



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



In the matter of: )  
)  
) ISCR Case No. 23-00557  
)  
Applicant for Security Clearance )

**Appearances**

For Government: William H. Miller, Esquire, Department Counsel  
For Applicant: *Pro se*

01/08/2024

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**Decision**

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GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding drug involvement and substance misuse. He successfully mitigated the security concerns regarding personal conduct. Eligibility for a security clearance is denied.

**Statement of the Case**

On July 13, 2022, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On November 28, 2022, an investigator from the U.S. Office of Personnel Management (OPM) interviewed him. On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to those interrogatories on March 29, 2023. On April 6, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) issued a Statement of Reasons (SOR) to him under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016) (AG), effective June 8, 2017.

The SOR alleged security concerns under Guideline H (Drug Involvement and Substance Misuse) and detailed reasons why the DCSA adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On April 26/27, 2023, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was mailed to him by the Defense Office of Hearings and Appeals (DOHA) on June 13, 2023, and he was afforded an opportunity, within a period of 30 days, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, he was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on June 21, 2023. His response was due on July 21, 2023. Applicant chose not to respond to the FORM, for as of August 7, 2023, no response had been received. The case was assigned to me on October 17, 2023, and there was still no response to the FORM.

### **Findings of Fact**

In his Answer to the SOR, Applicant partially admitted and partially denied, with substantial comments, the factual allegations pertaining to drug involvement and substance misuse (SOR ¶¶ 1.a. and 1.b.). He essentially denied the personal conduct allegation (SOR ¶ 2.a.), also with substantial comments. Applicant's admissions and acknowledgments are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

### **Background**

Applicant is a 48-year-old employee of a defense contractor. He has been serving as an application engineer with a university applied physics lab since July 2022. He previously worked for other employers as a data integration consultant (March 2022 – July 2022); chief technology officer (January 2018 – March 2022); and senior engineering IT analyst (April 2009 – January 2018). He received an associate degree in mechanical engineering technology in 1995 and a bachelor's degree in plastics engineering technology in 1998. He has never served with the U.S. military. It is unclear if he was ever granted a security clearance. He was married in 2004. He has two children, born in 2006 and 2010.

### **Drug Involvement and Substance Misuse, and Personal Conduct**

Applicant was an illegal substance user whose substance of choice was marijuana – also known as tetrahydrocannabinol (THC) – a Schedule I Controlled Substance. (<https://www.deadiversion.usdoj.gov/schedules/>; 21 U.S.C. § 812 (c)) He denied "misusing" the substance. (Item 2 at 2) The exact commencement period of such use as well as the purchase history are unclear for Applicant has given several different versions.

Consistent facts are that he had an injury that he was trying to self-treat, and that he obtained marijuana in a variety of ways to do so. In January 2015 while serving as a youth assistant wrestling coach, and engaging in a friendly match with another coach, Applicant suffered a herniated vertebra, causing excruciating pain for a period of 12 to 16 months. He eventually underwent minimally invasive surgery and became heavily dependent on opiates which masked the pain but also introduced undesirable side effects.

According to one version of the scenario, shortly prior to his surgery, Applicant travelled to another state where he purchased some medical marijuana to find an alternative to the opiates. He claimed to be under the impression that the purchases were legal because they were done over the counter without the need for a state marijuana card which is required in his home state. He also illegally purchased marijuana through other students at school, but either failed or refused to identify the students' names. On occasion, he would purchase over the counter cannabidiol (CBD) products, some of which contained concentrations of THC. While his surgery greatly reduced the pain, it also left him with a constant numbness on the left side of his body. In April 2020, several years after his surgery, the pain started to increase, and he entered the state medical marijuana program. He remained in the program and continued using marijuana until November 2022, when he decided to search for a new career. (Item 2, at 2; Item 3 at 34-35; Item 4 at 5)

