



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 22-00383
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Andre M. Gregorian, Esq., Department Counsel  
 For Applicant: *Pro se*  
 12/06/2022  
**Decision**

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KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Department of Defense’s intent to deny her eligibility for access to classified information. Applicant has not mitigated the security concern raised by her use of illegal drugs and her personal conduct. Eligibility is denied.

**Statement of the Case**

Applicant submitted her most recent of three security clearance application (SCA) on June 24, 2021. The Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) on April 13, 2022, detailing security concerns under Guideline H, Drug Involvement and Substance Misuse, and Guideline E, Personal Conduct. The DOD CAF acted 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* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

On May 31, 2022, Applicant submitted an answer to the SOR (Answer) and elected a decision on the written record in lieu of a hearing by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On June 22, 2022, Department Counsel submitted the Government’s file of relevant material (FORM), including documents identified as Items 1 through 7 (Items). Applicant was sent the FORM on June 23, 2022, and she received it on June 28, 2022. She was afforded 30 days after receiving

the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant responded to the FORM on July 25, 2022 (Response). The SOR and the Answer (Items 1S and 1A, respectively) are the pleadings in this case. Items 2 through 7 are admitted without objection. The case was assigned to me on October 3, 2022.

### **Findings of Fact**

Applicant is 33 years old. She has never married and has no children. She graduated in May 2011 with a bachelor's degree and earned her juris *doctor* degree in May 2014. Since February 2021, she has been employed by a defense contractor. (Item 5.)

Under Guideline H, the SOR alleged that Applicant: (1) used marijuana with varying frequency from October 2007 to May 2021, and; (2) used marijuana after being granted public trust eligibility in June 2017 and January 2020. (Item 1S.) She admitted those allegations. (Item 1A.)

Under Guideline E, the SOR alleged that Applicant: (1) deliberately falsified material facts in her January 4, 2016 SCA when she answered "No," to whether she had illegally used marijuana in the last year; (2) deliberately falsified material facts in her October 29, 2018 SCA when she answered "No," to whether she had illegally used marijuana in the last year; (3) deliberately falsified material facts in her November 2, 2018 Additional Questions for Public Trust Positions (AQPTP) when she answered "No," to whether she had illegally used marijuana within the last seven (7) years. (Item 1S.) Applicant denied those allegations. (Item 1A.)

For purposes of Guideline E, the salient terms of Items 2 through 5 are discussed below.

In the January 4, 2016 SCA, the second page of the form states its purpose as follows:

#### **Purpose of this Form**

"The United States Government conducts background investigations . . . to establish that applicants either employed by the Government or working for the Government under contract are suitable for the job and/or eligible for a public trust or sensitive position." (Item 2.)

Each SCA in the record had identical language at the beginning of the form. (Items 3 and 5.) The AQPTP stated that it is a "supplement" to the SCA. (Item 4.)

Each SCA and the AQPTP had the following language:

#### **Certification That My Answers Are True**

“My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both (See section 1001 of title 18, United States Code).” (Items 2 through 5.) Applicant digitally signed each certification. (Items 2 through 5.)

In Applicant’s most recent SCA (June 24, 2021), she disclosed that she used marijuana between October 2007 and May 2021. She characterized her use as “infrequent,” about 20 times. She also described how marijuana affected her: “Not a pleasant feeling, do not enjoy.” (Item 5.)

In Applicant’s March 31, 2022 Responses to Interrogatories, she stated that she used marijuana between October 2007 and May 2021 “once every few years” and that she had “no intention to use drugs in the future.” In her Personal Subject Interview (PSI), she explained that she used marijuana with friends for “experimental” purposes, and no longer associates with those individuals. (Item 6.)

Applicant’s Response to the FORM makes the following relevant points:

#### Guideline H

- Her sole use of marijuana after being granted a public trust position was in May 2021, when she unintentionally ingested a fruit snack containing THC.
- Aside from the incident in May 2021, most of her marijuana use was prior to 2012.

#### Guideline E

- The January 2016 SCA, October 2018 SCA, and November 2018 AQPTP questions about marijuana usage only looked back one year. She had not used marijuana in the one-year periods before those questions were posed to her.
- She “misunderstood the [November 2, 2018 AQPTP] question to be exclusive of marijuana use, given its legalization at the state level at the time [she] completed the form.”

