



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
)  
)  
[NAME REDACTED] ) ISCR Case No. 22-00989  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Tara R. Karoian, Esq., Department Counsel  
For Applicant: *Pro se*

09/20/2023

---

**Decision**

---

MALONE, Matthew E., Administrative Judge:

Applicant used marijuana, a federally controlled substance, between 1968 and at least January 2022. He has had access to classified information since June 2011, and he has stated his intent to use marijuana in the future. Applicant did not mitigate the resulting security concerns about drug involvement and substance misuse. His request for eligibility for access to classified information is denied.

**Statement of the Case**

On June 10, 2021, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to renew his eligibility for access to classified information required for his employment with a federal contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Department of Defense (DOD) could not determine that it was clearly consistent with the interests of national security for Applicant to have access to classified information, as required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive).

On December 13, 2022, the DOD sent Applicant a Statement of Reasons (SOR) alleging facts and security concerns addressed under Guideline H (Drug Involvement and Substance Misuse). The action was taken pursuant to and consistent with 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) effective within the DOD on June 8, 2017.

Applicant timely responded to the SOR (Answer) and requested a decision without a hearing. On April 18, 2023, as provided for by paragraph E3.1.7 of the Directive, Department Counsel for the Defense Office of Hearings and Appeals (DOHA) issued a File of Relevant Material (FORM) that Applicant received on May 18, 2023. The FORM contained six exhibits (Items 1 – 6) on which the Government relies to support the SOR allegations.

Applicant was advised he had 30 days from receipt of the FORM to object to any of the Government's exhibits and to provide additional information in response to the FORM. He did not submit any additional information and he did not raise any objections to the Government's exhibits. The record closed on June 20, 2023, and I received the case for decision on September 13, 2023.

### **Findings of Fact**

Under Guideline H, the SOR alleged that Applicant used marijuana between 1968 and January 2022 (SOR 1.a); that between June 2014 and January 2022, his use of marijuana occurred while he had access to classified information (SOR 1.b); and that he intends to continue using marijuana (SOR 1.c). (FORM, Item 1)

In response to the SOR, he admitted, with comments, the allegations at SOR 1.a and 1.b. He denied, with comments, the SOR 1.c allegation. (FORM, Item 2) The facts alleged at SOR 1.a and 1.b are established by his admissions, and based on my review of the information presented in the FORM, I make the following additional findings of fact.

Applicant is a 71-year-old employee of a federal contractor, for whom he has worked in an information technology (IT) position since November 2010. He earned a bachelor's degree in 1982, and he has been married since 1984. He and his wife have one adult child. (FORM, Item 3)

Applicant disclosed in Section 23 (Illegal Use of Drugs or Drug Activity) of his 2021 e-QIP that he used marijuana between June 2014 and May 2020. He could not state with any precision how many times or how often he used marijuana because he did not use or possess the drug unless he happened to be socializing with friends who were using marijuana and offered it to him. As to his intentions regarding future use of marijuana, he stated the following:

I'd be lying if I said I wasn't going to ever, ever again have a smoke knowing it's quite likely I will find myself (as I have in the past) in a situation sometime

in the future where others are passing it around. You might find this incredible to believe, but marijuana is really popular, especially now that it is (about to be) legal in [the state where he lives and works]. (FORM, Item 3)

On August 25, 2021, Applicant completed a personal subject interview (PSI) by a government investigator as part of his most recent background investigation. During the PSI, he confirmed his disclosed use between 2014 and 2020, estimating he smokes marijuana between three and six times a year when it is offered to him in social settings. He also stated that he knows his drug use violates federal workplace policies. In response to interrogatories from Department Counsel, Applicant disclosed that he has used marijuana since 1968, but ceased frequent use in 1984. When he was first hired by his current employer in 2010, he submitted an e-QIP in which he was required to disclose, *inter alia*, any illegal drug use in the preceding seven years. He answered “no” to all of the Section 23 questions in that clearance application. He was first granted a security clearance and access to classified information based on a background investigation completed in March 2011. As to his future intent to use marijuana, Applicant now avers that he will abstain from using marijuana while he has “an active security clearance.” (FORM, Items 2, 5, and 6)

*Sua sponte*, I take administrative notice of the fact that marijuana is a Schedule I controlled substance, the use and possession of which is a criminal violation of federal law. Guidance issued by the Office of the Assistant Secretary of Defense (OASD) in February 2013, and by the Director of National Intelligence (DNI) in December 2021, makes clear that changes in the laws pertaining to marijuana by the various states, territories, and the District of Columbia do not alter the current National Security Adjudicative Guidelines. Because federal law supersedes state laws on this issue, Applicant’s use of marijuana, regardless of location or medical justification in his state of residence, is illegal. Further, federal workplaces prohibit illegal drug use by civilian federal employees and by persons employed for work on federal contracts.

