



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



In the matter of: )  
)  
) ISCR Case No. 23-01173  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Nicholas T. Temple, Esq., Department Counsel  
For Applicant: *Pro Se*

12/27/2023

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**Decision**

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BORGSTROM, Eric H., Administrative Judge

Applicant illegally used marijuana daily from March 2020 until late June 2023, and he repeatedly expressed his intent to use marijuana in the future. He has only recently abstained from marijuana use and expressed his intent to abstain from marijuana in the future. Applicant's candor and exemplary work performance do not overcome the concerns raised by his knowing and repeated violation of Federal and state drug laws. He did not mitigate the drug involvement and substance misuse security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On June 20, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse). The CAS acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines implemented by the DOD on June 8, 2017.

In Applicant's July 19, 2023 response to the SOR, he admitted, with explanations, both SOR allegations. He requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. (Answer)

On August 23, 2023, the Government was ready to proceed to hearing. I was assigned this case on November 3, 2023. On November 13, 2023, DOHA issued a Notice of Hearing, scheduling a hearing by video teleconference for November 28, 2023. The hearing proceeded as scheduled. The Government proffered two exhibits, which I admitted as Government Exhibits (GE) 1 and 2 without objection. Applicant testified and proffered two exhibits, which I marked as Applicant Exhibits (AE) A and B. I admitted AE A without objection, and I sustained Department Counsel's objection to the admissibility of AE B, as discussed below. At Applicant's request, I held the record open until December 12, 2023, for him to supplement the evidentiary record. DOHA received the hearing transcript (Tr.) on December 5, 2023. On December 8, 2023, Applicant submitted a two-page exhibit, which I admitted as AE C without objection. Applicant confirmed that he had no further submissions, and the record closed on December 8, 2023.

### **Evidentiary Ruling**

At the hearing, Applicant introduced two photographs (AE 8) showing what appeared to be test vials with tetrahydrocannabinol (THC) markings with backgrounds of the Government's discovery letter, dated August 23, 2023, and a computer monitor's calendar, dated November 20, 2023. These two photographs did not show Applicant's name, a testing date, who administered the test, or instructions on reading results. Applicant proffered that he purchased two at-home drug tests, which exclusively tested for THC. He himself provided the urine sample, conducted the test, and interpreted the results. There was no evidence showing that Applicant adhered to any accepted testing protocols or limitations specified in the urinalysis instructions.

Department Counsel objected to the admissibility of AE B on the grounds of authentication and relevance. I sustained Department Counsel's objection because the authenticity and reliability concerns far outweighed the probative value of AE B. I left the record open until December 12, 2023, to provide Applicant the opportunity to participate in a urinalysis administered by an authorized facility or medical professional. I permitted Applicant to testify about purchasing and administering the at-home tests and his understanding of the test results. (Tr. 19-23)

### **Findings of Fact**

Applicant is 28 years old. He earned a bachelor's degree in May 2017 and a master's degree in December 2022. He has never married, and he does not have any children. Since May 2016, he has been employed with a DOD contractor, currently as an earned value analyst. (GE 1; Tr. 25-27)

On January 31, 2023, Applicant certified and submitted an Electronic Questionnaire for Investigations Processing (e-QIP). Under Section 23 - Illegal Use of Drugs or Drug Activity, he reported that he had first used marijuana in September 2013 and had most recently used marijuana in January 2023. He stated, "Casual smoker. Two

to three times a day but not always consecutively." He also reported that he had purchased marijuana approximately once every one to three months between September 2013 and November 2022. He admitted that he intended to use marijuana in the future. (GE 1)

On February 24, 2023, Applicant was interviewed by an investigator on behalf of the Office of Personnel Management (OPM). He admitted his marijuana use and purchase as reported in his e-QIP. He explained that he typically used marijuana at home or in various social settings. He had both purchased marijuana illegally and from state-licensed dispensaries. As of the interview, he had last used marijuana on February 23, 2023. He noted that he used marijuana to help sleep and to relieve his anxiety, and he continued to socialize with individuals who used illegal drugs. At the time of the interview, he did not intend to alter his daily use of marijuana; however, he was willing to stop if required for his employment. (GE 2)

In his July 19, 2023 Answer, Applicant admitted his marijuana use from "September 2013 to the present." He argued that his marijuana use complied with the laws of his state(s) where he resided at that time of his use. He disagreed with the position that his marijuana use constituted a security concern, and he expressed his intent to abstain from future marijuana use. (Answer)

At the hearing, Applicant clarified his drug involvement. From about September 2013 to March 2020, he typically used marijuana about once a month. From March 2020 to late June 2023, he used marijuana approximately two or three times a day. He admitted that he used marijuana at least once after receiving the SOR. In late June 2023, he recognized the gravity of the Government's security concerns arising from his drug involvement. He then ceased his marijuana use and decided to abstain from marijuana use in the future, because he highly valued his job and wanted to show his willingness to comply with Federal rules and regulations. (Tr. 27-30, 33, 37, 42)