The November 2, 2018 AQPTP question about marijuana usage looks back seven years, not one year. (Item 4.)

### **Law and Policies**

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

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines. These guidelines are flexible rules of law that apply together with common sense and the general factors of the whole-person concept. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable, in making a decision. The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, then 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 in seeking a favorable security decision.

### **Guideline H – Drug Involvement and Substance Abuse**

Under AG H, illegal drug use may raise questions about a person's ability or willingness to comply with laws, rules, and regulations. AG ¶ 24 sets forth the concern, as follows:

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 analyzing the facts of this case, I considered the following disqualifying and mitigating conditions or factors:

AG ¶ 25(a) any substance misuse (see above definition); and

AG ¶ 25(f) any illegal drug use while granted access to classification or holding a sensitive position.

The potentially applicable mitigating factors here are quoted below:

AG ¶ 26(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

AG ¶ 26(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used; and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant admitted that she used marijuana with varying frequency from October 2007 to May 2021, and after being granted public trust eligibility in June 2017 and January 2020. Facts admitted by an applicant in an SCA, an Answer to a SOR, or in an interview require no further proof from the Government. ISCR Case No. 94-1159 at 4 (App. Bd. Dec. 4, 1995) ("any admissions [applicant] made to the SOR allegations . . . relieve Department Counsel of its burden of proof"); ISCR Case No. 94-0569 at 4 and n.1 (App. Bd. Mar. 30, 1995) ("[a]n applicant's admissions, whether testimonial or written, can provide a legal basis for an Administrative Judge's findings").

Marijuana is a Schedule I controlled substances, and possession of it is regulated by the federal government under the Controlled Substances Act. 21 U.S.C. § 811 *et seq.* The knowing or intentional possession and use of any such substance is unlawful and punishable by imprisonment, a fine or both. 21 U.S.C. § 844. In an October 25, 2014 memorandum, the Director of National Intelligence affirmed that the use of marijuana is a security concern. James R. Clapper, Director of National Intelligence, Memorandum: *Adherence to Federal Laws Prohibiting Marijuana Use* (October 25, 2014). See also <http://www.dea.gov/druginfo/ds.shtml>

More recently, 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 medicinal or 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.

Because Applicant used marijuana for an extended period of time, including while holding a public trust position, disqualifying conditions AG ¶¶ 25(a) and (f) apply. The next inquiry is whether any mitigating factors apply.

I considered mitigating condition AG ¶ 26(a). Applicant began using marijuana in 2007, almost 15 years ago. Therefore, her initial use was long ago. She did, however, continue that use with varying frequency through May 2021. Her drug use is not mitigated by AG ¶ 26(a).

I considered mitigating condition AG ¶ 26(b). That condition has two components. First, the individual must acknowledge her drug involvement and substance misuse. Second, the individual must establish a “pattern of abstinence.” The condition then lists several nonexclusive examples of how a pattern could be shown.

Applicant acknowledged her marijuana use for the first time in her June 24, 2021 SCA. There is no temporal component to *when* that acknowledgement must be made. That is, the timing of the acknowledgement is not prescribed, but its timing may be considered in weighing the overall evidence. Here, Applicant did acknowledge her marijuana use, albeit quite belatedly.

The second component requires an applicant to show a pattern of abstinence. Here, Applicant said she no longer associates with the friends with whom she used marijuana. That is helpful to her cause.

Mitigating condition AG ¶ 26(b) also suggests that providing a signed statement in the form described could aid in showing a commitment to abstinence. In her March 31, 2022 responses to interrogatories, Applicant said she had “no intention to use drugs in the future.” Her statement of future intent, however, is not controlling. The core of AG ¶ 26(b) is whether Applicant has established a *pattern* of abstinence. Her drug use from October 2007 to 2021, even if infrequent, was a lengthy period. On balance, her abstinence from 2021 to the present is not a sufficient period of abstinence to establish a pattern that satisfies AG ¶ 26(b). Her drug use is not mitigated by AG ¶ 26(b).

I find against Applicant on SOR ¶ 1.

### **Guideline E - Personal Conduct**

In assessing an allegation of deliberate falsification, I consider not only the allegation and applicant’s answer but also all relevant circumstances. AG ¶¶ 2(a) and (d)(1)-(9) (explaining the “whole-person” concept and factors). Under Guideline E for personal conduct, the concern is that “[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified or sensitive information.” A statement or an omission is false or dishonest when it is made deliberately (knowingly and willfully).

