



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



In the matter of:	)	
	)	
	)	ISCR Case No. 23-02360
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Tovah Minister, Esq., Department Counsel  
For Applicant: *Pro se*

04/17/2024

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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. The Guideline E, personal conduct security concerns were not established. Eligibility for access to classified information is denied.

**Statement of the Case**

On November 15, 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 and Guideline E, personal conduct. 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 November 28, 2023, and elected to have his 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 January 18,

2024. He 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 responded to the FORM and made corrections to the FORM's narrative, but did not make any other corrections, and did not object to any of the Items. His response is marked as Applicant Exhibit (AE) A. Items 2 through 4 are admitted into evidence. The case was assigned to me on March 27, 2024.

### **Findings of Fact**

Applicant admitted the SOR allegation in ¶ 1.a. He admitted the SOR allegation in ¶ 2.a but then provided an explanation that basically denied it. I have treated it as a denial. His 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 37 years old. He received a bachelor's degree in 2008. He married in 2017. He has no children. He has worked for his employer, a federal contractor, since 2010.

In March 2023, Applicant completed a security clearance application (SCA). Section 23 – Illegal use of Drugs or Drug Activity requested information that stated:

We note, with reference to this section, that neither your truthful responses nor information derived from your response to this section will be used as evidence against you in a subsequent criminal proceeding. As to this particular section, this applies whether or not you are currently employed by the Federal government. The following questions pertain to the illegal use of drugs or controlled substances or drug or controlled substance activity in accordance with Federal law, even though permissible under state laws. (Item 3)

The section asked if in the past seven years he had illegally used any drugs or illegally purchased any drugs. He responded "no" to both questions. (Item 3)

SOR ¶ 2.b alleged Applicant deliberately failed to disclose his illegal drug use by answering "no" to the questions in Section 23 of his SCA. He admitted the allegation and stated:

My initial response didn't take into account the fact that marijuana is still illegal federally, despite being legal locally. Upon realizing this during my interview, I immediately disclosed my marijuana use to the interviewer. (Item 2)

Applicant completed government interrogatories in October 2023. Included with the interrogatories was his personal summary of interview with a government investigator

from May 2023. Applicant affirmed that the statement he made was accurate and he did not make any corrections or additions.

During Applicant's background interview with a government investigator in May 2023, he disclosed that he had used and purchased marijuana in the past seven years. He first started using it in 2018. He said that is the year it became legal to use marijuana in his state. He purchased it from a state dispensary. He did not use it again until 2021 when he moved to his current residence and learned his neighbors used marijuana occasionally. His wife was interested in using marijuana. They purchased different varieties and options. Since then, Applicant has been a regular user of marijuana. He used it about once or twice a week from mid-2021 on weeknights and weekends, in the evening at home. He uses it with his spouse. He purchases it in pre-rolled cigarette form and smokes it or ingests it as a marijuana infused seltzer. He purchases it once or twice a month from the state dispensary and pays about \$100 to \$200 a month. His most recent use was the day before his interview with the government investigator. He told the investigator that he intended to continue to purchase marijuana and use it in the evenings and on weekends. He said it has never impacted his work. He has no history of drug counseling or treatment. He said he did not disclose his marijuana use on his SCA because he did not consider it illegal because of the laws in his state. (Item 4)

In the government interrogatories, Applicant was asked if he had used marijuana since his May 2023 interview with a government investigator. He responded "yes." He was asked to list the dates and frequency. He stated "roughly 4-7 days per week since interview. Excluding the later half of June 2023, when traveling for vacation. Outside of workhours, after work." His last use was in October 2023. He was asked if he ever used marijuana, any product containing THC or any other illegal drug while employed as a federal contractor and he responded "yes." He stated he used marijuana while employed by his present employer. The number of times and frequency is the same as he noted above. (Item 4)

Applicant was asked about his understanding of the legality of the use of marijuana or products containing THC. He responded:

Many states have legalized use of marijuana for recreational and/or medical purposes, however, federal laws have not yet followed suit, and marijuana is still illegal at the federal level. (Item 4)

Applicant was further asked if his federal employer has a policy concerning use of illegal drugs. He responded "yes." He reported the policy as follows: "The use of illegal drugs is not tolerated, and possession/use on [employer] property or during work hours is forbidden." Applicant reported he continues to use marijuana with his spouse. The interrogatories gave him an opportunity to provide a letter of intent to discontinue his use in the future. He did not complete a declaration. (Item 4)

In Applicant's answer to the SOR, he admitted he used and purchased marijuana with varying frequency from 2018 to the present. He stated he believes the responsible

use of legal marijuana outside of the scope of his work, off the premises of employment and outside work hours does not compromise his integrity in preserving national security.

## **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; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant uses, possesses, and purchases marijuana in a state where it does not violate state law. However, it is illegal under Federal law. He has expressed his intent to continue to use and purchase it. 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.

On October 25, 2014, the Director of National Intelligence (the Security Executive Agent (SecEA)) issued DNI Memorandum ES 2014-00674, "*Adherence to Federal Laws Prohibiting Marijuana Use*," which 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.

On December 21, 2021, the SecEA promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications. It states in pertinent part:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] 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. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.

Applicant plans to continue to use marijuana, despite being aware it is a violation of federal law. He used it after completing his SCA, and after his interview with a government investigator. He was given an opportunity to provide a declaration that he would not use marijuana in the future and did not. After he received the FORM, he had a

final opportunity to state that he no longer intends to use marijuana, but he did not. Applicant continues to use and purchase marijuana in violation of federal law. None of the above mitigating conditions apply.

### **Guideline E, Personal Conduct**

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

The SOR alleged that Applicant deliberately failed to disclose his drug use. Applicant stated that he did not take into account that his drug use was illegal under federal law and did not disclose it. During his background interview he volunteered the details of his drug use. I find this is a credible explanation for his failure to disclose this information, and that he did not deliberately omit this information from his SCA. AG ¶ 16(a) has not been established. SOR ¶ 2.a is concluded for Applicant.

### **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 Guidelines H and E, in my whole-person analysis.

Applicant failed to meet his burden of persuasion. After weighing the disqualifying and mitigating conditions under Guidelines H and E and evaluating all the evidence in the context of the whole person, I conclude Applicant failed to mitigate the security concerns under drug involvement and substance misuse. The Guideline E, personal conduct allegation is not established, and found in Applicant's favor.

### **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
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For 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