



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



In the matter of: )  
)  
) ISCR Case No. 22-02421  
)  
Applicant for Security Clearance )

**Appearances**

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

05/01/2024

**Decision**

RICCIARDELLO, Carol G., Administrative Judge:

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

**Statement of the Case**

On May 25, 2023, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. 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 July 10, 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 December 13, 2023. 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 6 (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 6 are admitted in evidence. The case was assigned to me on March 27, 2024.

### **Findings of Fact**

Applicant admitted the allegations in SOR ¶¶ 1.b through 1.d and 2.a. He admitted the SOR allegations in ¶¶ 2.b and 2.c with explanations essentially denying the allegations, and he denied ¶ 1.a. 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 42 years old. He married in 2007 and has two minor children and an adult stepchild. He earned an associate's degree in 2015. He has worked for his employer, a federal contractor, since August 2021. (Item 3)

Applicant enlisted in the military in 2004. In 2016, he went to a Uniform Code of Military Justice (UCMJ) Article 15 nonjudicial punishment hearing after he tested positive for marijuana on a random urinalysis. His wife provided a letter that stated she is a marijuana user in a state where it is legal. She purchased a liquid version of marijuana and while visiting with friends, she put it into her drink. She did not tell her husband that the marijuana was in her drink. She fell asleep, and he unknowingly consumed the remainder of her drink. His use resulted in a positive urinalysis. His command believed Applicant was unaware of his consumption and found him not guilty at the Article 15 hearing. (Items 2, 3, 4, 6)

Applicant disclosed on his July 2022 security clearance application (SCA) that his first background investigation for a security clearance occurred in 2007, and he was granted a secret clearance. He was on active duty in the military at the time. In 2016, he had another background investigation for eligibility for a security clearance, in which he was again granted a secret clearance. (Item 3)

Applicant completed government interrogatories in March 2023. As part of them, he affirmed that his statements made to government investigators were correct, and he had no additions or corrections. (Item 4)

As part of his security clearance investigation, Applicant was interviewed by a government investigator in November 2018. He explained to the investigator the circumstances surrounding his 2016 UMCJ Article 15 hearing after testing positive for marijuana on a urinalysis. He said his wife provided a letter to the commander explaining the circumstances, and he was subsequently acquitted of the charge. (Item 4)

Applicant told the investigator that his wife uses marijuana, and it is legal in the state where they live. He said he had no intention of using marijuana in the future, and he

and his wife had taken extra precautions to prevent a similar situation from happening. He said he had no additional instances of use of an illegal drug or controlled substance, including while holding a security clearance. (Item 4)

In September 2019 Applicant failed another random urinalysis when he tested positive for marijuana. He admitted he had been using marijuana twice a week for three or four months in 2019. Applicant held a security clearance at this time. He went to a UCMJ Article 15 disciplinary hearing. He was found guilty at the hearing and received 45 days extra duty. He attended a drug education class. It was recommended that he be discharged from the military for misconduct due to drug use. He went before an administrative discharge board, and it was recommended that he be retained and medically retired. He was subsequently medically retired and received an Honorable Discharge. (Items 2, 3, 4, 5)

On his July 2022 SCA, Applicant disclosed his 2019 UCMJ Article 15 noting the offense charged was "consumption of a control substance, THC." He wrote "FOUND NOT GUILTY; EXTRA DUTY." Documentary evidence and his previous statements made to the government investigator clearly prove he was found guilty at his 2019 Article 15 hearing for wrongful use of marijuana and then was administratively processed for separation from the military. (Items 3, 5)

The SOR does not allege these falsifications, and I will not consider them for disqualifying purposes, but may consider them in the application of mitigating conditions and in my whole-person analysis.

Section 23 of the SCA-Illegal Use of Drugs or Drug Activity states:

We note, with reference to this section, that neither your truthful responses nor information derived from your responses 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 laws, even though permissible under state laws.

This section then asks:

In the last seven (7) years, have you illegally used any drugs or controlled substances: Use of a drug or controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any drug or controlled substance.

In the last seven (7) years, have you been involved in the illegal purchase, manufacture, cultivation, trafficking, production, transfer, shipping, receiving, handling or sale of any drug or controlled substance?

Have you EVER illegally used or otherwise been illegally involved with a drug or controlled substance while possessing a security clearance other than previously listed. (Item 3)

Applicant responded "NO" to each question. During his September 2022 background interview, he told the government investigator that he used marijuana twice a week for three to four months in 2019 for pain management when lifting weights and because pain medications did not work. He purchased it from a dispensary. He told the investigator that his wife continues to use marijuana in their state where it is legal. He said her use does not impact his employment. His oldest daughter, after she was 18 years old, has used marijuana after surgery. He had no thoughts regarding the fact that possession of marijuana is against federal law. He said if it became legal under federal law, he would use it if his employer permitted it. (Items 3, 4)

In response to Applicant's March 2023 interrogatories, he stated he had not used marijuana since September 2019. He could not recall when he last purchased marijuana. He stated he did not intend to use it in the future. He stated the reason was because, "It is prohibited in my line of work." (Item 4)

In Applicant's SOR answer he admitted that in 2019 he used marijuana for three to four months twice a week while in the military. He admitted he purchased it and used it despite the potential ramifications and fact that he had gone to an Article 15 hearing in 2016 when he consumed his wife's drink laced with marijuana. He admitted he held a security clearance in 2019 and held a sensitive position while attached to an elite unit in the military. (Item 2)

The SOR alleges that Applicant deliberately failed to disclose on his July 2022 SCA his drug use in the last seven years and his drug use while holding a security clearance. In his answer to the SOR, Applicant admits the allegations, but then states he did not intend to falsify material facts and not tell the truth. He stated the following:

I misunderstood the line of questioning. I was under the impression that since those incidents had already been adjudicated and also handled on the military side, and no other incidents had occurred since then, that the answer was "no". In addition, those incidents were thoroughly discussed with the investigator during my interview, which demonstrates that I was clearly not trying to withhold information.

