



**DEPARTMENT OF DEFENSE**

**DEFENSE OFFICE OF HEARINGS AND APPEALS**

In the matter of:	)	
	)	
	)	ISCR Case No. 22-02432
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Sakeena Farhath, Esq., Department Counsel  
For Applicant: Strider L. Dickson, Esq

09/18/2024

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**Decision**

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MASON, Paul J., Administrative Judge:

Because Applicant’s evidence in mitigation is sufficient to mitigate the security concerns raised by the guidelines for drug involvement and personal conduct, his eligibility for a security clearance is granted.

**Statement of the Case**

On June 15, 2022, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIPs) to obtain security clearance eligibility required for his position with a defense contractor. The Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) could not render affirmative findings required to grant a security clearance and issued to Applicant a Statement of Reasons (SOR), dated December 21, 2022, detailing security concerns raised by the guidelines for drug involvement (Guideline H), and personal conduct (Guideline E). The action was taken under Executive Order (E.O.) 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 the adjudicative guidelines (AG), effective in the DOD on June 8, 2017.

On January 16, 2023, Applicant provided an answer to the SOR. He admitted the first sentence of SOR ¶ 1.a (drug involvement) but denied that he intended to continue using marijuana in the future as alleged in the second sentence of the allegation. He admitted SOR ¶ 1.b. He admitted SOR ¶ 1.c. He did not answer (admit or deny) SOR ¶ 2.a (personal conduct). Instead, he directed the adjudicator to refer to the answers to SOR ¶¶ 1.a, 1.b, and 1.c. The lack of an answer is interpreted as a denial of the allegation. He provided an explanation for his answers to the drug involvement allegations. He stated that he stopped using THC (tetrahydrocannabinol) and CBD (cannabidiol) oils in early December 2022 due to the positive outcome of the second surgery in September 2022 and ongoing therapy. As noted below, he resumed use of various forms and strengths of THC/CBD because of a painfully deteriorating medical condition that was inadequately controlled with opioids.

The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 28, 2024, for a hearing on April 16, 2024. The live in-person hearing was held as scheduled. The Government's exhibits, (GE) 1 and 3 were entered into evidence without objection. (Tr. 11) GE 2 was objected to because there was no Government witness to authenticate the exhibit. The objection was granted, and GE 2 was withdrawn pursuant to E3.1.20. of DOD Directive 5220.6. (Tr. 9, 131) Applicant's 11 exhibits, (AE) A through K (bound in a black binder), were admitted into evidence without objection. (Tr. 12) DOHA received the hearing transcript (Tr.) on April 25, 2024, and the record closed the same day.

### **Findings of Fact**

Applicant is 48 years old. He is single and has a 17-year-old daughter. (Tr. 16) He is engaged to his fiancé that he has been living with since about 2020. (Tr. 16) From November 2017 to the present, he has been a self-employed subcontractor working through a contractor on defense projects for the United States Army (USA). (Tr. 18-20) From February 2018 to June 2020, he was a sales consultant for a multinational computer service company. From August 2017 to November 2017, he was self-employed as a chief economic officer (CEO) of a company. From August 2014 to August 2017, he was a principal consultant and technical manager of a defense contractor. In 2016, he received his first security clearance and has had access to classified information since that year but has not always worked on classified information. (Tr. 77, 92-93) He was a data systems architect from November 2010 to August 2014. Prior to 2010, he worked in various contractor jobs or in state agency positions. (GE 1 at 9-18, Tr. 22-30) Employment locations, names of character references, and other sensitive information is not specifically identified to protect the privacy rights of Applicant.

