



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



In the matter of:	)	
	)	
[Name Redacted]	)	ISCR Case No. 24-00356
	)	
Applicant for Security Clearance	)	

**Appearances**

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

08/30/2024

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**Decision**

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HOGAN, Erin C., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H, Drug Involvement and Substance Misuse. Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on July 31, 2023. The Defense Counterintelligence & Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR) on March 18, 2024, detailing security concerns under Guideline H. DCSA CAS acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

Applicant answered the SOR on March 20, 2024, and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On April 30, 2024, Department Counsel submitted the Government's File of

Relevant Material (FORM), including documents identified as Items 1 through 5. Applicant received the FORM on May 16, 2024. He was afforded 30 days after receiving the FORM to file objections and submit material in refutation, extenuation, or mitigation. He did not submit additional matters in response to the FORM. The case was forwarded to the Hearing Office on June 28, 2024, and assigned to me on August 28, 2024.

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

### **Findings of Fact**

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

Applicant is 24 years old. He has been employed by a DOD contractor since June 2023 and is applying for a security clearance for the first time. His highest level of education is a bachelor's degree. He is single and has no children. (Item 4)

The SOR alleges under Guideline H that Applicant used and purchased marijuana (THC) with varying frequency from approximately September 2019 to about July 2023 (SOR ¶ 1.a: Item 4 at 36-37); and Applicant intends to use marijuana in the future. (SOR ¶ 1.b: Item 4 at 37)

Applicant listed his marijuana use on his July 2023 SCA in response to Section 23 - Illegal Use of Drugs or Drug Activity. He indicated that he inhaled and consumed by mouth marijuana products from September 2019 to July 2023. He stated he used marijuana for pain reduction. He estimated he used marijuana on a weekly basis. He indicated that he intended to use marijuana in the future. He wrote, "I would like to continue to use this drug as it as [sic] positive effects on pain reduction and tolerance." (Item 4 at 36-37)

On August 23, 2023, Applicant was interviewed in conjunction with his security clearance background investigation. He told the investigator that he began using marijuana in 2019 while he was in college. He uses marijuana by consuming edibles or smoking it. His most recent use before the interview was in July 2023. He used marijuana two to three times per week between 2019 and February 2023. From February 2023 to July 2023, he used marijuana approximately two times per month. He mentioned he consumed marijuana for purely recreational reasons. He was asked why he listed that he used marijuana for pain relief on his July 2023 SCA. He answered that if he strains his back working out, marijuana reduces his pain. He uses marijuana by himself or with friends. He lives in a state where marijuana use remains illegal. He purchases marijuana in a neighboring state where marijuana is legal. (Item 5)

Applicant says that he is not dependent on marijuana. It makes him feel "calm and peaceful." His marijuana use cannot be used as basis for blackmail, coercion, exploitation, or duress. His parents, siblings and friends are aware he uses marijuana. It has not adversely affected his life. His future intention is to continue using marijuana.

However, he would stop using marijuana if it was required for him to have a security clearance and keep his job. His employer is not aware that he uses marijuana. He stopped using marijuana for a while in February 2023 in order to pass a drug test which was a requirement of employment with the DOD contractor. He told the investigator that it is his choice to use marijuana illegally. He is aware that it is illegal to possess or consume marijuana in the state where he resides and works. (Item 5)

### **Policies**

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

The adjudicative guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

### **DOD and Federal Government Policy on Marijuana Use**

On October 25, 2014, the Director for National Intelligence issued a memorandum titled, “Adherence to Federal Laws Prohibiting Marijuana Use” addressing concerns

raised by the decriminalization of marijuana use in several states and the District of Columbia. The memorandum states that changes to state and local laws do not alter the existing National Security Adjudicative Guidelines. “An individual’s disregard for federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations.”

On May 26, 2015, the Director of the United States Office of Personnel Management (OPM) issued a memorandum titled, “Federal Laws and Policies Prohibiting Marijuana Use.” The Director of OPM acknowledged that several jurisdictions have decriminalized the use of marijuana, allowing the use of marijuana for medicinal purposes and/or for limited recreational use but states that Federal law on marijuana remains unchanged. Marijuana is categorized as a controlled substance under Schedule I of the Controlled Substances Act. Thus, knowing or intentional marijuana possession is illegal, even if the individual has no intent to manufacture, distribute, or dispense marijuana.

On December 21, 2021, the Director of National Intelligence signed the memorandum, *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*. It emphasizes that federal law remains unchanged with respect to the illegal use, possession, production, and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the “whole-person concept” stated under SEAD 4, to determine whether the applicant’s behavior raises a security concern that has not been mitigated.

## **Analysis**

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

AG ¶ 24 expresses the security concern for drug involvement:

The illegal use of controlled substances . . . can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.

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

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

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

The record evidence shows Applicant has a history of habitual recreational marijuana use from September 2019 to at least July 2023. He admits to using marijuana several times a week between September 2019 to February 2023. He then reduced his marijuana use to approximately two times a month. His last known use of marijuana was July 2023. He likely used marijuana after that date because he expressed an intent to continue using marijuana in the future. Marijuana use is illegal in the state where he resides and works. He travels to a nearby state where marijuana is legal under state law to purchase his marijuana products. The use and possession of marijuana remains illegal under federal law. Despite this information, he intends to use marijuana in the future unless he is told to abstain from marijuana use as a condition for obtaining his security clearance. AG ¶¶ 25(a), 25(c), and 25(g) apply.

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

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

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

AG ¶ 26(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 26(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence on actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to: 1. Disassociation from drug-using associates and contacts; 2. changing or avoiding the environment where drugs were used; and 3.

providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Neither mitigating condition applies pertaining to Applicant's use and purchase of marijuana. (SOR ¶ 1.a) His last known use of marijuana occurred in July 2023, only a little over a year ago. He continued to use marijuana after starting employment with a DOD contractor in June 2023. In fact, he stopped using marijuana temporarily in February 2023 in order to pass a pre-employment drug screen. He intends to continue using marijuana in the future unless told that he needs to stop using marijuana as a condition of holding a security clearance. He was made aware that using illegal drugs is not consistent with employment with a DOD contractor when he was required to take a pre-employment drug screen. The security clearance process put on him on notice that using marijuana is inconsistent with holding a security clearance, yet he intends to continue using marijuana. He did not take the security clearance standards and processes seriously. At this time, he has not mitigated the concerns raised under Drug Involvement and Substance Misuse.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline H and the AG ¶ 2(d) factors in this whole-person analysis.

I considered that Applicant has been an employee with a DOD contractor since June 2023. I considered he provided full disclosure about his illegal marijuana use on his July 2023 SCA and during his August 2023 background investigation interview. I considered that he used marijuana while fully aware it was illegal in the state where he resides and works. It also remains illegal under federal law and raises security concerns. Applicant's failure to realize his marijuana use was an issue during the security clearance

process and his continued marijuana use after submitting a security clearance application raise questions about his judgment and reliability. Questions about his judgment are also raised because of his expressed intent to use marijuana in the future unless someone tells him not to, even after he was provided sufficient information that marijuana use remains illegal under Federal law and is not compatible with someone who holds a security clearance. Concerns under Drug Involvement and Substance Misuse are not mitigated.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant

### **Conclusion**

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

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Erin C. Hogan  
Administrative Judge