Although Applicant claims to have “a bit of disdain for drugs and alcohol” – based on a family and friend history of substance abuse and substance-related suicides, he recognizes that it is unfortunate that the one drug he wishes to use for his medical issues is illegal under federal law. (Item 2 at 3) Applicant began using the marijuana – in the form of edibles obtained from local dispensaries - to help him manage his back pain and enable him to relax and fall asleep. He generally used it while alone at night. (Item 4 at 5) When he was interviewed by an investigator with the U.S. Office of Personnel Management (OPM) on November 28, 2022, Applicant stated that he intended “to keep using the drug as it is helpful to relieve his back pain and help with his insomnia.” (Item 4 at 5) In his SF 86 and in his Answer to the SOR, Applicant admitted that he desired to use medical marijuana in the future for all the reasons he previously explained. Nevertheless, while he would prefer to use it for its intended purposes, his career and livelihood are more important to him than the pain and numbness, and he intended to seek other treatments such as CBD. (Item 2 at 2; Item 3 at 34)

As of the closing of the record, Applicant had not submitted 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; and had not submitted verifiable proof that he had disassociated himself from drug-providing associates. In addition, he failed to submit verifiable evidence that he is no longer participating in the state medical marijuana program, an association that he claimed he terminated in November 2022.

There is no evidence to indicate that Applicant ever reported his marijuana use to his employer's security manager or to anyone else where he worked.

Regarding Applicant's alleged deliberate falsification of facts associated with the commencement date of his first use of marijuana, in his SF 86, he reported his first such involvement occurred through the state medical marijuana program in April 2020 "estimated." (Item 3 at 34-35) The Government has argued that his use of marijuana commenced in January 2015, not five years later as he reported. Applicant denied deliberately failing to disclose that his use of marijuana began in January 2015, claiming that the year was one of the most difficult years of his life and much of it was a blur. He explained that he had a lapse of memory when completing his SF 86 since he did not regularly use marijuana between 2015 and 2020. He remembered the more accurate date shortly before his OPM interview during which he revealed the 2015 date. (Item 2 at 3)

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)) As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." (Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.)

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. The entire process is a conscientious scrutiny of several 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence." "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)). "Substantial evidence" is "more than a scintilla but less than a preponderance." (See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994).)

The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation, or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).)

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials." (*Egan*, 484 U.S. at 531)

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." (See Exec. Or. 10865 § 7) Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

## **Analysis**

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

The security concern relating to the guideline for Drug Involvement and Substance Abuse 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. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

Furthermore, on October 25, 2014, the Director of National Intelligence (DNI) issued 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 (Reference H and I). 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.

In addition, on December 21, 2021, the DNI issued Memorandum ES 2021-01529, *Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, which states in part:

. . . disregard of federal law pertaining to marijuana remains relevant, but not determinative, to adjudications of eligibility for access to classified information or eligibility to hold a sensitive position....

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.

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. Although the passage of the Agricultural Improvement Act of 2018 excluded hemp from the definition of marijuana within the Controlled Substances Act, products containing greater than a 0.3 percent concentration of ... THC, a psychoactive ingredient in marijuana, do not meet the definition of "hemp." Accordingly, products labeled as hemp-derived that contain greater than 0.3 percent THC continue to meet the legal definition of marijuana, and therefore remain illegal to use under federal law and policy. 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 threshold for hemp, notwithstanding advertising labels.... 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.

The guideline notes several conditions under AG ¶ 25 that could raise security concerns in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including . . . purchase;
- (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.

Commencing in about January 2015, or perhaps sometime after that date, Applicant legally and illegally purchased, as well as used, marijuana – a Schedule I Controlled Substance – to help him manage his back pain and enable him to relax and fall asleep, until at least November 2022. During the same period, he obtained and used CBD, the concentration of THC which has not been established. Nevertheless, both products were used for the same purposes. He purportedly stopped purchasing and using the marijuana and the CBD in November 2022, several months after he submitted his SF 86 July 2022 in preparation for being hired by his current employer. That continued use of marijuana after July 2022 raises questions about his judgment, reliability, and willingness to comply with laws, rules, and regulations. See ISCR Case No. 16-03460 at 3 (App. Bd. May 24, 2018)

Applicant's variety of comments regarding future use of marijuana create some confusion regarding his true intentions. He initially intended "to keep using the drug as it is helpful to relieve ... back pain and help with his insomnia." He eventually stated that while he would prefer to use it for its intended purposes, his career and livelihood are purportedly more important to him than the pain and numbness, and he intended to seek other treatments such as CBD. But he continued to use marijuana for several months after submitting his SF 86. These comment variations and continued use reflect an equivocation or failure to clearly and convincingly commit to discontinue such misuse. AG ¶¶ 25(a), 25(c), and 25(g) have been established. While it appears that the positions Applicant has held in the past might be sensitive positions, there is no evidence other than speculative evidence that they were sensitive positions, and thus AG ¶ 25(f) has not been established

The guideline also includes examples of conditions under AG ¶ 26 that could mitigate security concerns arising from Drug Involvement and Substance Misuse:

(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 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.