In about June 1996 (20 years old), Applicant tried to cash two checks from a checkbook he found. He was charged with forgery, a felony, in March 1997 and placed on probation until 2001. The criminal conviction was expunged. (GE 1 at 37) He used marijuana (THC) once in 2013 to ease work-related stress. When the drug did not relieve his stress, he stopped using the drug. In August 2021 and under medical supervision, he resumed using the drug in different forms and strengths for pain associated with hip issues. He was using THC, including topical oils, because the hip pain interfered with his sleep. He was using the drug for medical purposes deemed legal under state law. The THC or hemp-related products enabled him to discontinue opioid medication for a period. Reflecting on his use of hemp-based products, Applicant credibly testified that he never used the drug for recreation, but to tranquilize his hip pain. (GE 1 at 38-39; Tr. 30-36, 84-85)

For about a year before his first surgery in December 2020, Applicant had been experiencing acute hip pain when he walked or jogged. (Tr. 30-31) Two months after the surgery, his pain became more intense, and he was sent to a pain specialist who prescribed a variety of drugs. In his medical notes, the pain specialist described Applicant's medical condition, his medications (both opioid and non-opioid), and other medical procedures administered on his hip and the nerves controlling pain in the area. The specialist noted that Applicant's hip pain interfered with his sleep and concentration at work as a subcontractor for the USA. Based on the comments from his other patients who achieved relief from the THC/CBD oils, the pain specialist indicated to Applicant that it was okay to use hemp products for medicinal purposes under medical supervision, even with his security clearance. Applicant resumed using THC products in August 2021 when he could not sleep because of the pain. He legally purchased the drug at least a couple of times legally at drug dispensaries. He never purchased the drug illegally. He indicated in his June 2022 security clearance application that he used the drug while possessing a security clearance and would use it in the future under medical supervision. (GE 1 at 39-40; Tr. 32-45, 47, 50, 51, 90-91; AE A at 1-37)

Because of lingering pain, Applicant had an arthroscopy performed on his hip in September 2022. And he began physical therapy shortly afterward. His medications before and after the September 2022 surgery are listed in the medical records of the treating doctor. (AE B at 2-3, 9, 14-15; Tr. 51-55)

In a medical note dated January 6, 2023, summarizing Applicant's treatment at the above date, and entitled "LETTER OF MEDICAL NECESSITY," one of Applicant's treating doctors (Dr. AA) indicated that Applicant stopped using hemp-based products after his surgery in September 2022. As noted in his answer to the SOR, Applicant ceased using the hemp-based products in December 2022. However, the period of abstinence that followed was temporary. At some time in 2023, Dr. AA encouraged him to reduce and replace his THC use with the CBD alternative. (Answer to SOR; AE C at 1)

On April 9, 2024, Applicant's current treating doctor (Dr. AB) provided a three-page historical summary of his hip and related problems since 2020. Dr. AB indicated that he had been treating Applicant for over a year (since January 2023) with low dose THC oil, hip injections, spinal injections, and physical therapy. Dr. AB's chronology of treatment tends to controvert Applicant's testimonial claim that he stopped using all hemp-based products in March or April 2023. (Tr. 65) Dr. AB and Applicant were aware that THC use was against federal law, but Dr. AB explained that the state law certified him to prescribe low dose THC oil under stringent conditions. Applicant's THC card authorized him to receive low-dose THC oil. (Tr. 61, 64; AE E) Dr. AB noted that Applicant's intensifying pain and depression, coupled with his desire to comply with federal laws regarding illegal drug use and concern for his future employment, compelled the need to shift from low-dose THC oil use to opioids and surgery. Applicant stopped all use of hemp-based products in August 2023. Dr. AB referred Applicant to Dr. CD for a complete hip replacement that was scheduled for April 18, 2024, two days after the hearing. (AE F; Tr. 66), Dr. AB agreed that Applicant should eventually quit his use of opioid medication and step up his exercise regimen. (AE D at 1-3; Tr. 58-61, 65)

The drug policy of Applicant's current employer prohibits illegal drug use under any circumstances. He could not recall whether his employer requires employees to report illegal drug use. He has never been randomly tested for drugs but is willing to undergo such testing in the future. (Tr. 120-121, 126-127) Applicant's urinalysis in March 2024 registered negative results for marijuana and several other drugs. (AE J) On April 12, 2024, Applicant submitted a signed statement of intent to abstain from all illegal substances, acknowledging that future drug involvement would be grounds for revocation of his national security eligibility. (AE K)

Applicant testified that he does not associate with drug users. His fiancé does not use THC. He has never used any other illegal drugs or been arrested for illegal drugs. He has never associated with individuals who use drugs. (Tr. 124-125)

## **Character Evidence**

On April 5, 2024, Applicant's manager indicated in a letter that he self-reported his health and security clearance status. She praised his dedication and expertise as a cybersecurity administrator. His team-player performance was rewarded with a recent pay increase. (Tr. 69-72, 121; AE G) There is no indication that Applicant self-reported his THC use to the manager.

