



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



In the matter of: )  
)  
) ISCR Case No. 23-00253  
)  
Applicant for Security Clearance )

**Appearances**

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

11/15/2023

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**Decision**

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BENSON, Pamela, C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H (Drug Involvement and Substance Misuse). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on April 12, 2022. On March 17, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H. The CAS 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) effective on June 8, 2017.

On March 21, 2023, Applicant provided a response to the SOR and requested a hearing before an administrative judge (Answer). The case was assigned to me on May 26, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 18, 2023, setting the hearing for August 24, 2023. The hearing was held as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through 3. I admitted all proffered exhibits into evidence without objection. Applicant testified but did not offer any documents. I held the record open until September 7, 2023, in the event either party wanted to supplement the record. Applicant timely submitted four documents, which I labeled as Applicant Exhibits (AE) A through D and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on August 31, 2023, and the record closed on September 8, 2023.

### **Findings of Fact**

Applicant admitted SOR ¶¶ 1.a and 1.b, and he denied ¶ 1.c. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 41 years old. He enlisted in the U.S. Navy in November 2000, and he received a medical discharge in March 2002. He earned a professional certification in 2013. He was previously married in 2007 and divorced in 2013. He married his current wife in 2019. He has one adult son. Since March 2021, he has been employed by a federal contractor as a manufacturing technician. He had previously worked for this employer on a temporary basis in 2020. Applicant currently possesses a DOD security clearance that was issued in December 2020. (Tr. 16, 20; GE 1, GE 2; AE C)

In Applicant's April 2022 SCA, he did not disclose any illegal drug use. SOR ¶ 1.a alleges that Applicant used marijuana with varying frequency from September 1996 to March 2023. In his Answer, Applicant stated that he used marijuana in high school, but he did not use any marijuana while he served in the U.S. Navy. In 2012, he ruptured his Achilles tendon which required surgery. He was prescribed Lortab and Oxycodone for pain management. He did not feel comfortable taking the prescribed narcotics, so he chose marijuana instead to treat his pain from 2012-2015. In 2016 he ruptured his left Achilles tendon, and although he was not required to have surgery, he again chose to use marijuana to manage his pain. After the pain went away, he used marijuana to treat symptoms of depression. In 2018, his state of residence legalized marijuana, and he obtained a medical marijuana card to continue to treat his depression and his post-traumatic stress disorder (PTSD). (GE 1; Answer)

Applicant testified that he applied for a permanent position with his employer in January 2021. He had previously worked for this employer as a temporary employee, and he was aware that he would be required to take a drug test to be offered a permanent position. SOR ¶ 1.b alleges that in February 2021, Applicant tested positive for marijuana during a drug test given by his employer. An incident report disclosing a positive drug test was filed on Applicant in March 2021. In the SOR Answer, he admitted he had used marijuana during the holidays due to depression and not working. He had informed the federal contractor that he would test positive during the drug test due to his medical marijuana use. He was required to show his medical marijuana card, and he was offered a permanent position in March 2021. (Tr. 18-19; GE 2; Answer)

Applicant provided inconsistent testimony that conflicted with his Answer when he stated that he was prescribed a medical marijuana card in 2012 after his first Achilles tendon surgery. He stated he used medical marijuana every other day from 2012 to January 2021. His medical marijuana card expired in May 2021. He continued to purchase marijuana to treat his symptoms from another state he had moved to in 2020 that had also legalized marijuana use for recreational purposes. According to his Answer, he could not have obtained a medical marijuana card in 2012 since his state of residence did not legalize medicinal use of marijuana until 2018. (Tr. 19-27; Answer)

Applicant also provided conflicting information when he testified that he was completely unaware that marijuana use was illegal under federal law, and therefore incompatible with a federal government contractor employee possessing a DOD security clearance. He did not learn that this was an issue until March 2023, when he received an interrogatory from DOHA. In his interrogatory response he listed that he last used marijuana in March 2023, and he intended to use marijuana in the future. (SOR ¶ 1.c) The SOR was also issued in March 2023, and in his Answer, he denied that he intended to use marijuana in the future. He had no intentions of using marijuana as long as it could have an adverse effect on his employment with a federal contractor. (Tr. 27-28; GE 3; Answer)

