



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



In the matter of:	)	
	)	
	)	ISCR Case No. 23-02934
	)	
Applicant for Security Clearance	)	

**Appearances**

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

08/28/2024

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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 security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On February 26, 2024, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse. 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 April 5, 2024, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government’s file of relevant material (FORM), and Applicant received it on May 9, 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 3 through 8 (Item 1 is the SOR; Item 2 is comprised of administrative documents). Applicant did not provide a response to the FORM or object to the Government's documents. The case was assigned to me on August 13, 2024. Items 3 through 8 are admitted in evidence.

### **Findings of Fact**

Applicant admitted the SOR allegations with explanations. His admission is 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 40 years old. He attended college and did not earn a degree. He has worked for a federal contractor since November 2019. (Items 4, 5)

In September 2019, Applicant received a job offer from Company X, a nongovernment employer, and he was required to take a pre-employment drug screen, which he did in October 2019. He tested positive for marijuana, and Company X rescinded the job offer. SOR ¶ 1.d alleges a positive drug test for marijuana. Applicant explained in his SOR answer that he was not aware he would be drug tested, and he assumed that because the job was in a state where marijuana is legal that he would not be drug tested for marijuana. He stated he was mistaken, and he respected that Company X had a policy against drug use. A copy of the positive drug report was provided. (Items 3, 6)

In March 2020, Applicant completed a security clearance application (SCA). Section 23 - Illegal Use of Drugs or Drug Activity inquired about his past use of illegal drugs. Applicant did not report any illegal drug use in the past seven years. The section states:

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 law. (Item 4)

Applicant was granted a security clearance in October 2020. In November 2020, Applicant completed another SCA apparently to upgrade his clearance level and again he did not report any illegal drug use under Section 23. (Item 5)

Applicant completed government interrogatories in February 2024. He affirmed the accuracy of his personal subject interview with a government investigator from March 2021 and did not make any corrections or changes. He told the government investigator during the interview that he had been using marijuana since 2006 and using it daily since 2013. He said his last use was in March 2021. He said he used it medicinally to help him sleep. He admitted he used marijuana while holding a security clearance. He told the government investigator that he did not believe his use of marijuana was an issue

because it is legal to purchase and use in the state where he lives. He told the investigator that he continued to use marijuana and if his use was an issue, he is willing to cease. He said he was not aware that he was required to report his marijuana use while holding a security clearance. He said during his interview that he had used marijuana daily since being granted a security clearance in September 2020. (Item 6)

In his government interrogatories, Applicant reported that he had used marijuana about twice a week from September 21, 2020, to January 28, 2024, while he held a position in which access to classified information had been granted. He stated in response to interrogatories that he did not intend to continue to use marijuana in the future. He said he no longer associates with illegal drug users or frequent places where illegal drugs are present.<sup>1</sup> (Item 6)

In Applicant's SOR answer he said he took full responsibility for not disclosing his marijuana use and purchases. He said he did not understand the questions in the SCA and once he realized his mistake, he admitted to the government investigator his past marijuana uses when questioned. He further stated that at one point he had a medical marijuana card to purchase it but after 2016 he no longer renewed the card because it was no longer required to purchase it. He said he used it for migraines and to help him sleep. He said he never used it during work hours. He takes full responsibility for his "gross misunderstanding" when he completed his initial SCA. He said in his SOR answer that he was asked by the government investigator if he was willing to cease using marijuana and he stated "At that time I stated, if my clearance requires me to do so, I would." He further stated, "The interrogatories asked if [I] would cease usage knowing that even though it is legal in my state, it [is] still federally illegal. I answered yes and I have ceased all usage since that date." (Item 6)

Applicant admitted he purchased marijuana in his state where it is legal under state law but not under federal law from December 2021 to at least December 2023 on various occasions. Receipts show that Applicant purchased marijuana or tetrahydrocannabinol (THC) at least 18 times from September 2020 to December 2023. (Items 3, 6)

### **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.

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<sup>1</sup> SOR ¶ 1.a alleged Applicant used and purchased marijuana from October 2006 to December 2021; ¶ 1.b alleged that from December 2021 to January 2024, Applicant used marijuana while holding a sensitive position in which he held a security clearance; ¶ 1.c alleged from December 2021 to December 2023 he purchased marijuana on various occasions while holding a sensitive position in which he held a security clearance. Some of the alleged dates do not correspond exactly with the evidence. I have only considered the dates alleged for disqualifying purposes and have not considered any other derogatory information for disqualifying purposes. However, I may consider this information in my application of mitigating conditions and in a whole-person analysis.

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;
- (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.

Applicant used marijuana with varying frequency from about 2006 to at least January 2024. He purchased marijuana with varying frequency from 2006 to at least December 2023. He used marijuana and purchased marijuana while holding a sensitive position, that is one in which he held a security clearance. Applicant tested positive for marijuana in October 2019. Minimally he became aware during his March 2021 personal subject interview that marijuana use was inconsistent with holding a security clearance and he said he would cease using marijuana if required. He did not cease and continued to use it until at least approximately January 28, 2024. His quasi commitment to discontinue using marijuana during his March 2021 subject interview and then his continued use for another three years constitutes a failure to clearly and convincingly commit to discontinue his misuse. 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.

Applicant used and purchased marijuana in a state where it is legal. He was put on notice when he failed a pre-employment drug test that even though marijuana may be legal in his state it is prohibited by many employers. When he completed his first SCA, it clearly states he was required to disclose his illegal use of drugs in accordance with federal law, even though it may be permissible under state law. Applicant was on notice again that he cannot rely on his state's laws. Even if, at that time, he still believed his conduct was not illegal, he was again given an opportunity to cease using marijuana after he was interviewed by a government investigator in March 2021. Instead, he gave a qualified commitment to cease using it if it would impact his ability to retain his security clearance. However, he continued to use marijuana daily while holding a sensitive position, that is one in which he held a security clearance, until January 28, 2024. Because Applicant requested a determination on the record without a hearing, I had no opportunity to question him about his illegal drug use; whether he has used marijuana since his January 2024 statement; why he continued to use marijuana during the entire security clearance process; and evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). I find his drug use is recent and he did not establish that it is unlikely to recur. He knowingly continued to use marijuana while holding a sensitive position, that is one in which required a security clearance. His actions cast doubt on his current reliability, trustworthiness, and good judgment. The above mitigating conditions do not 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 Guideline H in my whole-person analysis.

Applicant failed to meet his burden of persuasion. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement and substance misuse.

### **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
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Subparagraphs 1.a-1.d:	Against Applicant
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### **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