In a character reference dated April 2, 2024, a doctor and head of emergency medical services of a hospital disclosed that he has been Applicant's friend for 20 years. The doctor described his concern for Applicant's continued use of opioids to treat his pain. He opined that THC seemed to be more effective in controlling his pain than the opioids. The doctor extols Applicant's stability and integrity. (Tr. 72-73, 123; GE H)

Applicant provided a performance evaluation for 2022. The review, requested by Applicant's manager in January 2023, indicates that he provided outstanding support for audits on certain projects, demonstrating his team-player attitude by temporarily undertaking an administrative position so a key monitoring service could continue to function. (Tr. 74; AE I)

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines, which should be applied with common sense and the general factors of the whole-person concept. All available and reliable information about the person, past and present, favorable and unfavorable, should be carefully reviewed before rendering a decision. The protection of the national security is the paramount consideration. AG ¶ 2(d) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion in seeking a favorable security decision.

### **Analysis**

The SOR lists two allegations under **Guideline H**. They are:

#### **Drug Involvement and Substance Misuse**

The security concern under the Drug Involvement and Substance Misuse Guideline is set forth 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.

In my analysis of this case, I have taken administrative notice of the Director of National Intelligence Memorandum (October 25, 2014), *Adherence to Federal Laws*

*Prohibiting Marijuana Use*, which clearly emphasizes that state laws do not authorize persons to violate federal laws, including the Controlled Substances Act (21 U.S.C. §§ 801-971 (1970)), which identifies marijuana as a Schedule 1 controlled drug.

Changes in state laws or the District of Columbia, pertaining to marijuana use do not change the existing National Security Adjudicative Guidelines (Security Executive Agent Directive 4, effective June 8, 2017). An individual's disregard of the federal law pertaining to marijuana involvement remains adjudicatively relevant in national security determinations.

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 highlights that federal law remains unchanged with respect to illegal use, possession, production, and distribution of marijuana. Disregard of federal law relevant to marijuana use (including prior recreational marijuana use) remains relevant, but not determinative to adjudications of security clearance eligibility. Agencies are required to employ the "whole-person concept" stated under SEAD 4, to determine if an applicant's behavior raises a security concern that has not been mitigated.

AG ¶ 25. Conditions that could raise a security concern and may be disqualifying include:

- (a) any substance misuse (see above definition);
- (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's illegal use of THC/CBD meet the definitions of AG ¶¶ 25(a) and 25(c). In order to use the drug, he had to possess it, and he purchased the drug in various forms on at least a couple of occasions as defined by AG ¶ 25(c). AG ¶ 25(f) applies because he started using marijuana in August 2021, after he was granted a security clearance or a sensitive position in 2016.

AG ¶ 26. Conditions that could mitigate security concerns include:

- (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.

Applicant's use of THC did not stop until August 2023. His use throughout the period of August 2021 through August 2023 cannot be characterized as infrequent or sporadic. However, attempting to alleviate his hip pain, multiple surgical and nerve procedures were performed between December 2020 and 2023, with little success. Applicant was prescribed numerous medications that seemed to do nothing more than mask the continuing pain. He is confident that the hip replacement scheduled for April 18, 2024, will eliminate his pain altogether.

For about a year before his first hip surgery in December 2020, Applicant had been experiencing acute hip pain when he walked or jogged. Two months after the surgery, his hip pain, which moderated for a time, became more intense. A pain specialist, based on the comments from his other patients who achieved relief from the THC/CBD oils, indicated to Applicant that it was okay to use hemp products for medicinal purposes under medical supervision, even with his security clearance. Applicant resumed using THC products in August 2021 when he could not sleep because of the pain. In June 2022, he voluntarily reported his THC use on his security clearance application. He stated his intention to use some form of the drug in the future because he mistakenly believed that his use was lawful since he had a medical marijuana card, and he was using the drug under medical supervision.