### **Policies**

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). (See Directive, 6.3) Decisions must also reflect consideration of the factors listed in AG ¶ 2(d). Commonly referred to as the “whole-person” concept, those factors are:

- (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 presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest for an applicant to either receive or continue to have access to classified information. (*Department of the Navy v. Egan*, 484 U.S. 518 (1988))

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion. (See *Egan*, 484 U.S. at 528, 531) A person who has access to classified information enters 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 one who will protect the national interests as his or her 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. (See *Egan*; AG ¶ 2(b))

## **Analysis**

### **Drug Involvement and Substance Misuse**

The Government presented information that reasonably raises the security concern about drug involvement stated at AG ¶ 24 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.

Applicant has illegally used marijuana since 1968, when he was a teenager. Despite claiming he has not used it frequently since 1984, he has continued to use it until as recently as early 2022, after age 70. He also has illegally used marijuana while having access to classified information as a defense contractor. As to his future intent regarding

illegal drug use, his statements in his latest e-QIP, in his PSI, and in response to the SOR show that he is likely to use if offered the drug by people with whom, apparently, he still associates. Further, he offers that he will not use marijuana while he has “an active security clearance.” At a minimum, his statements in this regard fail to show that he is clearly committed to abstaining from using marijuana in the future. The foregoing requires application of the following AG ¶ 25 disqualifying conditions:

- (a) any drug abuse (see above definition);
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

By contrast, I have considered the potential applicability of the pertinent mitigating conditions presented under 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
- (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.

Department Counsel presented sufficient evidence to support the SOR allegations and raise security concerns under this guideline. It thus fell to Applicant to present information that warrants application of any pertinent mitigating conditions. Applicant did not present information that would support any of these mitigating conditions. His history of drug use is extensive, occurring as it has for most of his life, and he did not present sufficient information to show that the circumstances surrounding his drug use have changed. To the contrary, he suggests they have not. Additionally, even if, as alleged in the SOR, he has not used marijuana since January 2022, such a recent period of abstinence would not be sufficient, when compared to the previous five decades, to show that his conduct will not recur.

As to future intent, his statements are equivocal, at best, making future use contingent on whether he has a clearance. Thus, if he does not have a clearance, then he would still be willing to disregard existing laws and policy governing controlled substances. I also note that he did not disclose any drug use in the e-QIP he submitted in 2010, when he was first hired by his employer. His initial clearance was granted in 2011 based on incomplete information. When he was interviewed by a government investigator during his most recent background investigation, he did not explain the full scope of his drug use, choosing instead to confirm his statement that he had used marijuana since 2014. It was not until he responded to Department Counsel's interrogatories in January 2023 that he disclosed the full extent of his illegal drug use. The Government did not allege that he made any false official statements about his drug use. Nonetheless, I have considered his omissions (as well as the flippant nature of some of his comments regarding his drug use) for the limited purpose of assessing his credibility, evaluating his evidence of extenuation, mitigation, or changed circumstances, and considering whether he has demonstrated successful rehabilitation. See, e.g., ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017).

Finally, while Applicant's drug use may be legal under the laws of his state, it is still impermissible under federal controlled substances laws and DOD industrial security policy guidance. During his PSI, he acknowledged his awareness that using marijuana was inconsistent with DOD policies regarding illegal drug use in the workplace. On balance, Applicant did not mitigate the security concerns established by the Government's information.

In addition to my evaluation of the facts and my application of the appropriate adjudicative factors under Guideline H, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Applicant's response to the SOR, along with the Government's information, leaves unchanged the doubts raised about his judgment, reliability, and willingness to follow rules and regulations regarding the protection of sensitive information. Because the protection of the national interest is the principal goal of these adjudications, those doubts must be resolved against the Applicant.

### **Formal Findings**

Formal findings 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

## **Conclusion**

In light of all available information, it is not clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for security clearance eligibility is denied.

MATTHEW E. MALONE  
Administrative Judge