



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 21-01361
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Mary Margaret Foreman, Esq., Department Counsel  
For Applicant: *Pro se*

05/06/2022

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**Decision**

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MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used marijuana on occasion in college between October 2003 and May 2006. He abstained from marijuana while working for the U.S. government from May 2006 to July 2011, but relapsed into recreational marijuana use after resigning from his government job. His evidence in mitigation falls short of establishing that he can be counted on to abide by his current intention of no future marijuana use. Clearance eligibility is denied.

**Statement of the Case**

On October 1, 2021, 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.

On October 15, 2021, Applicant answered the SOR allegations and requested a decision on the written record in lieu of a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. The Government submitted a File of Relevant Material (FORM) on December 17, 2021, consisting of a statement of its position and five exhibits pre-marked as Items, which included the SOR as Item 1 and the SOR response as Item 2. DOHA forwarded a copy of the FORM to Applicant on December 20, 2021, and instructed him that any response was due within 30 days of receipt. Applicant received the FORM on January 15, 2022. No response was received by the February 14, 2022 deadline.

On March 18, 2022, 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 28, 2022.

### **Evidentiary Rulings**

Department Counsel submitted as Item 4 in the FORM a summary report of a personal subject interview (PSI) of Applicant conducted on November 16, 2020, by an authorized investigator for the Office of Personnel Management (OPM). The summary report of the PSI 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 was 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 notice regarding Item 4:

### **IMPORTANT NOTICE TO APPLICANT**

The attached summary of your Personal Subject Interview (PSI) (**Item 4**) 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 may comment on whether the PSI summary accurately reflects the information you provided to the authorized OPM investigator(s) and you may make any corrections, additions, deletions, and updates necessary to make the summary clear and accurate. Alternatively, you may 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 this FORM, the Administrative Judge may determine that you have waived any objections to the admissibility of the summary and may consider it 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 if he was represented by legal counsel. *Pro se* applicants are not expected to act like lawyers, but they are expected to take timely and reasonable steps to protect their rights under the Directive. See ISCR Case No. 12-10810 at 2 (App. Bd. Jul. 12, 2016). See *also* 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 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 submit a response to the FORM.

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). Applicant can reasonably be held to have read the PSI summary in Item 4, 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 Applicant waived any objections to the PSI summary. Items 1 through 5 are accepted as evidentiary exhibits subject to issues of relevance and materiality in light of the entire record.

### **Findings of Fact**

The SOR alleges under Guideline H that Applicant used marijuana with varying frequency from approximately October 2003 to about May 2020 (SOR ¶ 1.a), including after he was granted a DOD security clearance in July 2006 (SOR ¶ 1.b). (Item 1.) When he answered the SOR, Applicant admitted that he used marijuana in the past, but not while employed by the U.S. government. After resigning from federal civilian service in July 2011 and moving abroad for his now ex-wife's education, he resumed using marijuana "sporadically." (Item 2.) Applicant's admission to having used marijuana is accepted and incorporated as a factual finding. After considering Items 1 through 5 in the FORM, I make the following additional findings of fact.

Applicant is 41 years old and divorced. He and his ex-wife were married from June 2011 to January 2014. He has been in a cohabitant relationship since October 2018. He has no children. He earned a bachelor's degree in electrical engineering in May 2005. (Item 3.)

Applicant began his undergraduate studies in August 1999. He spent the fall semester in 2001 at a community college and then returned to the university to finish his degree. He used marijuana recreationally during his last two years in college, starting in October 2003. (Items 3-4.) No information was provided as to whether Applicant was employed in the year following his graduation from college.

From May 2006 to July 2011, Applicant was employed as an electrical engineer for the U.S. government. (Items 3-4.) He was granted a DOD secret clearance for his duties in July 2006. (Item 5.) Applicant did not use any marijuana while working for the U.S. government. (Items 2, 4.)

