

On December 21, 2021, the Director of National Intelligence signed the memorandum, *Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*. It emphasizes that federal law remains unchanged with respect to the illegal use, possession, production and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the "whole-person concept" stated under SEAD 4, to determine whether the applicant's behavior raises a security concern that has not been mitigated.

## Analysis

### Drug Involvement and Substance Misuse

AG ¶ 24 articulates the security concern for the illegal use of drugs:

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.

Applicant used marijuana with varying frequency, from about 2012 to 2013, after he applied for and was granted eligibility for a position of trust in 2010. He used marijuana with varying frequency, between 2015 and 2018, after he was granted access to classified information in 2015. He told a government investigator during a 2015 interview, that he did not intend to use marijuana in the future. Thus, he acknowledged knowing that the use of marijuana was illegal under federal law, and that the Government has a policy against security clearance holders using illegal drugs.

AG ¶ 25 provides disqualifying conditions that could raise a security concern and may be disqualifying in this case:

- (a) any substance misuse;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The record established the above disqualifying conditions. An evaluation of applicable mitigating conditions is required.

AG ¶ 26 provides conditions that could mitigate security concerns. 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;

(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;

(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; 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.

The 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 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Considering the evidence as a whole, none of the mitigating conditions apply. Applicant has a history of illegal marijuana possession and use between 2012 and 2018. He illegally used marijuana between January 2012 and 2015, after he applied for and was granted a public trust position in 2010. He applied for a secret clearance in 2015. During a subsequent interview, he stated his intent not to use marijuana again in the future, and he was granted a secret clearance in 2015.

Notwithstanding, Applicant used marijuana again between 2015 and 2018, while possessing a secret clearance. He knew that the use of marijuana is illegal under federal law, and that the Federal Government has a policy against people holding a clearance and using illegal drugs.

Applicant has not disassociated from his long-time, marijuana-using and enabling friend. His possession and use of marijuana after stating his intent in 2015 not to use marijuana again, and while holding a secret clearance, cast doubts on his current reliability, trustworthiness, good judgment, and his ability or willingness to comply with laws, rules, and regulations. His suitability to hold a clearance is questionable, especially because his substance misuse occurred while holding a position of trust and while possessing a clearance.

Applicant claimed he has not used marijuana since 2018, and promised not to use marijuana in the future. However, considering his past criminal behavior and his empty promises to stop his marijuana use, the passage of time so far is insufficient to establish that his use of marijuana is unlikely to recur. He was aware of the Federal Government's policy against illegal drug use, and the adverse security consequences for such use. Nevertheless, he was unwilling to stop using marijuana.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. SEAD 4, App. A, ¶¶ 2(a) and 2(d). I have incorporated my comments under Guideline H in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant is a 36-year-old employee of a federal contractor. He has been working for federal contractors since 2010. He was granted eligibility for a position of trust in 2010, and for a secret clearance in 2015. He illegally used marijuana between 2012 and 2018. Applicant's lack of judgment and his unwillingness to comply with federal rules and regulations continue to raise serious questions about his current reliability, trustworthiness, and ability to protect classified or sensitive information. Considering the record as a whole, the passage of time since his most recent marijuana use so far is insufficient to establish that his use of marijuana is unlikely to recur. The drug involvement and substance misuse security concerns are not mitigated.

### **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
Subparagraphs 1.a and 1.b:	Against Applicant

## **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest of the United States to grant Applicant's eligibility for a security clearance. Clearance is denied.

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JUAN J. RIVERA  
Administrative Judge