



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



In the matter of:	)	
	)	
	)	ISCR Case No. 23-00312
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Erin Thompson, Esq., Department Counsel  
For Applicant: *Pro se*

01/30/2024

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**Decision**

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RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Guideline H, drug involvement and substance misuse security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On April 28, 2023, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse. The action was taken 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.

Applicant answered the SOR on May 19, 2023, and elected to have her case decided on the written the record in lieu of a hearing. Department Counsel submitted the Government’s file of relevant material (FORM), and Applicant received it on September 11, 2023. She was afforded an opportunity to file objections and submit material in

refutation, extenuation, or mitigation within 30 days of receipt of the FORM. The Government's evidence is identified as Items 2 through 4. (Item 1 is the SOR) Applicant did not provide a response to the FORM. There were no objections to any of the evidence and Items 2 through 4 are admitted into evidence. The case was assigned to me on January 10, 2024.

### **Findings of Fact**

Applicant admitted the SOR allegations in ¶¶ 1.a and 1.b. She denied the SOR allegation in ¶ 1.c. Her admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 41 years old. She earned a bachelor's degree in 2008. She married in 2014 and has two children ages seven and four. She has worked for the same federal contractor since 2006. Applicant held a top secret clearance with access to sensitive compartmented information (SCI), but it is unknown when she first was granted access.

Applicant completed a security clearance application (SCA) in September 2020. Section 23 asked if in the past seven years she had illegally used any drugs or controlled substance. She answered "yes." She said that from about June 2011 to the present, she used marijuana. She stated:

In the past, I've occasionally used marijuana for recreational purposes. However, since the COVID lock down I've started taking CBD/THC gummies more regularly to help ease my anxiety and insomnia. Honestly, the transition to the sole caregiver of my infant and toddler has been HARD! I have found these help cope with being stuck in the house all day with two crazy kids. Some people unwind with a glass of wine, I like to unwind with a gummy. However, I have NEVER used marijuana during work hours or while I'm working. (Item 4)

Applicant further stated that since March 2020, she would typically take one gummy at 6:00 p.m. almost every day. She would occasionally smoke marijuana at night on the weekends. She said her stress levels were "off the charts" being thrown into being a full-time mother and marijuana helped her relax and sleep. She intended to continue to use marijuana gummies to manage her anxiety and insomnia because of her challenging circumstances "being stuck at home 24/7, no interaction with others, having no help." She reiterated that she had never been under the influence at work or during working hours. She disclosed she used the drug while holding a security clearance, and she intended to continue to do so. She did not report in this SCA that she believed her marijuana use was legal under state law and therefore permissible. (Item 4)

Applicant also disclosed in her September 2020 SCA that during a 2018 polygraph examination, when asked about her drug use, she reported that she occasionally used marijuana. She said that this information did not align with her 2018 SCA because she

had responded “no” to the question that asked if she had illegally used any drugs or controlled substances in the past seven years. She answered “yes” to the question on her 2020 SCA that asked if she ever had her security clearance eligibility/access authorization denied, suspended, or revoked. Apparently, her failure to disclose her illegal drug use on her 2018 SCA caused her access to SCI to be suspended or revoked but she continued to hold a top secret security clearance. She said she was given a written letter from a senior adjudication officer but did not believe there is anything in her employment record.

Applicant completed an SCA in November 2022. Under Section 23, which asked if in the past seven years she had illegally used any drugs or controlled substance, she stated “yes” and disclosed her marijuana use. She provided essentially the same information about her past marijuana use except she reported her last use was in November 2022. She stated that with the COVID lockdown over, she had cut back on her use to about three times a week after her children were asleep. She also continued to smoke marijuana at night on the weekends. She does not drink alcohol, so she found marijuana helped her relax and sleep. She reported that she continued to use it while holding a security clearance and that she intended to continue to use the marijuana gummies and occasionally smoke marijuana in the future. She stated: “Living in [State A] where marijuana is legal, I see it interchangeably with alcohol.” (Item 3)

Applicant reported on her November 2022 SCA the following regarding whether she had received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy:

