



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



In the matter of:	)	
	)	
[Name Redacted]	)	ISCR Case No. 22-02106
	)	
Applicant for Security Clearance	)	

**Appearances**

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

07/18/2023

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**Decision**

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HOGAN, Erin C., Administrative Judge:

**Statement of the Case**

Applicant submitted an electronic questionnaire for investigations processing (hereinafter referred to as SCA) on May 17, 2021. He was interviewed by government investigators on August 4, 2021, and he answered a set of interrogatories from the Defense Office of Hearings and Appeals (DOHA) sometime thereafter. After reviewing the information gathered during the background investigation, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement and substance misuse) and Guideline E (personal conduct) on February 16, 2023. Applicant answered the SOR on March 13, 2023, and requested a decision based on the written record in lieu of a hearing.

The Government’s written case, containing the evidence supporting the security concerns, was submitted on March 29, 2023. A complete copy of the file of relevant material (FORM) was provided to Applicant on April 13, 2023, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant did not submit a response to the FORM. The case was

assigned to me on June 7, 2023. Without objections, I admitted and considered all of the FORM's proffered evidence.

### **Findings of Fact**

Applicant is a 24-year-old employee of a DoD contractor. He has worked for a DoD contractor since February 2020. He received a bachelor's degree in May 2021. He has never been married and has no children. (Item 2) Applicant was granted a Top Secret clearance on October 20, 2021. (Item 4)

SOR ¶ 1.a alleged that Applicant used marijuana with varying frequency, from July 2016 to January 2023. SOR ¶ 1.b alleged that Applicant used the prescription drug Adderall, that was not prescribed to him, in October 2020. SOR ¶ 1.c alleged Applicant used marijuana in January 2023, after having been granted access to classified information. This allegation was cross-alleged under the personal conduct guideline. (SOR ¶ 2.a) He admitted all SOR allegations. His SOR admissions are incorporated as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

In his answers to Section 23 (Illegal Use of Drugs or Drug Activity) of his May 2021 SCA, Applicant disclosed that he illegally used marijuana with varying frequency between July 2016 and February 2021. (Item 3) He described his illegal marijuana use as follows:

“The nature of the use was social (friends or parties) or individual (self-medication). The frequency ranged from once every 6 months to daily use depending on the time period. The number of times used is probably around 100-200.” (Item 2 at 40)

He also stated his intent to not use marijuana in the future while it is still federally illegal. He wanted to progress in his career and had no desire to indulge in activities that could hinder his opportunities. (Item 2 at 41)

During an August 2021 interview with a government investigator, Applicant was questioned about his illegal use of marijuana. (Item 4) He indicated he used marijuana between 100 to 200 times, mostly for recreation and self-medication. He indicated he stopped using marijuana because he did not want it to cause problems for his future career. He would only use marijuana in the future if it became legal under federal law. He was aware that marijuana use was illegal when he used marijuana. Applicant purchased marijuana on several occasions from August 2018 to February 2021. In October 2020, Applicant took Adderall without a prescription. He took the Adderall so he could focus on a class assignment. This was the only time he took Adderall. (Item 4)

Applicant provided his employer's policy on the use of illegal drugs in response to DOHA Interrogatories. The employee handbook states: “The Company is dedicated to providing employees with a workplace that is free of drugs and alcohol. The Company

reserves the right to test any employee for the use of illegal drugs, marijuana, or alcohol in accordance with applicable law.” (Item 5 at 18)

In January 2023, while on vacation in a state where the use of marijuana is legal, Applicant and the friend he was visiting stopped at a marijuana dispensary. Applicant purchased a pack of marijuana joints for his friend as a thank you for hosting him. When they returned to his friend’s house, a joint was being passed around and Applicant shared the joint with his friend or friends. He claims he used due to the spontaneity of the situation as well as dealing with depression. When Applicant returned home, he booked an appointment with a therapist. He states he began therapy on January 22, 2023, and has attended on a weekly basis. He did not provide documentation regarding his therapy. He wanted to be accountable for the marijuana incident and self-reported his marijuana use on February 10, 2023. (Item 1; Item 4)

