



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



In the matter of: )  
)  
) ISCR Case No. 21-02938  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Andrea Corrales, Esq., Department Counsel  
For Applicant: *Pro se*

03/04/2024

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**Decision**

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NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to deny his eligibility for a security clearance to work in the defense industry. He failed to mitigate the concerns about his judgment, reliability, and trustworthiness raised by his history of marijuana use, drug-related criminal history, and drug-related adverse employment actions. Clearance is denied.

**Statement of the Case**

On May 5, 2022, DOD issued Applicant a Statement of Reasons (SOR) detailing security concerns undern the personal conduct and drug involvement and substance misuse guidelines. The Agency acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on June 8, 2017.

Based on the available information, DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant's security clearance and recommended that the case be submitted to a Defense Office of Hearings and Appeals (DOHA) administrative judge to determine whether to grant or deny his security clearance.

Applicant timely answered the SOR and requested a hearing. At the hearing convened on June 28, 2023, I admitted as Hearing Exhibit (HE) I the disclosure letter the Government sent to Applicant, dated August 23, 2022. I also admitted Government's Exhibits (GE) 1 through 6, and Applicant's Exhibits (AE) A through E without objection. I left the record open until June 30, 2023, to allow Applicant to submit any corrections he may have had to GE 6, a series of subject interview summaries from his 2009 and 2021 background investigations. He did not submit any changes. DOHA received the hearing transcript (Tr.) on July 13, 2023. (Tr. 17-20, 60-62, 171)

### **Findings of Fact**

Applicant, 58, has worked for his current employer since December 2020 as a project manager. He was previously granted access to classified information by another government agency in March 2009, but only held an active security clearance between 2010 and 2012, when he returned to work in the private sector. He completed his most recent security clearance application in January 2021. He disclosed marijuana use between December 1983 and October 2020. He disclosed being terminated from jobs in March 2018 and November 2020 for testing positive for Tetrahydrocannabinol (THC), the principal psychoactive component in marijuana, on urinalysis tests. He also disclosed incidents of drug-related criminal conduct in 1992 and 2013. The background investigation discovered additional drug-related criminal conduct dating back to 1988. (GE 1)

Applicant's drug history dates to high school. He began using the drug his sophomore year in high school. At some point, he began selling marijuana cigarettes. In January 1984, during his senior year of high school, school officials found marijuana in his locker. He was arrested and charged with violating State 1's controlled substances act and two counts of disorderly conduct. He was expelled from school, which housed the honors program in which he had been enrolled. He was required to finish his senior year at an alternative high school. Because of his prior performance, he was able to keep the scholar's distinction he earned at the previous school on his diploma. He received a suspended sentence on the criminal charges. (GE 6; Tr. 81-83)

He attended college in State 1, between August 1984 and May 1989, earning a bachelor's degree in physics. During college, he used marijuana recreationally with friends. He was arrested in May 1988 in State 2, where he traveled with a group of friends to go to a party or nightclub. The group left the event, intending to smoke marijuana in the car they used to travel to State 2. Applicant did not own the car and he was not the driver. A police officer observed them in the car and approached the vehicle. Upon doing so, the officer noticed an open container of alcohol. Applicant and his friends were arrested and charged with possession of marijuana. He was released

from jail the next morning on his own recognizance but was required to return to State 2 for the criminal proceedings. He appeared, as required, represented by counsel. He was found not guilty. (GE 1; GE 6; Tr. 84-85)

After graduating from college in May 1989, he accepted a job in his hometown and lived with a roommate. Though he does not remember the circumstances, he was arrested after police came to his home and while there found marijuana on the premises. Applicant maintains that the marijuana did not belong to him. He was arrested for possession of marijuana in September 1989. The charges were dismissed. (Tr. 87-88)

