



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



In the matter of: )  
)  
) ISCR Case No. 22-00414  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Aubrey M. De Angelis, Esq., Department Counsel  
For Applicant: *Pro se*

01/17/2023

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**Decision**

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DORSEY, Benjamin R., Administrative Judge:

Applicant did not mitigate the drug involvement and substance misuse security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On March 18, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement and substance misuse. Applicant responded to the SOR on April 13, 2022 (Answer), and requested a hearing before an administrative judge. The case was assigned to me on October 25, 2022.

The hearing was convened as scheduled on November 30, 2022. I admitted Government Exhibits (GE) 1 and 2 and Applicant Exhibits (AE) A and B in evidence without objection. I received a transcript (Tr.) of the hearing on December 7, 2022.

## Findings of Fact

Applicant is a 51-year-old employee of a government contractor for whom he has worked since 1999. He earned a high school diploma in 1989. He was married from 2006 until February 2017, when he finalized his divorce. He served on active duty with the U.S. Marines from 1991 until 1994, when he received an honorable discharge. He resides with his girlfriend, to whom he is engaged to be married. He has two adult children. (Tr. 15-18, 27; GE 1)

At all times relevant to this proceeding, marijuana purchase, possession, and use has been illegal under federal law. Federal laws regarding marijuana supersede any state laws that are inconsistent with it. Applicant was granted access to classified information at all times relevant hereto. (Tr. 17; GE 1, 2)

In about February 2020, Applicant traveled about 45 miles from home to purchase marijuana from a dispensary in State A, where it was sold legally under state law. In February and March 2020, he used marijuana on weekend nights a total of about 16 times in order to help him sleep. He did not report his marijuana purchase, possession, or use to his employer or facility security officer (FSO) until he realized that he would likely be caught for this use. Any adverse information not alleged in the SOR, such as Applicant's failure to report his marijuana purchase, possession, and use to his employer or FSO, cannot be used for disqualification purposes. It may be considered when assessing the application of mitigating conditions and for the whole-person analysis. On March 24, 2020, he underwent a random drug test through his employer. Prior to the test, he told his employer that he did not believe that he would pass the drug test because he had been using marijuana. He tested positive for marijuana after taking this drug test. As a result of his marijuana use and positive drug test, his employer created an incident report in the Defense Information System for Security (DISS). (Tr. 18-22, 34-35, 37; Answer; GE 1, 2; AE A)

While using marijuana, Applicant knew it was illegal to do so. Since 1999, he received annual training regarding his responsibilities as a security clearance holder with respect to illegal drugs. He knew that using marijuana violated the conditions of holding his security clearance and the terms of his employment. He knew that he was subject to random drug testing. Applicant has sleep apnea and other unspecified ailments. He claimed he used marijuana despite knowing it was illegal and incompatible with holding a security clearance, because he was desperate to get quality sleep. His girlfriend recommended that he try marijuana for his sleeping problems. A doctor did not recommend or prescribe him marijuana. He did try other prescription and non-prescription medications to help him sleep before resorting to marijuana. (Tr. 15-19, 31-34, 36; Answer)

As a result of his positive drug test, instead of terminating him, Applicant's employer suspended him without pay until he completed a substance abuse program (SAP). On May 2, 2020, he completed an SAP. The SAP consisted of three group meetings a week for 30 days. His employer also placed him on probation for 24 months. While he was on probation, he could not be promoted. His employer required him to

take monthly drug tests for 38 months. His employer also had him enter into a “Last Chance Agreement” whereby he acknowledged that any recurrence of inappropriate behavior would result in his immediate termination of employment. After his initial positive drug test, all of his subsequent monthly drug tests have had negative results. After he completes 38 months of monthly drug tests, Applicant will be subject to random drug tests. Applicant is no longer on probation. He was promoted at work once he became eligible. He claimed that he will never use marijuana again and that he is “scared to death” because of all the trouble it has caused him. (Tr. 22-24, 36-37; Answer; GE 1, 2; AE A, B)