In July 2011, Applicant resigned from his federal civil service job, and in August 2011, he moved overseas with his then spouse, who began her master's degree studies in a program co-sponsored by business schools in the United States and the foreign country (country X). (Item 3.) Applicant resumed using marijuana while living in country X. (Item 4.)

Applicant was unemployed in country X from August 2011 until April 2012, when he started working as a test engineer in the commercial sector. Applicant's marriage deteriorated abroad, and in June 2013, he quit his job in country X and returned to the United States. Initially, he lived with his mother and was unemployed. (Item 3.)

In October 2013, Applicant relocated to his present area. He worked part time in the restaurant industry primarily. He also worked part-time for a tech shop from March 2015 to February 2016, when he was laid off; and from July 2016 to June 2017, as a self-employed product engineer for a start-up company that went out of business. In December 2018, he quit working as a bartender to focus on finding a job in the tech industry. He was unemployed until June 2019, when he began working as a part-time tutor. In September 2020, he accepted an offer of employment as an engineer and developer for a defense contractor. The job is contingent on him obtaining a DOD secret clearance. (Item 3.)

On September 30, 2020, Applicant completed and certified as accurate a Questionnaire for National Security Positions (SF 86). He responded affirmatively to an SF 86 inquiry concerning any illegal drug use in the last seven years and reported that he had used marijuana. He provided dates of October 2003 for his first use and May 2020 for his most recent use, and added, "I occasionally have used marijuana for recreational use, or to help reduce anxiety and help sleep. Frequency 0 – 3 times a week, do not know number of times." He denied any use of marijuana while possessing a security clearance and any intention to use marijuana in the future, citing the importance of his career path to him. He indicated that he did not want to be seen as unreliable or as a liability. (Item 3.)

Applicant was asked about his illegal drug involvement during his November 16, 2020 PSI. He related that he could not specify the frequency of his marijuana use as it differed each week. He explained that there were long periods when he did not use marijuana, including during the time that he possessed a security clearance. He affirmed his SF 86 disclosure of having used marijuana from zero to three times per week; characterized his marijuana use as solely recreational; and related that it occurred in his apartment with lots of friends, who brought the drug with them. He found marijuana to be calming and relaxing. He expressed that he did not intend to use marijuana in the future, as he desired a career in the tech industry, and to that end, he was no longer in contact with the persons with whom he had used marijuana in the past. (Item 4.)

In response to the SOR, Applicant explained about his marijuana use (SOR ¶ 1.a) that he first used the drug “around October 2003 to May 2005” while he was in college. He stated that he “did not use marijuana at all” as a federal employee, but after resigning his position in July 2011, he moved to country X for his now ex-wife’s graduate education “[w]here [he] imbibed a marijuana cigarette.” In response to SOR ¶ 1.b, Applicant stated that he used marijuana sporadically after he resigned from his federal job:

Outside of employment with the Federal Government and with no interaction with any former government employees or government entities is when I again used marijuana sporadically. But at NO time during my employment as a Federal Government Employee was marijuana used. (Item 2.)

## **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.

In addition to the above matters, I note that marijuana remains a Schedule I controlled substance under federal law pursuant to Title 21, Section 812 of the United States Code. 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. Section 844 under Title 21 of the United States Code makes it unlawful for any person to knowingly or intentionally possess a controlled substance not obtained pursuant to a valid prescription. On October 25, 2014, the then Director of National Intelligence (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.

Applicant has admitted that he used marijuana in college, starting around October 2006. It is unclear whether he used any marijuana during the year following his college graduation in May 2005. He abstained from marijuana for five years while a federal civilian employee with a DOD secret clearance. After moving abroad with his now ex-wife in 2011, he resumed using marijuana. He provided no details about the circumstances or the frequency of his marijuana use in the foreign country. Similarly, apart from indicating that he smoked marijuana with many friends in his apartment, he provided little specifics about his use of marijuana after he returned to the United States in July 2013. He asserts a last use in May 2020, and there is no evidence to the contrary. On his SF 86, he indicated a frequency of marijuana use "0 – 3" times a week." It may reasonably be found that there were weeks when he used marijuana three times. His marijuana use (SOR ¶ 1.a) is potentially disqualifying under 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 triggered only in that he had physical possession of marijuana when he smoked it. He stated during his PSI that his friends provided the marijuana that he used. There is no evidence that he purchased marijuana.

