



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



In the matter of: )  
)  
) ISCR Case No. 23-01536  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Aubrey M. De Angelis, Esq., Department Counsel  
For Applicant: *Pro se*

03/21/2024

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**Decision**

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HOGAN, Erin C., Administrative Judge:

Applicant did not 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 February 6, 2023. The Defense Counterintelligence & Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR) on August 11, 2023, detailing security concerns under Guideline H. DCSA CAS acted under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

Applicant timely answered the SOR and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On November 27, 2023, Department Counsel submitted the Government’s file of relevant

material (FORM), including documents identified as Items 1 through 6. Applicant received the FORM on December 4, 2023. He was afforded 30 days after receiving the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any information within the prescribed time period. The case was assigned to me on March 14, 2024.

Several names and other facts have been modified to protect Applicant's privacy interests. More detailed facts can be found in the record.

### **Procedural Issue**

In the FORM, Department Counsel moved to amend SOR ¶ 1.c by replacing the language in SOR ¶ 1.c with the following language:

1.c. From about February 2023 to about July 2023, you used marijuana while holding a sensitive position.

The basis for the amendment was to conform with the evidence in accordance with paragraph E3.1.17 of the Directive. The SOR amendment dropped the phrase “. . . while granted access to classified information” and replaced it with “. . . while holding a sensitive position.” Applicant was given the option to admit or deny the amendment in his response to the FORM. He did not submit a response to the FORM. The motion to amend the SOR is granted.

### **Findings of Fact**

In Applicant's SOR response, he admitted all SOR allegations. Applicant's admissions are accepted as findings of fact. (Item 3)

Applicant is 27 years old. He has been employed by a DOD contractor since 2022 and is applying for a security clearance. He was granted an interim security clearance at the secret level on February 27, 2023. His highest level of education is a master's degree. He is single and has no children. (Item 3)

The SOR alleges under Guideline H that Applicant used and purchased marijuana (THC) with varying frequency from approximately August 2021 to approximately July 2023. (SOR ¶ 1.a: Item 4, Section 23, at 38-39); he used marijuana from February 2023 to July 2023, after completing an Electronic Questionnaire for Investigations Processing (e-QIP) on February 6, 2023 in order to obtain a security clearance with DOD. (SOR ¶ 1.b: Item 4: Item 5); that he used marijuana from February 2023 to July 2023, while he held a sensitive position (SOR ¶ 1.c: Item 4; Item 5; Item 6); and that he intends to continue to use marijuana in the future. (SOR ¶ 1.d: Item 4: Item 5);

Applicant listed his marijuana use on his February 2023 SCA in response to Section 23 - Illegal Use of Drugs or Drug Activity. He indicated he uses “Legal medical marijuana only.” (Item 4 at 39)

During his background investigation interview, on March 23, 2023, Applicant mentioned he first smoked marijuana in August 2021 and last smoked it on March 22, 2023, the day before his background investigation interview. He smokes marijuana daily by inhaling one time from a water pipe before he goes to bed. Marijuana helps him sleep and reduces his anxiety. He purchases marijuana monthly. He buys less than an ounce for about \$200. He has never sold or grown marijuana. On occasion, he smokes marijuana with a friend. He obtained a medical marijuana card where he currently resides in February 2023. He previously bought marijuana legally in the state where he attended college. He was unaware that using marijuana as a government contractor was forbidden. He was asked whether he was going to continue using marijuana. He said he was not prepared to make a decision. (Item 5 at 4)

In response to DOHA Interrogatories, dated July 27, 2023, Applicant indicated he was willing to cease or reduce his marijuana usage in accordance with guidelines or requirements. His last purchase of marijuana was on July 16, 2023. (Item 5 at 12) He indicates that he prioritizes his career, federal guidelines, and national security over his continued marijuana usage. (Item 5 at 14)

In his response to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a and 1.b. He denies the allegation in SOR ¶ 1.c because he denies ever having access to classified information. He provided the contact information of his Facility Security Officer and Project Manager who can verify that he never handled classified information. He also mentioned he would have never used marijuana while doing any work-related activities. He denied the allegation in SOR ¶ 1.d because his intentions are to cease marijuana usage. He does not intend to use marijuana in the future. (Item 3)

### **Policies**

It is well established that no one has a right to a security clearance. As the Supreme Court held, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

The adjudicative 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 access to classified information 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. 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 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.

## **Analysis**

### **Guideline H: Drug Involvement and Substance Misuse**

AG ¶ 24 expresses the security concern for drug involvement:

The illegal use of controlled substances . . . 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.

I have considered the disqualifying conditions for drug involvement and substance misuse under AG ¶ 25 and the following are potentially applicable:

AG ¶ 25(a) any substance misuse;

AG ¶ 25(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The record evidence shows Applicant has a history of habitual marijuana use from 2021 to at least July 2023. He used marijuana every night before he went to sleep and admitted purchasing marijuana on a monthly basis from his state medical marijuana dispensary. During his background investigation interview, he expressed reservations about stopping his marijuana use. He later mentioned in his interrogatories that he is willing to cease or reduce his marijuana usage. The record is unclear as to whether he

actually stopped using marijuana. He failed to demonstrate that he clearly and convincingly stopped using marijuana. AG ¶¶ 25(a), 25(c), and 25(g) apply.

While Applicant's use of marijuana is legal in the state where he resides, it remains illegal under Federal law. On October 25, 2014, the Director of National Intelligence (DNI) issued an October 25, 2014, memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

The Government's substantial evidence and Applicant's admissions raise security concerns under Guideline H. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 22, 2005))

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement and substance misuse. The following mitigating conditions under AG ¶ 26 potentially apply:

AG ¶ 26(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

AG ¶ 26(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence on 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.

Neither mitigating condition applies. Applicant has used marijuana on a daily basis from 2021 to at least July 2023, only eight months ago. He never provided a signed statement of intent indicating he would abstain from all drug involvement and substance abuse, acknowledging that any future involvement or misuse is grounds for revocation of national security.

Questions about Applicant's judgment remain. He continued to use marijuana on a daily basis after submitting a security clearance application in February 2023. He

continued to use marijuana on a nightly basis from February 2023 to his background investigation interview in March 2023. He continued to use marijuana from March 2023 to July 27, 2023, when he answered interrogatories. He mentioned in his answers to interrogatories that he last purchased marijuana on July 16, 2023. He mentioned that he was willing to cease or reduce his marijuana use. While his use of marijuana was legal in the state where he resides, he should have realized that there may be issues with his use of marijuana throughout the security clearance process as well as his employment as a DOD contractor. He could have asked questions. He did not ask any questions. While he mentioned in his Response to the SOR that he intended to cease marijuana use, it is unclear that he stopped using at the time he answered the SOR. Even if he stopped using marijuana, not enough time has passed to persuasively demonstrate he has the fortitude to stop using marijuana over the long term. He did not mitigate the concerns under Drug Involvement and Substance Misuse.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position 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 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 AG ¶ 2(d) factors in this whole-person analysis.

I considered that Applicant has been an employee with a DOD contractor since 2022. I considered he provided full disclosure about his marijuana use for medical purposes on his security clearance application. While his marijuana use was legal under state law, it remains illegal under federal law and raises security concerns. Applicant's failure to realize his marijuana use was an issue during the security clearance process raises questions about his judgment. He did not realize the gravity of the issue until it was too late. Concerns under Drug Involvement and Substance Misuse are not mitigated.

## **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.d:	Against Applicant

## **Conclusion**

In light of all of the circumstances presented, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

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Erin C. Hogan  
Administrative Judge