



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



In the matter of:	)	
	)	
	)	ISCR Case No. 22-01657
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Jeff Nagel, Esq., Department Counsel  
For Applicant: *Pro se*

11/15/2023

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**Decision**

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COACHER, Robert E., Administrative Judge:

Applicant mitigated the drug involvement and substance misuse and the personal conduct security concerns. Eligibility for access to classified information is granted.

**Statement of the Case**

On March 17, 2023, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H and Guideline E. DOD acted 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).

Applicant answered the SOR on March 20, 2023, and requested a hearing before an administrative judge. The case was assigned to me on July 11, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 26, 2023, and the hearing was convened as scheduled on September 14, 2023. The Government offered exhibits (GE) 1-2, which were admitted into evidence without objection. The Government’s discovery letter and exhibit index were marked as hearing exhibits (HE) I

and II, respectively. Applicant testified and offered exhibits (AE) A-C, which were admitted without objection. DOHA received the hearing transcript (Tr.) on September 22, 2023.

### **Findings of Fact**

Applicant admitted the Guideline H allegations, with explanations, in his answer and denied the Guideline E allegations. His admissions are incorporated as findings of fact. After a review of the pleadings and evidence, I make the following additional findings of fact.

Applicant is 40 years old. He is being sponsored for a clearance by a defense contractor. He works in information technology. He has worked for defense contractors since 2015 and has held a secret clearance since 2016. He holds an associate degree. He is married, has two children, and was expecting a third child at the time of his hearing. (Tr. at 6, 20-22; GE 1)

The SOR alleged Applicant used and purchased marijuana. It further alleged he used and purchased marijuana from November 2015 to about August 2016, while granted access to classified information. (SOR ¶¶ 1.a-1.b) It also alleged he falsified information in response to two questions on his March 2022 security clearance application (SCA) when he failed to disclose his marijuana use, as alleged above. The marijuana use allegations were also cross-alleged under Guideline E. (SOR ¶¶ 2a-2.c)

Applicant testified that he experimented with marijuana while in high school. In 2015, he was hired by a defense contractor located in another state (State A). He and his family moved to State A to take the job. At the time of his move, State A had legalized the use of marijuana and the purchase of marijuana from state-licensed dispensaries. Sometime in 2015, he completed an SCA (this document was not put into evidence) with the assistance of his facility security officer (FSO). He described this process as him being on the telephone with his FSO, answering the FSO's questions from the SCA, and the FSO taking those answers and inputting them into the SCA online computer program. He answered "no" to the questions about whether he used any illegal substances. He did this because he believed his use of marijuana in 2015 was not illegal because it was allowed under State A's law. He was unaware that use, possession, and purchasing of marijuana was in violation of federal law. He does not recall receiving any information from his employer or FSO that marijuana use was prohibited by federal law. (Nothing about falsifying his 2015 SCA was alleged in the SOR, so I will not use that information for disqualifying purposes. However, I may consider it for credibility, mitigation, and in applying the whole-person factors). (Tr. 20-23; SOR answer; AE A, p. 6)

Applicant admitted that he used, purchased, and possessed marijuana in the form of gummies in approximately 2015 and perhaps into 2016. He used the marijuana-gummies between 50-100 times during that timeframe. He did it to relax. It also helped with his migraine headaches. In approximately August of 2016, he attended a security briefing and was informed that use, possession, and purchase of marijuana violated

federal law. Armed with this knowledge, he approached his program manager and told him about his marijuana use and his mistaken belief about the law. His program manager told him to stop using marijuana, but otherwise not to worry about it. Applicant has not used, purchased, or possessed marijuana since told to stop doing so in approximately August 2016. While he worked in a cleared environment, he never handled classified information during this time period. (Tr. 23-25, 40; SOR answer; AE A, p.6)

In March 2022, Applicant was selected by his employer to apply for a top secret clearance. This required him to complete a new SCA, which he did on March 25, 2022. During the process of completing his SCA, he contemplated the drug-related questions: **“In the last seven years, have you illegally used any drugs or controlled substances?”** and **“Have you ever illegally used . . . a controlled substance while possessing a security clearance . . . .”** He answered “no” to both questions. Before completing his answers, he testified that he sought guidance from his FSO about how to answer the questions because he was not sure if his last marijuana use was within the seven-year timeframe. Applicant did not address the difference in the nature of the questions. The first asking if he used within the last seven years and the second asking if he ever used. His FSO told him to “do his best” in completing the SCA and address any questions he had in the follow-up interview with an investigator. He also asked his senior colleagues about how he should answer the questions and they agreed with the FSO that he should address any questions or ambiguities during his follow-up interview. Applicant denied that he intentionally provided false information on his SCA. (Tr. 25-27, 37; GE 1; AE A, p. 6)