From about January 2022 until he received the SOR in March 2022, Applicant purchased marijuana for his girlfriend on three separate occasions. He purchased the marijuana at the same dispensary in State A from which he purchased marijuana for himself in 2020. He claimed that he purchased the marijuana instead of his girlfriend as he received a discount because he is a military veteran. He claimed he did not understand that purchasing marijuana is illegal. He thought that he was doing nothing wrong as long as he was not using marijuana. He claimed that his annual training, his SAP and his Last Chance Agreement did not inform him that purchasing marijuana was inappropriate or illegal. There is no documentary evidence in the record relating to this training, the SAP, or the Last Chance Agreement. He claimed that after he received the SOR, he realized that purchasing marijuana is illegal, so he stopped purchasing marijuana and wants nothing more to do with it. (Tr. 24-35, 37)

Applicant’s girlfriend has used marijuana recreationally for at least six years and plans to continue to use it. She has used it a couple of times per week. She has kept the marijuana in the home she shares with Applicant, but has used it on the property outside the house. She has used it while Applicant is home. Applicant claimed that he does not monitor her use and “just stay(s) away from it.” (Tr. 24-35)

Applicant provided character reference letters from two co-workers who know him noting his reliability, professionalism, trustworthiness, strong character, selflessness, and good work ethic. They also note that he cares for his family and has always provided for them. His employer awarded him a certificate of recognition in March 2022 for his significant contribution to a work project. (AE A, B)

Under Guideline H, the SOR alleged Applicant’s purchase and use of marijuana in February and March 2020 while holding a security clearance. The SOR also alleged Applicant’s March 2020 failed drug test and the resultant punishment from his employer. He admitted the SOR allegations with additional comment. (SOR; Answer)

### **Policies**

This case is adjudicated under Executive Order (EO) 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 the adjudicative guidelines (AG), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines 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(c), 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."

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 the 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 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.

Section 7 of EO 10865 provides that adverse 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 concern for drug involvement and substance misuse is set out 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following is potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug;
- (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.

Applicant purchased marijuana in February 2020. He used marijuana approximately 16 times in February and March 2020 while granted access to classified information. He also tested positive for marijuana. Marijuana is a controlled substance and its purchase and use are illegal under federal law. He knew using marijuana was illegal and inconsistent with the terms of his employment and with holding a security clearance. The above disqualifying conditions are applicable.

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;  
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; and

(c) 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.

Applicant repeatedly used marijuana despite knowing it violated the law, violated the requirements of holding a security clearance, and violated his terms of employment. I also note the involuntary manner in which he was caught. While he stopped using marijuana about two and one-half years ago, he purchased marijuana again several times in 2022, with the last purchase being about six months ago. His illegal drug involvement was therefore recent and frequent. While he claimed that he did not know purchasing marijuana was illegal, his willingness to involve himself with marijuana again after suspension of employment, SAP training, and employment probation shows poor judgment and a lack of reliability. Mitigating factor AG ¶ 26(a) does not apply.

Regardless of the two and one-half year pattern of abstinence of marijuana use that Applicant has established, he still resides and associates with his fiancée who regularly uses marijuana and does not plan to stop. He also failed to provide a signed statement of intent to abstain from all drug involvement and substance misuse. Mitigating factor AG ¶ 26(b) does not apply.

Applicant completed an SAP without recurrence of abuse. He did not present evidence of a favorable prognosis by a duly qualified medical professional. Mitigating factor AG ¶ 26(d) partially applies.

None of the drug involvement and substance misuse mitigating conditions are fully applicable. For the reasons stated herein, I have ongoing concerns about Applicant's judgment and reliability.

### **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 have considered Applicant's positive character references and his military service. I have incorporated my comments under Guideline H in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the drug involvement and substance misuse security concerns.

### **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-1.b:	Against Applicant

### **Conclusion**

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Benjamin R. Dorsey  
Administrative Judge