Because of persistent pain, Applicant had a second arthroscopy performed on his hip in September 2022. The hip pain decreased to a level where Applicant concluded that he could discontinue the drug altogether in December 2022. However, the hip pain returned.

Dr. AB, who had been treating Applicant throughout 2023 and the early part of 2024, reinforced Applicant's mistaken belief that he could continue low-dose THC use even though the drug continued to be against the Federal law. Based on Applicant's overriding concern to comply with Federal law prohibiting THC use and to continue his

future employability, he discontinued THC use in August 2023 and resumed opioid use with an eye towards surgery on April 18, 2024. I am persuaded that Applicant's THC use occurred under unusual circumstances that he will not repeat in the future.

Prior to his use of hemp-based products between August 2021 and August 2023, Applicant's last involvement with THC or any other illegal drugs, was a one-time use eight years ago in 2013. He disclosed that use in his June 2022 e-QIP. Other than his infrequent purchases of hemp-based products from dispensaries, he has never associated with drug users due to his abiding concern to preserve his security clearance. He was candid in his admissions of his THC/CBD use in his June 2022 e-QIP and at the hearing in April 2024. He stated his intention to use the drug in the future because his use of the drug was under medical supervision, and he had a marijuana card. His signed statement of intent signifies his understanding that all THC/CBD use, as well as other drug use, is against federal law.

### **Personal Conduct**

The security concern for personal conduct is set forth 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 information. Of special interest is any failure to provide truthful and candid answers during the national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation or further processing for national security eligibility.

The potential disqualifying conditions under AG ¶ 16 are:

(c) credible adverse information in several adjudicative areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that she may not properly safeguard classified or sensitive information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment untrustworthiness, unreliability, lack of candor, unwilling to comply with



rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

This includes, but is not limited to, consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;
- (2) any disruptive, violent, or other inappropriate behavior; and
- (3) a pattern of dishonesty or rule violations; and..."

Applicant's use of marijuana between August 2021 and August 2022 while being granted access to classified information or employment in a sensitive position, his intention in June 2022 to continue future use, and his purchase of hemp-based products from August 2021 to at least August 2022, is fully covered under Guideline H. His conduct under Guideline E simply reiterates the Applicant's behavior under Guideline H. Significantly, there is no adverse behavior by Applicant to infer or suggest that he intentionally falsified his illegal drug use during any phase of the security clearance investigation. He was forthcoming about his THC/CBD use in his June 2022 e-QIP, and since that time. The personal conduct guideline is resolved in Applicant's favor.

### **Whole-Person Concept**

I have examined the evidence under the guideline for drug involvement in the context of the nine general factors of the whole-person concept 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 access to classified information must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole-person concept.

Applicant is 48 years old. He has a 17-year-old daughter and intends to marry his fiancé. He has been employed by his company since 2017, and his character evidence shows that his team player attitude has translated well at work.

About a year before his first hip operation in December 2020, Applicant had excruciating hip pain that interfered with his sleep and his work. As the medical records reveal, he has been prescribed a laundry list of medications and surgical procedures on his hip and nerves controlling the area. The medications have done little to alleviate his pain. At the April 2024 hearing, he was still experiencing intermittent pain.

Applicant's use of THC/CBD, especially after being granted a security clearance in 2016, displayed poor judgment. However, he was searching for an answer to his pain. He mistakenly thought that he was allowed to use the THC/CBD because it was permitted under state law and medical supervision. Applicant is not a drug user and has signed a statement of intent to forego illegal THC/CBD use in the future, understanding that future drug involvement will be grounds for revocation of his security clearance eligibility. He has mitigated the drug involvement and personal conduct guidelines.

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

### **Conclusion**

Considering all the circumstances presented by the record in this case, it is clearly consistent with the national security interest of the United States to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is granted.

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Paul J. Mason  
Administrative Judge