The evidence does not establish AG ¶ 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position." Applicant has repeatedly asserted that he abstained from marijuana while he was working as a federal employee holding a secret clearance. Marijuana use during that time cannot be inferred. While Applicant gave dates for first and last marijuana use of October 2003 and May 2020, respectively, it does not necessarily mean that he used marijuana throughout the entire time. Applicant indicated during his PSI that there was a long period where he abstained completely, and that he did not use marijuana while holding a security clearance. The evidence is undisputed that Applicant relapsed into marijuana use after he left his federal job. However, he had no need for a security clearance in any subsequent employments before he applied for the position with the company currently sponsoring him for security clearance eligibility. SOR ¶ 1.b is unsubstantiated in that it alleges that Applicant "continued" his use of marijuana after he was granted a DOD security clearance in July 2006.

Applicant bears the burden of establishing that matters in mitigation apply of his marijuana use. 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. When Applicant completed his SF 86, he indicated that he used marijuana “occasionally” for recreation or to reduce anxiety and help him sleep. During his PSI, Applicant reportedly stated that he could not be more specific about the number of times that he used marijuana because it was different each week. In response to the SOR, he described his marijuana use as sporadic. While there was no regular pattern to his marijuana use, and he abstained for some five years while working as a federal employee from 2006 to 2011, he stated that he used the drug with too many friends to name during his PSI. It was certainly recurrent. Moreover, Applicant’s use of marijuana in May 2020 was recent as of his September 2020 SF 86.

Regarding AG ¶ 26(b), Applicant indicated during his PSI that he no longer has any communications with the many friends with whom he used marijuana because he wants to focus on his career. He denied any intention to use marijuana in the future. While the disassociation from drug-using friends provides for some mitigation in AG ¶ 26(b), it is troubling that Applicant relapsed into using marijuana on occasion after he left his federal employment. His abstention from the drug while holding a DOD clearance is indication that he knew marijuana use was incompatible with his federal employment and clearance. Apparently, the federal prohibition against marijuana was not a concern for Applicant until he decided that it was in his best interest to abstain for his career.

While there is no evidence of any marijuana use by Applicant in almost two years, there is also a paucity of evidence of his current circumstances, activities, and associations. Having chosen a decision on the written record, it was incumbent on Applicant to provide sufficient mitigation to overcome the security concerns raised by his



use of marijuana for recreational purposes, but also to relax and help him sleep. His response to the SOR, where he admitted to sporadic use of marijuana, is difficult to reconcile with his PSI account of having used marijuana with friends too numerous to list during his PSI. Applicant has been in a cohabitant relationship since October 2018. It is unclear whether he used marijuana with his girlfriend. The risk of recurrence cannot be completely ruled out, given the limited evidence about the extent and circumstances of his marijuana use. The drug involvement and substance misuse security concerns are not fully mitigated.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(d). They are as follows:

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

The Government must be assured that those persons granted access to classified information can be counted on to fulfill their responsibilities consistent with laws, regulations, and policies, including federal drug laws and security clearance requirements. Applicant's marijuana use was not confined to college. After his marriage broke up, he made a new life for himself in his current area. That life included socialization with many friends who supplied him with marijuana. He was in his 30s, so his marijuana use cannot be excused as youthful indiscretion.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> Cir. 1990). For the reasons previously discussed, doubts persist as to whether it is clearly consistent with the national interest to grant Applicant eligibility 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 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