In August 2022, Applicant participated in a background interview with an authorized DOD investigator. Applicant was asked if he had used any illegal drugs or misused prescription drugs within the last seven years, which Applicant denied. He was then confronted with the March 2021 incident report of his positive drug test. He told the investigator that he was prescribed medical marijuana in 2012 after surgery to manage his pain. He ended his medicinal use of marijuana in 2015, but he continued to maintain his medical marijuana card in case he would need marijuana for pain in an emergency. He told the investigator that he moved his family to another state in 2020, and he used marijuana “a few times” due to lifting and carrying heavy items. He last used marijuana in March 2020, and he had reported this to the federal contractor when he was required to undergo a drug test in February 2021. He was aware of a co-worker under investigation for illegal drug use, and he had no intent to use marijuana unless it became legal under federal law. Applicant read the investigative report, and in his March 2023 interrogatory, he certified that the information was accurate. The information he provided during his August 2022 background interview is inconsistent with information he provided in his Answer and during his testimony. (GE 3)

Applicant provided two character reference letters from a co-worker and his wife. They described Applicant as dedicated and responsible. Although neither mentioned Applicant’s recent use of marijuana, they held no reservations about Applicant’s character or loyalty. (AE A and AE B)

## Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG 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(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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. 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 as to obtaining 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 as to 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

The security concern relating to the guideline 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.

AG ¶ 25 provides conditions that could raise a security concern and may be disqualifying 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;
- (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.

Applicant's admissions and the record evidence reflect that Applicant used marijuana from September 1996 to March 2023. He tested positive for marijuana during a drug test in February 2021, and despite holding a DOD security clearance since December 2020, he continued to use marijuana while holding a sensitive position. The record establishes AG ¶¶ 25(a), 25(b), 25(c), 25(f) and 25(g).

DNI Memorandum ES 2014-00674, "Adherence to Federal Laws Prohibiting Marijuana Use," October 25, 2014, states:

[C]hanges to state laws and the laws of 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. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. 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.

The guideline also includes conditions that could mitigate security concerns arising from drug involvement and substance misuse. The following mitigating conditions under AG ¶ 26 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 to overcome the 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 being 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

(d) 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.

None of the mitigating conditions apply. Applicant has a long history of using marijuana, and his last use occurred in March 2023. He provided inconsistent information during his background interview, in his Answer, and during his testimony. He is not considered to be a credible witness. He did disclose that he intended to use marijuana in the future in his March 2023 interrogatory response. After he received the SOR that same month, he stated that he no longer intended to use marijuana if his job was in peril. I do not find his statement to be dependable or convincing. He failed to abstain from marijuana involvement despite acknowledging during his background interview that doing so was in violation of federal law and in contravention of the

requirements for security clearance holders. Overall, his use of illegal substances while possessing a security clearance continues to cast doubt on his reliability, trustworthiness, and good judgment. Applicant failed to mitigate the drug involvement and substance misuse security concerns.

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

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

Applicant's use of marijuana while holding a security clearance places a heavy burden on him to establish mitigation. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See Dorfmont, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

After considering the record as a whole, to include Applicant's military service and the circumstances surrounding his use of marijuana to treat chronic pain and other varying symptoms, I conclude that Applicant has not met his heavy burden of proof and persuasion due to the recency of his last use of marijuana while holding a DOD security clearance. His decision to use marijuana despite knowing he was violating federal law and security regulations continues to cast doubt on his reliability, trustworthiness, and willingness to comply with laws, rules, and regulations. It was only after he realized that his employment position was in jeopardy that he decided to abstain from using

marijuana. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H.

**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

**Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson  
Administrative Judge