As noted above, as of the closing of the record, Applicant had merely submitted a watered-down indication or equivocation that he would live with his pain while hoping to continue using marijuana but seeking CBD substitutes. He had not submitted 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; and had not submitted verifiable proof that he had disassociated himself from drug-providing associates. In addition, he failed to submit verifiable evidence that he is no longer participating in the state medical marijuana program, an association that he claimed he terminated in November 2022 – several months after he obtained his current position. AG ¶ 26(b) minimally applies, but the other mitigating condition does not apply.

A person should not be held forever accountable for misconduct from the past. Continued abstinence is to be encouraged, but, when balanced against his full history of marijuana use, the relatively brief period of purported abstinence is considered insufficient to conclude that the abstinence will continue, especially after so much confusion regarding his future intentions. Applicant's use of marijuana for such a lengthy period, continues to cast doubt on his current reliability, trustworthiness, and good judgment.

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

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:



(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline also includes a condition that could raise security concerns under AG ¶ 16:

(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.

My discussions related to Applicant's drug involvement and substance misuse are adopted herein. As noted above, the exact commencement period of Applicant's use of marijuana and CBD, as well as his purchase history, are unclear for Applicant has given several different versions. He was quite clear in his July 2022 SF 86 when he reported what he considered to be an "estimated" commencement date of April 2020. When he was questioned by the OPM investigator several months later in November 2022, he candidly acknowledged that he had listed the date incorrectly. In his Answer to the SOR he denied deliberately failing to disclose the actual date claiming he had a lapse of memory when filling out the form. As he noted, when the actual dates were recalled, he informed the investigator rather than concealing the truth.

Department Counsel argues that Applicant's new explanation regarding the commencement date is undercut by his earlier inconsistent explanations. Those earlier reported "facts" clearly were confusing. However, except for the dates, Applicant did report his use of marijuana and he did not conceal it throughout the entire process.

Normally an applicant's comments provide sufficient evidence to examine if his or her answers were deliberate falsifications as alleged in the SOR or merely inaccurate answers that were the result of oversight or misunderstanding of the true facts on his or her part. Proof of incorrect answers, standing alone, does not establish or prove an applicant's intent or state of mind when the falsification or omission occurred. As an administrative judge, I must consider the record evidence to determine whether there is direct or circumstantial evidence concerning Applicant's intent or state of mind at the time the alleged falsifications or omissions occurred. The muddled facts described throughout the entire investigation as well as his estimated start date lead me to conclude that there is no direct or circumstantial evidence that Applicant deliberately falsified the commencement date of his marijuana use. Accordingly, AG ¶ 16(a) has not been established.

## 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 SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case considering the totality of the record evidence and have not merely performed a piecemeal analysis. (See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006))

There is some evidence mitigating Applicant's conduct. Applicant is a 48-year-old employee of a defense contractor. He has been serving as an application engineer with a university applied physics lab since July 2022. He previously worked for other employers as a data integration consultant; chief technology officer; and senior engineering IT analyst. He received an associate degree in mechanical engineering technology in 1995 and a bachelor's degree in plastics engineering technology in 1998. Applicant was partially candid in his SF 86 and spoke freely with the OPM investigator regarding his marijuana use. He was also candid about his desire to continue using marijuana in the future to address his pain.

The disqualifying evidence under the whole-person concept is more substantial. Applicant legally and illegally purchased, as well as used, marijuana – a Schedule I Controlled Substance – either in January 2015 or sometime thereafter to help him manage his back pain and enable him to relax and fall asleep. During the same period, he obtained and used CBD, the concentration of THC which had not been established. Nevertheless, both products were used for the same purposes. Although he submitted his SF 86 in July 2022, he continued using marijuana until at least November 2022. There is still a degree of equivocation surrounding his future intent regarding using marijuana.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his drug involvement and substance abuse. See SEAD 4, App. A, ¶¶ 2(d) (1) through AG 2(d) (9).

## **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. and 1.b.:	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 interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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ROBERT ROBINSON GALES  
Administrative Judge