The SOR alleged that Applicant falsified facts by failing to disclose her previous marijuana use. More specifically, the SOR alleged that she omitted marijuana use from her January 4, 2016 SCA, October 29, 2018 SCA, and November 2, 2018 AQPTP. Applicant denied those allegations. This alleged conduct falls squarely within AG ¶ 16(a), which states in pertinent part:

[D]eliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations.

AG ¶ 17(a) states in pertinent part a condition that may mitigate that disqualifying condition:

[The] individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.

Applicant offers two explanations. First, she claims that each of those three questionnaires look back only one year for prior drug use. She then states that she did not use marijuana during those respective one-year periods. The November 2, 2018 AQPTP, however, does not look back only one year; it looks back *seven* years, which captures drug use in 2011. She stated that “most of the marijuana use was prior to 2012.”

Applicant’s first explanation has another problem. She would have us believe that she can answer the following questions in the affirmative:

- (1) she remembers precisely that she did **not** use marijuana during the one year preceding her January 4, 2016 SCA?
- (2) she remembers precisely that she did **not** use marijuana during the one year preceding her October 29, 2018 SCA?
- (3) she remembers precisely that she did **not** use marijuana during the one year preceding her November 2, 2018 AQPTP? (Even though that questionnaire looks back seven years.)

Applicant’s pot-smoking sessions were not formal gatherings. She was with others at a friend’s house. It is not credible that she could honestly answer those three questions in the affirmative. Moreover, she began her use of marijuana in 2007 for “experimental” purposes. Yet she continued using for years, even though it was “not a pleasant feeling,” and she did “not enjoy” it. Applicant’s first explanation is not credible.

Moreover, Applicant’s “No” response to the AQPTP question is striking. The AQPTP asked about her marijuana use going back seven years, that is, from November 2018 back to November 2011. That seven-year period must have included at least one of the 20 times that she used marijuana between October 2007 and May 2021. She was trying to minimize the extent of her drug usage. An honest “Yes” answer would have defeated that purpose.

Applicant has a second explanation. Her omission of marijuana use was simply based on a misunderstanding. She “misunderstood the [November 2, 2018 AQPTP] question to be exclusive of marijuana use, given its legalization at the state level at the time [she] completed the form.” The context, however, suggests otherwise.

Each SCA states at page two its purpose:

“The United States Government conducts background investigations . . . to establish that applicants either employed by the Government or working for the Government under contract are suitable for the job and/or eligible for a public trust or sensitive position.”

The AQPTP stated that it was a “supplement” to the SCAs. Since Applicant digitally signed each form, surely she knew that the forms were to be used by the **U.S. Government**, not state governments.

There is more context that undermines Applicant’s “misunderstanding.” Each form has the following Certification:

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both (See section 1001 of title 18, United States Code).

Applicant digitally signed each Certification. That Certification on its face is governed by **federal**, not state law. There is not even a hint in any of the documents of record that state law applies to the federal trustworthiness process. Applicant was granted public trust eligibility in June 2017 and January 2020. She is well aware that the **federal** Government holds illegal drug use to be important in the public trust eligibility process. Given Applicant’s education, background, and experience, her “misunderstanding” is not credible.

Finally, there is AG ¶ 17(a) that states in pertinent part a condition that may mitigate the disqualifying conditions that apply here:

[The] individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.

Applicant’s first material omission was in her January 4, 2016 SCA. She made no prompt efforts to correct that omission. Her second material omission was in her October 29, 2018 SCA. She made no prompt efforts to correct that omission. Her third material omission was in her November 2, 2018 AQPTP. She made no prompt efforts to correct that omission. In fact, she never made any efforts, let alone prompt ones, to correct her three material omissions. This history shows a pattern of deliberate omissions. She finally



answered truthfully when she was confronted by her June 24, 2021 SCA. AG ¶ 17(a) does not apply.

I find that Applicant made deliberately false omissions, as alleged in SOR ¶ 2.

### **The Whole-Person Concept**

The record raises doubts about Applicant's reliability, trustworthiness, judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept. AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6). Accordingly, I conclude that Applicant has not met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### **Formal Findings**

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the SOR allegations:

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

### **Conclusion**

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's eligibility is denied.

Philip J. Katauskas  
Administrative Judge