In May 2022, Applicant was interviewed as part of his background investigation. The written summary of this investigation appears at GE 2. Applicant disputed some of the characterizations made by the interviewer and noted them in an email to Department Counsel (AE A, pp. 3-4) in August 2023. Applicant admitted using marijuana in the last seven years to the investigator without first being confronted with knowledge of his prior use. He further explained the circumstances of his use and his ignorance of federal law prohibiting use of marijuana until his enlightenment in approximately August 2016. Appellant disagrees with the investigator’s characterization that Applicant said he did not know why he did not list his marijuana use on his SCA. He maintains that he told the investigator about his confusion concerning the seven-year window to report drug use and he was not sure whether his situation required reporting. He decided to wait to ask clarifying questions when he spoke to the investigator, which he did. Overall, I found Applicant’s testimony and explanations credible. (Tr. 26, 37-38; GE 2; SOR answer; AE A, pp. 3-4)

Applicant submitted a letter from a friend who has rented a room from him for approximately 10 years. The friend stated that he has not witnessed Applicant use marijuana since 2016. Applicant also submitted a written statement of intent not to use marijuana or THC products in the future, that such use could result in the revocation of his clearance, and that marijuana use is illegal under federal law. Applicant’s wife does not use marijuana or THC products. (Tr. 30; AE B-C)

## Policies

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.

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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that 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

AG ¶ 24 expresses the security concern pertaining to drug involvement and substance abuse:

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

- (a) any substance misuse; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant used marijuana from 2015 to sometime in 2016. Although he held a security clearance at the time, there is no evidence that he had access to classified information. The evidence is to the contrary based on his testimony that he did not handle classified information, which went unrebutted by the Government. I find that AG ¶ 25(a) applies to both SOR ¶¶ 1.a and 1.b, however, without the "while granted access to classified information" language established here, those two allegations become duplicitous. I find in favor on Applicant regarding SOR ¶ 1.b.

AG ¶ 26 provides conditions that could mitigate security concerns. The following potentially apply in this case:

- (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.

Applicant's last use of marijuana occurred approximately seven years ago. He credibly testified that he immediately stopped using marijuana upon learning it was illegal under federal law. There is no evidence of more recent use. He acknowledged his drug use and took action to change his behavior by ceasing all use of marijuana. He also provided a signed statement of intent not to use marijuana in the future. AG ¶¶ 26(a) and 26(b) apply to SOR ¶ 1.a.

I also note in accordance with the Director of National Intelligence's clarifying guidance letter concerning marijuana dated December 21, 2021, I have considered that the evidence here supports mitigation in the form of Applicant's abstinence since 2016 and his signed letter of intent of nonuse in the future. The guidance also states that violation of federal drug law remains relevant, but not determinative, to adjudications of security clearance eligibility. (See ES 2021-01529)

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

AG ¶ 15 expresses the personal conduct security concern:

Conduct 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying conditions are potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and

regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing . . . .;

Applicant did not list his 2015-2016 marijuana use on his 2022 SCA. He credibly stated that his intent was not to deceive the government about his past drug activity. Rather, he was legitimately confused about his reporting responsibilities because of the ambiguity that existed in his mind about whether his last use was within the past seven years. While this does not apply to the "ever used" question of SOR ¶ 2.b, his response to both of these questions was confused by the guidance he sought from his FSO and other senior colleague as to how to answer them. He was advised to address any ambiguities he had about the questions with his background investigator, which he did. Thus, I find that while he deliberately answered both questions incorrectly, he did so without an intent to deceive, but with an intent to clarify the answers with the investigator. AG ¶ 16(a) applies to SOR ¶¶ 2.a-2.b.

Applicant's use of marijuana is sufficient under Guideline H, as noted above. AG ¶ 16(c) does not apply to SOR ¶ 2.c. Applicant's marijuana use, before his reporting of it, was a source of vulnerability to exploitation and could affect his professional standing. AG ¶ 16(e) applies to SOR ¶ 2.c.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant credibly explained that he was confused about his reporting responsibility when he was completing his 2022 SCA. He was advised by both his FSO and his senior colleagues to address any questions or ambiguities with his background investigator during his upcoming interview. He did so by telling the investigator all the circumstances of his prior marijuana use and his confusion over the applicability of federal law and the seven-year reporting window. He was not confronted by the investigator about his prior drug use before he reported it in response to a general question. AG ¶¶ 17(a) and 17(b) apply to SOR ¶¶ 2.a-2.b.

Applicant admitted his past marijuana use and credibly testified about his nearly seven years of abstinence. He immediately ceased using marijuana when he was made aware of its illegality under federal law. He provided a written statement of intent not to use in the future. I conclude that any future drug use is unlikely to occur. AG ¶ 17(d) applies to SOR ¶ 2.c

### **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 the 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 guideline and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E. Those factors in AG ¶ 2(d) were addressed under those guidelines.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the drug involvement and personal conduct 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: FOR APPLICANT

Subparagraphs: 1.a – 1.b: For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraphs: 2.a – 2.c: For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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Robert E. Coacher  
Administrative Judge