I spoke with the investigator during the in person interview, where she asked me a series of questions regarding past THC use and I answered all her questions candidly; just as I did back in 2018 for my SECRET clearance interview, referencing the accidental consumption in 2016. (Item 2)

He further stated in his SOR answer, "As a former service member, I would not try to coverup that factual occurrence, knowing it would be the first thing noticed within my [military] background." He said he has learned his lesson and has sought alternative pain

management from his physician. He stated that in the 19 years he has held a security clearance he never had a security violation, and his past performance has never been in question. He has always taken operational security very seriously. (Item 2)

## **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;
- (b) testing positive for an illegal drug;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant held a security clearance and a sensitive position while part of an elite military unit when he knowingly used marijuana twice a week for three to four months in 2019. He purchased marijuana at a dispensary. He tested positive for marijuana during a random urinalysis test. 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.

In 2019, Applicant knowingly used marijuana for three to four months while holding a security clearance and a sensitive position as part of an elite military unit. He previously had been put on notice of the seriousness of illegal drug use during a 2016 UCMJ Article 15 hearing where he was found not guilty for marijuana use due to an unknowing ingestion from his wife's drink. In his November 2018 background interview, he said he had no intention of using marijuana in the future, and he and his wife had taken extra precautions to prevent a similar situation from happening. He said he had no additional instances of use of an illegal drug or controlled substance, including while holding a security clearance. Months later he began using marijuana. It is somewhat baffling that he was obviously aware of the military's random urinalysis testing policy and the strict anti-drug policy, which he flaunted with his regular marijuana use. In his March 2023 response to interrogatories, he again stated he did not intend to use marijuana in the future.

I do not find his statements credible about his intent to refrain from future illegal drug use. I also do not find his statement credible that he takes operational security seriously when he was using marijuana regularly over three to four months while holding a security clearance and in a sensitive position. He had an opportunity to provide a response to the FORM to update whether he continued to abstain from marijuana use. He did not provide information about his current use or about whether his wife continues to use marijuana in their home. Because Applicant requested a determination on the record without a hearing, I had no opportunity to question him 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). I am unable to conclude Applicant's drug use was so long ago or happened under circumstances that are unlikely to recur. His knowing, frequent, and deliberate use while on active duty raises serious concerns about his reliability, judgment, and trustworthiness. None of the above mitigating conditions apply.

### **Guideline E: Personal Conduct**

AG ¶ 15 expresses the security concern for 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 provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I find the following 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, aware benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing . . .

Applicant purchased and used marijuana in 2019, which resulted in a UCMJ Article 15 disciplinary hearing where he was found guilty. On his July 2022 SCA he did not disclose his frequent drug use from 2019 when he responded "no" to questions about his use in the last seven years. He also responded "no" to the SCA question that asked if he had ever used illegal drugs while holding a security clearance. Applicant explained in his answer to the SOR that he misunderstood the questions and believed that because his drug use had been adjudicated by the military and no additional drug use had occurred since then, his "no" response was accurate. I do not find these explanations credible. Applicant indicated he held a security clearance for 19 years and had completed other SCAs. He said as a former uniformed person he would not try to cover up that factual occurrence, knowing it would be the first thing noticed within his military background. However, he failed to disclose his drug use and Article 15 under the military history section, which would have put the government on notice about his past drug use.

Applicant told the investigator in 2018 that he did not intend to use illegal drugs and then months later proceeded to use marijuana for three to four months while holding a security clearance and a sensitive position. The SCA question specifically asked if he used illegal drugs while holding a security clearance. He responded "no." Considering Applicant's background and experience, I find he deliberately failed to disclose his past drug use and while holding a security clearance or sensitive position. The above disqualifying condition applies.

The following mitigating conditions under AG ¶ 17 are potentially applicable to the disqualifying security concerns based on the facts:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy,

unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate the vulnerability to exploitation, manipulation, or duress; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant used and purchased marijuana in 2019, despite his experience of testing positive for it in 2016, which resulted in a UCMJ Article 15 hearing where he was found not guilty.

Applicant did not make a prompt, good-faith effort to correct his falsification before he was interviewed by a government investigator. I did not find his explanations credible for his failure to disclose his past illegal drug use and while holding a security clearance. He did not disclose it under the military history section of the SCA. With his military experience, background, and holding a security clearance for many years, I do not believe his failure to disclose his drug misconduct was because he did not understand the questions.

Failure to be honest on an SCA is not a minor offense and strikes at the very heart of the security clearance process. His conduct and falsifications did not happen under unique circumstances. He obviously continues to associate with his wife who presumably still uses marijuana. He did not provide evidence of steps he has taken to eliminate his vulnerability to exploitation, manipulation, or duress. None of the above mitigating conditions apply.

### **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 Guideline H, drug involvement and substance misuse and Guideline E, personal conduct.

### **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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a-2.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