DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 21-00367
	)	
Applicant for Security Clearance	)	

Appearances

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

10/03/2022

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Decision

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MURPHY, Braden M., Administrative Judge:

Applicant used marijuana with varying frequency between 1994 and July 2019, to including periods while he worked in the aerospace industry, after having been granted a security clearance, and in knowing violation of federal law. He resumed frequent, even daily marijuana use after leaving the aerospace industry in 2017, and used marijuana as recently as July 2019. He did not provide sufficient evidence to mitigate security concerns under Guideline H, drug involvement and substance misuse. Applicant's eligibility for continued access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 18, 2019. On March 12, 2021, the Department of Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement and substance misuse. The 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 March 21, 2021, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on April 6, 2022. On April 20, 2022, DOHA issued a notice scheduling the hearing for May 11, 2022, to occur virtually through an online platform.

I convened Applicant's hearing as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 3, which 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. Applicant subsequently submitted a signed statement (Applicant's Exhibit (AE) A) and two reference letters (AE B). AE A and AE B were admitted without objection and the record closed on May 23, 2022. DOHA received the hearing transcript (Tr.) on May 26, 2022.

Findings of Fact

In answering both allegations in the SOR (¶¶ 1.a and 1.b), Applicant denied that the drug use alleged in the SOR "caused psychological impairment that affected [his] reliability and trustworthiness." During his hearing testimony, when asked to clarify his answers, he admitted both SOR allegations. (Tr. 26) His admissions are 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 42 years old. He graduated from high school in 1998 and earned a bachelor's degree in 2004. He has never married and has no children. Applicant has spent most of his professional career as an engineer in the aerospace field. He worked for an aerospace company, contractor A, between 2006 and 2017 in state 1. He then left the industry and managed his own automotive consulting firm from 2017 to 2019. When that opportunity ended, he returned to the aerospace industry, with another company for whom he has worked since June 2019. He earns a $131,000 annual salary. He now lives in state 2. (GE 1; Tr. 20-24, 27-29, 33, 43-47)

On his SCA, Applicant disclosed marijuana use between about June 1994 to about July 2019. He reported using marijuana daily while in college. Applicant disclosed on his SCA that while employed with contractor A, he used marijuana "much more infrequently. I quit for many years due to random testing (about 2014 to 2017)" (GE 1 at 35) After leaving contractor A in 2017, he reported that he "used it daily for two years. I then mostly quit" and used it only rarely. In the nine months before submitting his September 2019 SCA, he used marijuana once, at a friend's birthday party. Applicant said he was no longer interested in using marijuana and no longer associates with old friends. He did not indicate that he had used marijuana use while possessing a security clearance. (GE 1 at 35-36)

Applicant was granted a DOD security clearance through DOD in either about September 2007 (GE 1 at 39) or soon thereafter, in 2008. (Tr. 34) He left Contractor A in February 2017 to start his own company. (GE 1 at 16) Applicant acknowledged using marijuana while at defense contractor A. He also acknowledged using marijuana with a clearance and while the company had a drug policy in place. He further acknowledged knowing marijuana use is not considered lawful use under federal law. (Tr. 30; GE 3)

Government Exhibit 3 details the substance abuse policy of contractor A, as of August 21, 2015. It includes the following:

> [Contractor A] follows substance abuse policies and procedures that are appropriate to the work environments, business conditions, and the overall interests of the Company. Implementation of this Policy is subject to restrictions contained in federal laws, and to the extent not inconsistent with federal government contractor requirements, state and local laws. (GE 3 at 2)
>
> Policy: 1: Whenever employees are working, are operating [Contractor A] equipment or vehicles, are present on [Contractor A] premises, or are conducting company-related work off-site, they are prohibited from:
>
> Using, possessing, buying selling, manufacturing, or dispensing illegal drugs (as defined under federal law and this Policy, including possession of drug paraphernalia; . . . . (GE 3 at 2)
>
> * * * *
>
> 3. Marijuana: Despite state laws legalizing recreational marijuana or medicinal use (including Washington and the District of Columbia) recreational use of marijuana or use of medicinal marijuana is not considered lawful possession or use, as a prescription drug or otherwise, because marijuana is a prohibited controlled substance under federal law. *See, e.g*., DOT [U.S. Department of Transportation] regulations, 49 C.F.R. §40.151. (GE 3 at 2-3)