Shortly after the September 1989 event, Applicant began selling drugs. Although he was working, he did not feel that he was earning enough money. At first, he sold marijuana. Sometime in 1991, he began selling cocaine. In August 1991, he was arrested for possession with intent to distribute cocaine after a buyer, who was working with the police, set up a transaction that ended in Applicant's arrest. (Tr. 91-96)

While pending trial on that matter, he continued to sell cocaine and was arrested again in May 1993. A police officer attempted a traffic stop on the car Applicant was driving. Instead of pulling over, he led the police on a brief chase, throwing the cocaine out of the window as he drove. Ultimately, he decided to pull over. He was charged with misdemeanors for prohibited offensive weapons, reckless endangerments, and violating the controlled substance, drug device, and cosmetic act. The charges were consolidated with those from the August 1991 arrest. He pleaded guilty to one felony and one misdemeanor count of violating State 1's controlled substances act and was sentenced to 18 to 36 months incarceration. Initially, he served his time in a halfway house, but after violating curfew, he was transferred to a state penitentiary to serve the remainder of his sentence. He was released in August 1996, and ordered to serve five years supervised parole. The court granted him early release after determining that Applicant's life was headed in a positive direction. He had enrolled in a graduate degree program and started working a job in his field that required travel. (GE 4, 6; Tr. 96-100)

After he was released from parole, he resumed using marijuana. He used the drug once or twice per week. He stopped using when his wife got pregnant in 1998. Despite his 1993 felony conviction, Applicant obtained a security clearance from another government agency in March 2009. During his 2009 background investigation, he discussed his history of drug use and drug-related criminal history in two subject interviews in August and October of 2009. In the October 2009 interview, he stated that he had no intention of using marijuana in the future. He claims he did not use marijuana while he had an active security clearance. (GE 1, 6)

He abstained from marijuana use until 2013, when he resumed use to help with the nausea, he experienced on deep sea fishing trips. At first, he used Dramamine to address the nausea. While it helped, it upset his stomach. A friend recommended marijuana to help with the issue. He did not consult his physician for another legally available remedy. He would either smoke the drug or consume edibles on each trip which he took at least three times per year. (Tr. 25-27, 102-105,122-123)

In April 2013, Applicant was traveling from his home to State 3 for a fishing trip. He was pulled over for speeding. During the traffic stop, the police officer smelled marijuana in the car. Applicant admitted to the officer that there was marijuana in the center console. He consented to a search of the vehicle, during which the officer found a gun in the driver's side door pocket. Because of his status as a convicted felon, he is unable to possess firearms. Applicant and his passenger were arrested and released on their own recognizance a few hours later. He was charged with two counts of felony firearm possession (which carried a possible 15-year prison sentence), concealing a dangerous weapon, possession of marijuana, and speeding. Applicant explained that he was driving his wife's car and did not realize the gun was in the car. At the hearing, she testified that she placed her loaded gun in the driver's door pocket the day before when she went into a store. She forgot to place the gun back in her purse, leaving it in the car without Applicant's knowledge. He pleaded guilty to possession of a firearm and was sentenced to probation before judgment for one year. He also pleaded guilty to possession of marijuana and received a 90-day suspended sentence. He was fined for speeding. (GE 3, Tr. 105-113)

Applicant continued to use marijuana on his fishing trips. In March 2018, Applicant was working for a municipal transit agency, responsible for providing hundreds of millions of rides to patrons each year. The team on which he was working was involved in an incident on the tracks caused by a lapse in safety protocols. Although neither he nor his team were responsible for the incident, agency protocol dictated that all involved in the incident were required to submit to a urinalysis test. He was aware that the transit service, for which he had been working since June 2012, had a zero-tolerance drug policy. He tested positive for THC and was fired. He was unemployed for more than a year. Applicant, the only source of income for his family, had to cash out his retirement account, which contained \$100,000 to support his family. At the time, he was 52 years old. (GE 1, 6; Tr. 119, 147, 151-156)