I was read in on a government program, but it was rescinded for failing to disclose the use of drugs on the updated security paperwork. I never received a written warning, and I don’t believe anything was added to my employee file but thought I should mention it. I’m not sure if that falls under a violation of the security policy as I still have an active TS DOD clearance. (Item 3)

In Applicant’s answer to the SOR, she reiterated that she used marijuana and marijuana gummies during the pandemic to cope with her children and professional workload and to decompress at the end of the day. She further stated that she recently submitted her security clearance paperwork and she said she intended to continue to use marijuana gummies and smoke marijuana because she was under the impression it was legal to do so. She stated that after conducting an internet search she learned the use of marijuana was illegal under federal law which trumped state law. She said she made a mistake and apologized. She stated she now will no longer use marijuana products because it is illegal and puts her security clearance at risk. (Item 2)

Applicant did not provide a response to the FORM or any information about her marijuana use from 2011 until 2016 before it was legalized in her state, while holding a security clearance, and after her SCI access was suspended or revoked in 2018 for failing to disclose her prior use, which was discovered during a polygraph examination.

## Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. 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(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 states 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 security concerns. The following are potentially applicable:

- (a) any substance misuse;
- (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 illegally used marijuana from 2011 through November 2022. She repeatedly indicated her intent to continue using marijuana gummies and smoking marijuana. It was not until she received the SOR in April 2023 that she said she would discontinue her future use. She disclosed she had been read into a government program and her access to SCI was rescinded because she said she failed to disclose her prior drug use. There is sufficient evidence that Applicant used marijuana while she was granted access to classified information. The above disqualifying conditions apply.

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; and

(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.

Applicant has been using marijuana while employed by a federal contractor since 2011. Personal marijuana use has been legal in the state where she lives since 2016. In her 2020 and 2022 SCA, she disclosed under the question that asked about illegal drug use that she used marijuana. She did not say anything in her 2020 SCA that she believed her use was legal due to state law. She said she failed to disclose her illegal drug use on her 2018 SCA, and it was not until she was polygraphed in 2018 that the information came to light. She said that her access to SCI was rescinded because she failed to disclose her drug use. It is unclear why if she believed her use was legal that she would have to disclose this information on her SCAs that asked to only disclose illegal drug use.

All these things should have been warning signs to Applicant about her conduct. Her access to SCI was rescinded because she failed to disclose her drug use. Minimally, at this point, Applicant was on notice that future drug use could be a detriment to holding a security clearance. I do not have any evidence that she sought guidance from her employer or facility security officer regarding her drug use before or after her access was rescinded. I have considered that she believed at some point that she was permitted to use marijuana because it was legal in her state. However, she is a long-time employee of a federal contractor who should have known there is a zero-drug use policy and marijuana use is inconsistent with her employment. She provided no explanation for why she was using marijuana for years before it was legalized in her state.

Despite Applicant's recent statement that she no longer intends to use marijuana in the future, she repeatedly expressed her intent to use it. Her previous conduct must be weighed against her recent decision. Specifically, that she was using marijuana prior to it being legalized, she reported her marijuana use as illegal, and she continued to use it even after her SCI access was rescinded. She did not respond to the FORM, so I do not have any recent update on whether she has continued to abstain from marijuana use or other clarifications.

I have considered Applicant's expressed intent to abstain from drug involvement. Her drug use is recent and considering the frequency and lengthy period of marijuana use, I am unable to find a sufficient period of abstinence has occurred and future use is unlikely to recur. Her conduct while holding a security clearance casts doubt on her reliability, trustworthiness, and good judgment. AG ¶ 26(a) does not apply. I find AG ¶ 26(b) has some application, but it is insufficient to fully mitigate the security concerns raised.

Because Applicant requested a determination on the record without a hearing, I had no opportunity to question her about his illegal drug use or evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003).

### **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.

I have a duty to exercise prudence because 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." I am obligated to follow that directive. Applicant failed to meet her burden of persuasion. After weighing the disqualifying and mitigating conditions under Guideline H and evaluating all the evidence in the context of the whole person, I conclude Applicant failed to mitigate the security concerns under the drug involvement and substance misuse guideline.

### **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 Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Carol G. Ricciardello  
Administrative Judge