Contractor A's policy regarding Random Drug Testing is, in pertinent part, as follows: ". . . Employees who hold a security clearance, or are assigned to safety-sensitive and/or sensitive positions . . . are subject to random drug testing." (GE 3 at 5)

The term "Sensitive Position" is defined in Contractor A's policy as:

> An employee who has been granted access to classified information, or employees in other positions that the contractor determines involves national security, health and safety, or functions other than the foregoing requiring a high degree of trust and confidence. (GE 3 at 9)

Applicant testified that after about 2013 or 2014, though he remained with contractor A until 2017, he no longer needed access to classified information. (Tr. 20-21) Afterwards, he said he used marijuana "very infrequently," which, when pressed, he said meant "never" because it "became far too dangerous to continue the behavior," so he stopped. (Tr. 41) He then said during that timeframe, he "effectively quit" but used marijuana perhaps once around Christmas during those years, and "I may have smoked it and immediately regretted it" because he was filled with the fear of testing positive due to the increased frequency of random testing. (Tr. 41-42) Applicant said, "If I had tested positive during the random drug test, they would have fired me." (Tr. 37) He knew that even though marijuana use was legal in state 1 at the time, it was illegal under federal law. (Tr. 35-36; GE 3 at 2-3)

Applicant explained that his understanding of the company's drug policy was, "what I did during the off-hours, as long as it did not affect my ability to do my job, were my business, such as going to a barbeque and having some beers, and, you know, getting a little tipsy." (Tr. 38) With respect to off-hours drug use, Applicant said, "I did it with enough infrequency to ensure that I would pass testing and that – I've never failed a test;" and, "As long as you are above the limit, you are OK. And with respect to that, if you do it infrequently enough, it does leave your system rather quickly, which was I suppose my thought process there. But not – again, it was done with quite of bit of risk, obviously." (Tr. 39, 40)

Applicant explained that his rationale for using drugs in violation of company policy was because "we were supposed to report any unusual behavior… and as a result of having no change in behavior, then there was nothing different about my behavior in any way for my entire tenure there. And the frequency was very infrequent because of the fear of random drug testing." (Tr. 30-31) As a result of increased random drug testing, he ceased marijuana use for several years for fear of losing his job. (Tr. 31, 40) Applicant is unaware whether his current employer has a drug policy, though it is a federal contractor. He has never been drug tested there. (Tr. 51)

Applicant reported on his SCA that he left the aerospace industry in March 2017. (GE 1 at 16) He did not have access to classified information after that. He resumed using marijuana on a daily basis from then until fall 2019, when he was not in classified position, while working for his own company. (Tr. 29, 42-43, 46) He then decided to "get serious and stop bad stuff" as he prepared to reenter the job market. (Tr. 46-47)

In 2019, Applicant moved to state 2, where marijuana use is also legal, for his current job. He said he severed most of his social ties and negative influences, and he no longer has an interest in using marijuana. (Tr. 20-24, 32) His last use of marijuana was in July 2019, after waking up feeling "pretty bad" (i.e., hung over) after a night of drinking with friends. (Tr. 45, GE 2) He termed this a "terrible mistake because I had been clean for six months at that point." (Tr. 32-33)

Applicant denied using any other controlled substances. He said there was "zero" chance of future drug use while holding a clearance. (Tr. 33) He asserted that his life

has changed since he took his current job and moved to a new state in 2019. He said he is no longer close to his old friends with whom he used to use marijuana. He is now a homeowner and has a good job in his specific field. He is dedicated to the United States and recognizes the importance of his work. (Tr. 49-50, 57, 63-64, 66) After the hearing, Applicant submitted a statement of intent to abstain from the use of marijuana in any form, "regardless of legal status, for the rest of my days." (AE A)