In March 2020, Applicant began working for a private transit company. The company had a zero-tolerance drug policy of which Applicant was aware. In August 2020, he contracted Covid-19. When the medication he received did not alleviate his symptoms, he testified that his doctor prescribed a medication that he did not want to take. Instead of seeking another medical option to treat his symptoms, Applicant decided to use an over-the-counter cannabidiol (CBD) product. He cannot recall the product that he used. After doing research on the internet, he believed that the CBD product he chose did not contain enough THC to be detected on a urinalysis test. He was subject to a random urinalysis in October 2020, tested positive for THC, and was fired. He attempted to explain his actions to the employer, to no avail. (Tr. 124-128, 156-157, 159-166)

Since his release from prison in 1996, Applicant has accomplished much. He earned a master's degree from a nationally recognized university in 2000. Shortly after earning his master's degree, he started a business to provide technology equipment and solutions to community groups and organizations. He also cofounded a non-profit organization providing technical and certification training and testing for low-income youth and young adults, ultimately placing them in information technology positions.

Both organizations benefitted his hometown in State 1. In 2022, he started another non-profit organization dedicated to exposing young people to opportunities in science, technology, engineering, math, entrepreneurship, robotics, and other life skills. He is active in his fraternity, a community service organization dedicated to developing a culture for service and service for humanity, and to promote scholarship and service. He has earned numerous awards and accommodations for his community service.

Applicant claims that he has not used marijuana or CBD products since October 2020. Although he still goes on deep sea fishing trips with the same friend, he now uses a nausea relief bracelet to deal with seasickness.

### **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." 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, 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 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible

extrapolation of potential, rather than actual, risk of compromise of classified 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**

The SOR alleges disqualifying conduct under the personal conduct and drug involvement and substance misuse guidelines. The Government has established a *prima facie* case. Although Applicant’s most recent marijuana use occurred while he was employed in private industry, it remains relevant to a determination of his current security worthiness. In a December 2021 memorandum, the Director of National Security provided guidance on the relevance of recreational marijuana use and CBD product use in security clearance adjudications:

... [P]rior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in SEAD 4 to agencies that requires them to use a "whole-person concept." This requires adjudicators to carefully weigh a number of variables in an individual's life to determine whether that individual's behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation.

With respect to the use of CBD products, agencies should be aware that using these cannabis derivatives may be relevant to adjudications in accordance with SEAD 4.... Additionally, agencies should be aware that the Federal Drug Administration does not certify levels of THC in CBD products, so the percentage of THC cannot be guaranteed, thus posing a concern pertaining to the use of a CBD product under federal law. Studies have shown that some CBD products exceed the 0.3 percent THC threshold for hemp, notwithstanding advertising labels (Reference F). Therefore, there is a risk that using these products may nonetheless cause sufficiently high levels of THC to result in a positive marijuana test under agency-administered employment or random drug testing programs.

### **Personal Conduct**

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 information. Of

special interest is any failure to cooperate or provide truthful answers during national security investigative or adjudicative process. (AG ¶ 15)

Between 1988 and 2013, Applicant was arrested five times for drug-related criminal conduct, resulting in multiple felony and misdemeanor convictions – the most serious of which resulted in a 36-month prison sentence. He chose to use marijuana and over-the-counter CBD products in violation of two employer’s zero-tolerance policies, resulting in terminations in March 2018 and October 2020 after failing urinalysis tests. Applicant’s history of drug-related criminal conduct and drug-related adverse employment actions raise serious questions about his judgment and ability to follow laws, rules, and regulations. The following disqualifying conditions apply:

AG ¶ 16(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; and

AG ¶ 16(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

None of the mitigating conditions apply. As a young man, Applicant’s drug use and decision to sell drugs had devastating consequences. While abstaining from marijuana between 1998 and 2012, he was able to achieve personal and professional success. Despite this he decided to resume marijuana use on multiple occasions even after experiencing significant consequences.