While in college in State B, Applicant illegally purchased or received marijuana from friends. After college, Applicant resided in State A. He would either illegally purchase marijuana in State A or travel to State B (where recreational marijuana use was permitted under State B laws), purchase marijuana, and then illegally transport that marijuana back to State A for his own use. He admitted that such transporting of marijuana across state lines was illegal. He last purchased marijuana in May 2023. With the exception of his time in college, he lived in State A. In State B, recreational marijuana use (for those over the age of 21) became legal in December 2016; however, no dispensaries opened until November 2018. In State A, recreational marijuana use (for those over the age of 21) became legal in July 2021; however, dispensaries were not opened until January 2023. (Answer; Tr. 24-25; 35-37)

In August 2023 and November 2023, Applicant purchased and administered an at-home urinalysis test, which only tested for the presence of THC. He testified that he provided the urine sample, administered the test, and interpreted the results as negative for the presence of THC. On December 4, 2023, Applicant participated in a urinalysis administered at a testing facility. He tested negative for all tested substances, including marijuana. (AE C; Tr. 40-41)

Applicant demonstrated a sophisticated understanding of Federal drug laws. He had been aware, prior to January 2023, that marijuana was a Schedule I controlled substance. He defined his understanding of a Schedule I drug as "a controlled substance that has a high probability of abuse and has a high ability to be addictive." In his Answer and at hearing, he expressed his frustration with what he believed was the Federal government's delay in adopting a less critical perspective on previous marijuana use in clearance adjudications. He specifically referenced pending Federal legislation proposing to reduce or eliminate the negative inferences of previous marijuana use upon applicants for clearance eligibility. (Tr. 31-32, 42-50; Answer)

Applicant submitted an excerpt of his personnel record, showing his promotions in November 2019 and October 2022. On November 2, 2023, he received an Achievement Award "for his extraordinary teamwork and customer focus." On April 4, 2023, he received an Achievement Award for "great teamwork, dedication, flexibility, and ownership." Applicant's supervisor and facility security officer (FSO) are unaware of his marijuana use. (AE A; Tr. 39-40)

## **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 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(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."

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 sensitive 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

sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive 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 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 are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Marijuana is a Schedule I controlled substance under Federal law pursuant to Title 21, Section 812 of the United States Code. Schedule I drugs are those which have a high potential for abuse; have no currently accepted medical use in treatment in the United States; and lack accepted safety for use of the drug under medical supervision. Section 844 under Title 21 of the United States Code makes it unlawful for any person to knowingly or intentionally possess a controlled substance not obtained pursuant to a valid prescription.

On October 25, 2014, the then Director of National Intelligence (DNI) issued guidance that changes to laws by some states and the District of Columbia to legalize or decriminalize the recreational use of marijuana do not alter existing federal law or the National Security Adjudicative Guidelines, and that an individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security eligibility determinations.

On December 21, 2021, the DNI issued clarifying guidance concerning marijuana, noting that prior recreational use of marijuana by an individual may be relevant to security adjudications, but is not determinative in the whole-person evaluation. Relevant factors in mitigation include the frequency of use and whether the individual can demonstrate that future use is unlikely to recur.

Between September 2013 and March 2020, Applicant used marijuana about once a month. Between March 2020 and late June 2023, he used marijuana two to three times a day. He illegally purchased marijuana and illegally transported it across state lines, in violation of Federal and state drug laws. He knowingly and repeatedly violated Federal and state drug laws, with his use and purchase of marijuana, over several years. AG ¶¶ 25(a) and 25(c) apply.

In his January 2023 e-QIP and during his February 2023 security interview, Applicant expressed his intent to use marijuana in the future. AG ¶ 25(g) applies.

Conditions that could mitigate the drug involvement security concerns are provided under AG ¶ 26. 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; 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.

Applicant's illegal use and purchase of marijuana spanned nearly 10 years. He willfully disregarded Federal drug laws, believing that his marijuana use was not a serious concern and that Federal prohibitions were not aligned with public sentiment about marijuana use. He used marijuana even after receiving the June 2023 SOR. He quit using

marijuana and expressed his intent to abstain from future marijuana use only after his employment and clearance eligibility were in jeopardy. Notwithstanding his statement of intent to abstain from all drug involvement, he has not established a pattern of abstinence sufficient to overcome his daily marijuana use between March 2020 and late June 2023. Given the recency and frequency of Applicant's marijuana use, coupled with his full awareness of his violation of drug laws, doubts remain as to his judgment and ability to adhere to rules and regulations. Applicant has not mitigated 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 position of trust 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 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 and the factors in AG ¶ 2(d) in this whole-person analysis.

Applicant's candor and exemplary work performance do not overcome the concerns raised by his knowing and repeated violation of Federal and state drug laws. His actions do not reflect the good judgment, reliability, and adherence to laws and regulations required of one entrusted to safeguard classified information. He did not mitigate the drug involvement security concerns. Eligibility for access to classified information is denied.

### **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**

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

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Eric H. Borgstrom  
Administrative Judge