Two longtime co-workers of Applicant's attested to his work ethic and dedicated professionalism. He works well with others and goes above and beyond what is expected to teach and train others. He is an asset to the team and he has an understanding of the importance of confidentiality and proprietary information. (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); and
>
> (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The Controlled Substances Act ("CSA") makes it illegal under Federal law to manufacture, possess, or distribute certain drugs, including marijuana. (Controlled Substances Act, 21 U.S.C. § 801, et seq. *See* § 844). All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. §§811, 812. Marijuana is classified as a Schedule I controlled substance, §812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment. §812(b)(1). *See Gonzales v. Raich*, 545 U.S. 1 (2005).

In October 2014, the Director of National Intelligence (DNI) issued a memorandum entitled "*Adherence to Federal Laws Prohibiting Marijuana Use,*" (2014

DNI Memo) which makes clear that changes in the laws pertaining to marijuana by the various states, territories, and the District of Columbia do not alter the existing National Security Adjudicative Guidelines, and that Federal law supersedes state laws on this issue:

> [C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines. . . . An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. 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 DOHA Appeal Board has cited the 2014 DNI Memo in holding that "state laws allowing for the legal use of marijuana in some limited circumstances do not pre-empt provisions of the Industrial Security Program, and the Department of Defense is not bound by the status of an applicant's conduct under state law when adjudicating that individual's eligibility for access to classified information." ISCR Case No. 14-03734 at 3-4 (App. Bd. Feb. 18, 2016). The current National Security Adjudicative Guidelines went into effect on June 8, 2017, after 2014 DNI memo was issued. Nevertheless, the principle continues to apply.

Moreover, on December 21, 2021, DNI Avril D. Haynes issued a memorandum entitled, "*Security Executive 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*." (2021 DNI Memo) The memo incorporates the AGs (at reference B) and the 2014 DNI Memo (at reference G) among various other relevant federal laws, executive orders, and memoranda. I take administrative notice of the 2021 DNI memo here, given its relevance to this case, its reliance on the AGs, and its recency.

The 2021 DNI memo specifically notes that "under policy set forth in SEAD 4's adjudicative guidelines, the illegal use or misuse of controlled substances can raise security concerns about an individual's reliability and trustworthiness to access classified information or to hold a sensitive position, as well as their ability or willingness to comply with laws, rules, and regulations." (citing Guideline H, alleged in this case, and the AGs for personal conduct and criminal conduct, Guidelines E and J, not alleged here). Thus, consistent with these references, the AGs indicate that "disregard of federal law pertaining to marijuana remains relevant, but not determinative, to adjudications of eligibility for access to classified information or eligibility to hold a sensitive position." (2021 DNI Memo)

SOR ¶ 1.a reads: "From about June 1994 until about July 2019, you used marijuana with varying frequency." Applicant admitted the allegation during his hearing testimony and disclosed marijuana use with varying frequency within this timeframe on his SCA. AG ¶ 25(a) is satisfied.

More specifically, Applicant acknowledged using marijuana daily during college; he graduated in 2004. He acknowledged using marijuana while employed with contractor A, his employer from 2006 to 2017. He acknowledged using marijuana while in possession of a security clearance, which he said was granted in 2007 or 2008. His use of marijuana between 2008 and 2014 is unclear. Applicant disclosed on his SCA that while employed with contractor A, he used marijuana "much more infrequently. I quit for many years due to random testing (about 2014 to 2017)." (GE 1 at 35) He also acknowledged using marijuana perhaps once around Christmas during that timeframe, something he said he quickly regretted due to the risk of testing positive on a random drug test. Applicant resumed frequent, even daily use of marijuana while in the automotive industry (from about November 2017 through 2018). After six months of abstinence, he used marijuana after a night out drinking with friends in July 2019, around the time he began working for his current employer and clearance sponsor, for whom he submitted his September 2018 SCA. AG ¶ 25(a) applies.