Each time Applicant used marijuana, he demonstrated significant deficiencies in judgment that raise questions about his current security worthiness that he failed to explain, refute, or mitigate. Applicant resumed marijuana use at 48 years old so that he could participate in a recreational activity, deep sea fishing, more comfortably. He, a married father of three and the sole means of financial support for his family, decided to rely upon an illegal drug to remedy a minor medical problem, seasickness, instead of seeking readily available and legal medical remedies for the issue. In doing so, he not only chose to engage in illegal behavior, but repeatedly placed the well-being and financial security of his family at risk.

Although Applicant testified about the 2013 arrest in a casual manner, it was a major event. What would have been a minor traffic stop was escalated and the criminal charges were aggravated by the presence of marijuana and a firearm. Under these circumstances, he was facing the potential of 15 years incarceration. Even though he was able resolve the incident with minimal criminal consequence, he did not view the event as an opportunity to reconsider his choices, instead, he chose to continue to use marijuana in disregard of federal law and his employer’s policies.

The March 2018 termination had devastating personal and financial consequences. He not only exposed his household to the loss of its only source of income for what could have been an indeterminate period, he also had to cash out over \$100,000 in retirement savings to replace his family's income, which in one's fifties is not insignificant.

Again, Applicant failed to use the 2018 termination as an opportunity to reevaluate his choices regarding marijuana use. When employed at another company with a zero-tolerance drug policy in 2020, he chose to use an unnamed, over-the-counter CBD product to deal with Covid-19 symptoms instead seeking legitimate medical treatment from his physician. He attempted to use CBD products to subvert his employer's zero tolerance policy relying on his internet research.

When these incidents and Applicant's behavior are reviewed as a whole, it reveals a pattern of flawed judgment. His use of marijuana has caused him to repeatedly act against his own best interest, in violation of federal law and his employer's policies, all to pursue his preferred recreational activity in comfort.

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

The illegal use of controlled substances . . . that cause physical or mental impairment . . . raises 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. (See AG ¶ 24).

The record establishes that Applicant has a history of marijuana use dating from his sophomore year in high school in 1982 to October 2020. He tested positive for THC while working in two railway transportation positions for employers with zero-tolerance drug policies in March 2018 and October 2020, respectively. The following disqualifying conditions apply.

AG ¶ 25(a) any substance misuse; and

AG ¶ 25(b) testing positive for an illegal drug.

None of the mitigating conditions apply. Applicant, now 58, has a has a 36-year history of marijuana use. His last reported use occurred over three years ago, which is not a sufficient period of abstinence given his history of drug use. His statements that he no longer uses marijuana are not credible. During his investigation in 2009, during a long period of abstinence, he told the Government that he would not use marijuana in the future. Not only did he resume marijuana use, he did so repeatedly despite experiencing adverse consequences. Furthermore, he continues to go deep sea fishing with the same person with whom he used marijuana. Under these circumstances, I do not find his testimony that he has resolved his seasickness issues with nausea bands credible.



Based on the record, Applicant is not a suitable candidate for access to classified information. This decision is not changed by a consideration of favorable facts in the record regarding Applicant's decades of community involvement under the whole persona concept in AG ¶ 2(d). He has demonstrated a pattern of behavior in which he routinely and repeatedly acted against his best interests to resolve issues with legal and readily available alternatives. At the hearing, he failed to demonstrate an understanding of the seriousness of his pattern of conduct and how it negatively reflect on his judgment, reliability, ability to follow laws, rules, and regulations. Ultimately, he has demonstrated that he does not possess the good judgment, reliability, or trustworthiness required of individuals given access to classified information.

### **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, Drug Involvement and Substance Misuse:	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2, Personal Conduct	AGAINST APPLICANT
Subparagraphs 2.a – 2.g:	Against Applicant

### **Conclusion**

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

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Nichole L. Noel  
Administrative Judge