### **Policies**

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

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, § 2. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in National Security Adjudicative Guidelines (Security Executive Agent Directive 4, effective June 8, 2017, or SEAD 4) App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

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

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

In reaching my decision, I specifically considered the following:

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

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

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

## Analysis

### Drug Involvement and Substance Misuse

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

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

Applicant used marijuana with varying frequency, from about July 2016 to January 2023. Of increased concern, he used marijuana in January 2023, after submitting a security clearance application and after being granted a security clearance in October 2021. Applicant admitted to using the prescription drug Adderall, without a prescription, on one occasion in October 2020 while he was in college.

Applicant indicated on his May 2021 SCA that he did not intend to use marijuana in the future while it was still illegal under federal law. He acknowledged knowing that the use of marijuana was illegal under federal and state law, and that his employer has a policy against employees using illegal drugs.

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

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

All of the above disqualifying conditions apply. AG ¶¶ 25(a) and 25(c) apply with regard to Applicant's illegal use and purchase of marijuana from 2016 to 2023. He also used the prescription drug Adderall in October 2020 although it was not prescribed to him.

AG ¶¶ 25(f) applies because Applicant purchased and used marijuana in January 2023 after being granted access to classified information in October 2021. The use of marijuana remains illegal under federal law. While the record is not clear about whether Applicant actively worked with classified information in January 2023, he was granted a security clearance in October 2021.

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

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

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

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used; 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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

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

Under AG ¶ 26, I find for Applicant with regard to his use of the prescription drug Adderall in October 2020, without a prescription, as alleged in SOR ¶ 1.b. This was a one-time use. It occurred over two years ago and is unlikely to recur.

Considering Applicant's history of marijuana abuse, none of the mitigating conditions apply in regards to SOR ¶¶ 1.a and 1.c. Applicant has a long history of marijuana use. His last use of marijuana was in January 2023. His last use was recent, after being granted a security clearance and after his expressed intent to refrain from illegal marijuana use in the future during his security clearance background investigation. AG ¶ 26(a) does not apply.

While Applicant is given credit for self-reporting his January 2023 marijuana use, the January 2023 use still raises questions about his judgment. He knew that the use of marijuana is illegal under federal law, and that his employer has a policy against employees using illegal drugs. He illegally used marijuana after he was granted a security clearance in October 2021 and after he expressed his intent to discontinue marijuana use. Considering Applicant and his friend visited a marijuana dispensary while he was visiting his friend in January 2023, and that he purchased some marijuana for his friend as a thank you for hosting him, the evidence is inconclusive as to whether he has disassociated from his marijuana-using friends. AG ¶ 26(b)(1) does not apply.

Applicant did not submit a signed statement of intent to abstain from all drug involvement and substance misuse. AG ¶ 26(b)(3) does not apply. Even if he did, the statement would carry less weight considering his continued use of marijuana despite past expressed intentions to no longer use marijuana.

Applicant's possession and use of marijuana casts doubt on his current reliability, trustworthiness, good judgment, and his ability or willingness to comply with laws, rules, and regulations. His suitability to hold a clearance is questionable, especially because his most recent substance misuse occurred after applying for and being granted a security clearance.

### **Guideline E, Personal Conduct**

SOR ¶ 1.c is cross-alleged under the Personal Conduct concern. I find that the concern was covered adequately under the Drug Involvement and Substance Abuse concerns discussed above. I find for Applicant regarding the Guideline E concern.

### **Whole-Person Concept**

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

Applicant is a 24-year-old employee of a federal contractor. He has been working for his employer since July 2020. He illegally used marijuana between 2016 and January 2023. Applicant's lack of judgment and his unwillingness to comply with federal rules and regulations continue to raise serious questions about his current reliability, trustworthiness, and ability to protect classified or sensitive information. Considering the record as a whole, the passage of time since his most recent marijuana use is insufficient to establish that his use of marijuana is unlikely to recur. The drug involvement and substance misuse security concerns are not mitigated.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a, 1.c:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

### **Conclusion**

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

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ERIN C. HOGAN  
Administrative Judge