SOR ¶ 1.b reads: "From about February 2008 to about February 2018, you used marijuana with varying frequency while granted access to classified information." Applicant admitted the allegation during his hearing testimony. However, further discussion is necessary for a variety of reasons, including recent guidance from the DOHA Appeal Board.

Applicant testified that he was granted access to classified information in 2008. Most likely, this means he was granted eligibility at that time, since there is no documentation from Contractor A in the record regarding when the company granted him access to classified information.

Applicant also testified that after about 2013 or 2014, he no longer had a need for access to classified information while with contractor A, though he did remain subject to random drug testing (which applied to him since he held a security clearance, according to Contractor A's drug policy). The specifics of Applicant's drug use prior to that time, while with contractor A, are unclear, though he did acknowledge using marijuana with a security clearance, knowing that doing so was in violation of federal law. He also said he curtailed his drug use significantly between 2014 and 2017 because of he knew he was subject to the increased risk of random drug testing. Applicant left employment with Contractor A in February 2017, and did not have access to classified information while with his own consulting firm, for the next two years. Thus, he would not have held a clearance, or had access to classified information, during that time (March 2017 to June 2019).

In ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022), a case published while this case has been pending decision, the Appeal Board stated:

> Eligibility for access to classified information and the granting of access to classified material are not synonymous concepts. There are separate determinations. The issuance of a security clearance is a determination that an individual is eligible for access to classified national security information up to a certain level. Security clearance eligibility alone does not grant an individual access to classified materials. In order to gain access to specific classified materials, an individual must have not only eligibility (*i.e.*, a security clearance), but also must have signed a nondisclosure agreement and have a "need to know." *See* Executive Order 13526, dated December 29, 2009, at § 4.1. While an eligibility determination is generally made at the agency level and is subject to various regulatory due process requirements, an access determination is most often made at the local level without any due process guarantees.

As I read the Board's holding in that regard, eligibility for access to classified information is not enough to establish AG ¶ 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position."

With that newly published guidance from the Appeal Board, which I am required to follow, while it is established Applicant used marijuana after having been granted a security clearance, it is not clearly established by this record (not withstanding Applicant's admission to SOR ¶ 1.b), that Applicant used marijuana "while granted access to classified information," as defined above, or, for that matter, while "holding a sensitive position," at least as defined in Contractor A's drug policy. (GE 3 at 9) SOR ¶ 1.b is therefore not established, and AG ¶ 25(f) does not apply.

Nevertheless, the fact that Applicant used marijuana while employed in the defense industry, after having been granted a security clearance, in knowing violation of federal law, and while subject to random drug testing under his then-employer's drug policy, are all circumstances to be considered in addressing mitigation.

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.

Applicant acknowledged his drug use on his SCA and during the security clearance process. He largely disassociated himself from his friends and associates with whom he used marijuana in the past. He moved to a new state for his current job, albeit a state where marijuana remains legal. He provided repeated statements both before and during his hearing that he is no longer interested in marijuana use, and he provided a signed statement of intent to abstain from marijuana permanently. AG ¶ 26(b) therefore has some application.

Applicant has a long history of marijuana use. He used marijuana daily in college. He used marijuana while employed in the defense industry, after having been granted a security clearance, and while subject to random drug testing, according to his federal contractor employer's drug policy. His use of marijuana was in knowing violation of federal law, even if marijuana use was legal under state law. Even if his outside-of-work drug use did not strictly violate company policy, he did so knowing he was taking a risk because he was subject to increased random drug testing. He resumed significant, even daily use of marijuana after 2017, for much of the next two years. He used marijuana as recently as July 2019, around the time he reentered the defense industry with his current employer. These circumstances establish that he breached the trust given to him the last time he had access to classified information, and these factors weigh against granting it to him again. His drug use is also frequent, not isolated, and relatively recent, frequent and not isolated, and it continues to cast doubt on his reliability, trustworthiness, and judgment. AG ¶ 26(a) does not apply.

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